IN THE SUPREME COURT OF GUAM

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

vs.

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 Defendant-Appellee.

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

AMENDED OPINION

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Argued and submitted on February 24, 2004
Hagåtña, Guam

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

TYDINGCO-GATEWOOD, J.:

[1] This amended opinion is issued in response to Intervening Defendant-Appellee Guam Resource Recovery Partners' Petition for Rehearing of this court's opinion found at 2003 Guam 13, wherein we held that the 1996 contractual agreement ("1996 Agreement") between Defendant-Appellee Government of Guam ("the Government") and Guam Resource Recovery Partners ("GRRP") (collectively referred to as "Appellees") is null and void because its terms violate section 1423j of the Organic Act of Guam and section 22401 of Title 5 of the Guam Code Annotated. In its petition, GRRP argues that: (1) the court improperly considered issues not directly related to issues argued by the parties thereby denying GRRP of its procedural due process rights afforded it under the United States Constitution; and (2) section 1423j of the Organic Act and section 22401 of Title 5 GCA do not require a contract violative of those provisions to be declared null and void, and further, this court should honor the severability clause provided for in the agreement, sever the offending provision and enforce the remaining provisions of the agreement. We affirm our previous holding in 2003 Guam 13 that section 4.04 of the 1996 Agreement results in a violation of section 1423j of the Organic Act and section 22401 of Title 5 GCA. We hold that we properly considered whether the 1996 Agreement was in violation of section 1423j of the Organic Act and section 22401 of Title 5 GCA and therefore, GRRP was not denied procedural due process. However, with respect to the issue of severability, we vacate our holding in 2003 Guam 13 that the 1996 Agreement is null and void in

[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.

its entirety, and we remand the matter to the trial court for further findings and proceedings consistent with this opinion.

[2] Furthermore, because we vacate our finding that the 1996 Agreement is null and void, we address the remaining issues raised on appeal by Plaintiffs-Appellants Vicente C. Pangelinan and Joseph C. Wesley (collectively referred to as "Appellants"), but not previously addressed by this court in 2003 Guam 13. Specifically, Appellants appeal from the trial court's final judgment in favor of Appellees, arguing that the 1996 agreement violates several Guam statutes, including Guam's procurement law. Appellants argue that the 1996 Agreement violates: (1) Guam procurement laws, as found in Chapter 5 of Title 5 of the Guam Code Annotated, by authorizing the expenditure of public funds without following the procurement process; (2) section 50103(f) of Title 12 of the Guam Code Annotated, Public Law 24-139, and Public Law 24-272, by authorizing the Guam Economic Development Authority to issue bonds without first obtaining legislative approval; and (3) section 1800 of Title 1 of the Guam Code Annotated by contracting for the transfer of land without first obtaining legislative approval. They also argue that the trial court erred in holding that Public Law 24-57 and Public Law 24-272 were violations of the Contracts Clause of the Organic Act and accordingly, inorganic and unconstitutional. We hold, with respect to the alleged violation of the procurement law, that the parties should be afforded the opportunity to address the issue of novation raised by this court for the first time on appeal and thus, we remand this matter to the trial court for further findings and proceedings consistent with this opinion. We also find that Appellees have not attempted to issue any bonds or transfer any land without the approval of the Legislature and therefore, the trial court's findings in this regard are affirmed. We find section 6 of Public Law 24-57 to be invalid as it unconstitutionally impairs the Government's obligations under the 1996 agreement, and therefore violates

the Contracts Clause of the Organic Act. Further, we find Public Law 24-272, in its entirety, to be invalid and void as a result of the invalidation of Public Law 23-139. Thus, we affirm the trial court's findings with respect to each of these public laws.

I.

[3] The procedural and factual background of this case was fully discussed at 2003 Guam 13 and need not be recited here. *See Pangelinan v. Gutierrez*, 2003 Guam 13, ¶¶ 2-10.

II.

[4] This court has jurisdiction over final judgments of the Superior Court of the Guam. Title 7 GCA §§ 3107 and 3108 (1994), *as amended by* Guam Public Law 27-31 (Oct. 31, 2003).

[5] 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).

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III.

A. GRRP's Petition for Rehearing

1. Issues Raised by the Court *Sua Sponte*

[6] The first issue raised by GRRP in its petition for rehearing is whether this court improperly considered issues not directly related to the issues argued by the parties, thereby denying GRRP procedural due process. Specifically, GRRP argues that the 1996 Agreement is voluminous and complex and thus, this court's application of section 1423j of the Organic Act and section 22401 of Title 5 GCA to the terms of 1996 Agreement presented an entirely new issue, never before raised on appeal.

[7] The United States Supreme Court has held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950). Therefore, the question before us is whether, under all the circumstances, GRRP was apprised of the pendency of this action and afforded an opportunity to object. We hold that GRRP was both apprised of the pendency of this action and afforded an opportunity to object.

[8] We disagree with GRRP's premise that the issue of legislative approval of the spending of government funds was never before raised by the parties. The issue framed by Appellants with respect to the expenditure of public funds is: "Did the trial court err in finding that the Government does possess the authority to incur public debt without legislative approval?" Appellants' Brief, p. 1. It is important to note, however, that the issue as framed misstates the decision of the trial court, from which this appeal arises. In particular, the trial court held that there was "nothing in the agreement resulting in an appropriation of government funds without Legislative approval. The Court [sic] is devoid of any term in the agreement

which could even allow for an appropriation without Legislative approval." *See* Appellant's Excerpts of Record, Tab 22, page 7 (Decision and Order). In their brief, Appellants clarify the substance of their appeal of the trial court's decision: "The trial court recognized that if expenditures are actually made without legislative approval, such action would likely give rise to a cause of action for a violation of § 1423j of the Organic Act. The trial court erred in failing to find that the contracting for such expenditures and not the spending constitutes the actual public debt." Appellants' Brief, p. 9. In addition, during the February 6, 2003 oral argument, counsel for Appellants directed the court's attention to section 4.04 of the 1996 Agreement, and argued that such section resulted in the expenditure of government funds, notwithstanding any action or inaction by the Legislature. Under these circumstances, in light of the language found in section 4.04 of the 1996 Agreement, and pursuant to section 1423j of the Organic Act and section 22401 of Title 5 GCA, we held that the trial court erred in holding that nothing in the agreement resulted in an appropriation of government funds without legislative approval. Because we find that this court did not raise any issues not already raised at the trial court level, we hold that GRRP was given adequate notice and an opportunity to be heard, and thus was not denied procedural due process.

[9] We further disagree with GRRP's related argument that this court may not *sua sponte* raise and address the illegality of the 1996 Agreement. Even assuming *arguendo* that this court raised a new issue on appeal, other courts have held that the illegality of a contract may be raised *sua sponte* by an appellate court. Thus, while we recognize the general rule that issues raised for the first time on appeal will not be addressed, such rule has its exceptions. *Dumiliang v. Silan*, 2001 Guam 24, ¶ 12. In particular, "the question of illegality of the contract sued on may be raised at any time, when the fact of its illegality has been made to appear." *Maynard Inv. Co. v. McCann*, 465 P.2d 657, 666 (Wash. 1970). This is because

"[c]ourts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent. A case brought before this court should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it." *Id.* at 661. For this reason, "[q]uestions necessarily involved in issues raised and litigated in the trial court are open for consideration on appeal or review, even though they were not specifically raised below." *Id.* (quoting 5 AM.JUR.2D *Appeal and Error* §§ 548-49 (1962)). This is especially the case "where the matter in question affects the public interest." *Id.*

[10] While the parties did not specifically cite to section 1423j of the Organic Act and section 22401 of Title 5 GCA in direct relation to section 4.04 of the 1996 Agreement, we need not be restricted by the issues or theories advanced where the statutory mandates are clear. Indeed, even if the issue of the illegality of the 1996 Agreement had not been advanced by the parties, the court has a duty to raise such an issue *sua sponte*. *See Cal. Pac. Bank v. Small Bus. Ass'n*, 557 F.2d 218, 223 (9th Cir. 1977) ("The court has a duty sua sponte to raise the issue [of illegality of a contract] in the interest of the administration of justice."); *Trees v. Kersey*, 56 P.3d 765, 768 (Idaho 2002) (stating that a "[c]ourt has the duty to raise the issue of illegality [of a contract] *sua sponte*.").

[11] Accordingly, we hold that this court properly considered whether the 1996 Agreement was in violation of section 1423j of the Organic Act and section 22401 of Title 5 GCA. The issue of whether the 1996 Agreement expended public funds prior to legislative approval was raised by the parties and addressed by the court at the trial level. Moreover, the court complied with its duty to *sua sponte* raise the issue of the illegality of 1996 Agreement. For the above reasons, we hold that GRRP had notice reasonably calculated to apprise interested parties of the pendency of the action and an opportunity to

object to the issues addressed by this court, and thus, GRRP was not denied procedural due process. Accordingly, we affirm our holding in 2003 Guam 13 on this issue.

2. Severability

[12] In 2003 Guam 13, this court found that the 1996 Agreement was null and void in its entirety. In its petition, GRRP argues that the 1996 Agreement is valid because neither section 1423j of the Organic Act nor section 22401 of Title 5 GCA require that a contract entered in violation of the respective provisions be rendered null and void in its entirety. GRRP argues that the court should instead sever the remaining, valid provisions of the 1996 Agreement, or remand the issue to the trial court to conduct a severability analysis in the first instance.

[13] "The rule is settled that partially illegal contracts may be upheld if the illegal portion is severable from the part which is legal." *Mailand v. Burckle*, 572 P.2d 1142, 1152 (Cal. 1978). This concept is codified at section 85404 of Title 18 GCA, which states: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." Title 18 GCA § 85404 (1994). The term "object" is also defined by local statute, to mean "the thing which is agreed, on the part of the party receiving the consideration, to do or not to do." Title 18 GCA § 85401 (1994). Section 85404 is identical to section 1599 of the California Civil Code and therefore, California case law is persuasive. *See Fajardo v. Liberty House*, 2000 Guam 4, ¶ 17. The rule of severability was summarized by the California Supreme Court as follows:

> Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.

Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 696 (Cal. 2000). This rule recognizes that one purpose of severance is to "attempt to conserve a contractual relationship if to do so would not be condoning an illegal scheme." *Id.*

[14] Under the above case law, it must be determined whether section 4.04 of the 1996 Agreement is the central purpose of the contract, and if so, then the contract is unenforceable in its entirety. On the other hand, if section 4.04 is collateral to the main purpose of the contract, *and if it can be severed or restricted*, then such severance or restriction will apply to save the remaining, valid portions of the contract.

[15] The issue of "whether a contract is entire or whether its various stipulations are to be regarded as severable is a question of construction." *Sterling v. Gregory*, 85 P. 305, 306 (Cal.1906). Thus, a court must examine "the language and subject-matter of the contract . . . according to the intention of the parties." *Pac. Wharf & Storage Co. v. Standard Am. Dredging Co.*, 192 P. 847, 849 (Cal. 1920). In determining the parties' intent, the court must consider "all the circumstances surrounding the making of the contract." *Sterling*, 85 P. at 306.

[16] The rules of law announced in the above California cases are consistent with basic principles of severability which have emerged in other jurisdictions, that is, although contracts containing provisions which violate a statute are illegal and void, "if the illegal provision in a contract is severable, the courts will enforce the remainder of the contract after excising the illegal portion." 17A AM. JUR. 2D *Contracts* § 247 (2003); *see Panasonic Co. v. Zinn*, 903 F.2d 1039, 1041 (5th Cir. 1990) ("Where the subject matter of the contract is legal, but the contract contains an illegal provision that is not an essential feature of the agreement, the illegal provision may be severed and the valid portion of the contract enforced. In

determining whether a particular provision is severable, the issue is whether the parties would have entered into the agreement absent the illegal parts.") (citations, quotation marks and brackets omitted); *Plumbers & Steamfitters Union, Local No. 598 v. Dillion*, 255 F.2d 820, 823 (9th Cir. 1958) ("[A]n illegal clause which is severable from the remainder of the contract is no bar to enforcement of the other contractual provisions."); *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279, 285 (4th Cir. 1974) ("When a contract covers several subjects, some of whose provisions are valid and some void, those [provisions] which are valid will be upheld if they are not so interwoven with those illegal as to make divisibility impossible").

[17] Moreover, while the concept of severability applies especially where the contract contains a clause which "expressly contemplates and provides for the severance of an illegal provision," *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 722 (5th Cir. 1995), "when the severed portion is integral to the entire contract, a severability clause, standing alone, cannot save the contract." *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 87 (Tex. App. 1996). Rather, "[t]he contractual provisions themselves, as well as the underlying circumstances and intent of the parties, must nonetheless be examined." *Budge v. Post*, 544 F.Supp. 370, 382 (N.D. Tex. 1982).

[18] Thus, we find that the trial court provides a more appropriate forum to address the issue of severability in the first instance. We therefore vacate our holding in 2003 Guam 13 that the 1996 Agreement is null and void, and remand to the trial court. On remand, upon examination of all the circumstances, the trial court must determine whether section 4.04 of the 1996 Agreement is the central purpose of the contract. If section 4.04 is the central purpose, then the trial court must find that the contract is unenforceable in its entirety. On the other hand, should the trial court determine that section 4.04 is

collateral to the main purpose of the contract, it must then assess whether section 4.04 is severable. This severability analysis requires the trial court to examine the language and subject-matter of the contract, and the intention of the parties, to determine whether section 4.04 is integral to the contract. *Pac. Wharf*, 192 P. at 849. Should the court find that section 4.04 is an integral part of the contract, and therefore the illegal provision cannot be severed, the trial court must find that the contract in its entirety is invalid. Conversely, should the court find that section 4.04 is not integral to the contract, and thus the illegal provision may be severed from the contract, the trial court must then find that the contract is valid.

B. Other Issues Raised on Appeal

[19] In 2003 Guam 13, we declared the 1996 Agreement null and void, thus precluding our need to address the other issues brought before us on appeal. GRRP's petition for a rehearing of this case, and our concurrence with GRRP that the issue of severability shall be remanded to the trial court for its initial determination, necessitates examining the other issues raised on appeal.

1. Procurement Law

[20] We first consider whether the 1996 Agreement is subject to the provisions of the procurement law, contained in Chapter 5 of Title 5 GCA. These provisions apply only to contracts solicited or entered into after the date the chapter was enacted, that is, October 1, 1983. Title 5 GCA § 5004(a) (1996); *see also* Title 5 GCA § 5009 (1996). The trial court found that because the 1996 Agreement was based on a license issued in 1982, before the effective date of the procurement provisions, then the 1996 Agreement fell outside of the procurement law.

[21] Appellants argue that the trial court erred in finding that the 1996 Agreement was not subject to procurement provisions. They rely first on section 5004(b) of Title 5 GCA, which states that *every*

expenditure of public funds requires compliance with the procurement law. Title 5 GCA § 5004(b) (1996). Appellants contend that while it appears section 5004(a) of Title 5 GCA places the agreement outside of the procurement process, section 5004(b) of Title 5 GCA acts to bring the agreement back within the procurement provisions. We disagree. A statutory provision should be interpreted consistently and so as not to render another statutory provision, particularly one concerning the same subject, null and void. *See Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 2483 (1974) (stating that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *see also Bank of Guam v. Reidy*, 2001 Guam 14, ¶ 21 (recognizing that "[c]ourts are reluctant to declare a statute void because of conflicting provisions."); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837, 108 S. Ct. 2182, 2189 (1988) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."). To read section 5004(b) as Appellants suggest would render section 5004(a) a nullity. Thus, we find that section 5004(b) of Title 5 GCA refers only to those expenditures of public funds made pursuant to contracts solicited or entered into that occur *after* the effective date of the procurement law.

[22] Appellants' second contention, presented during oral argument on February 6, 2003, is that the terms of the 1996 Agreement were sufficiently different from the 1982 License so as to render the 1996 Agreement a wholly new agreement, thereby bringing the 1996 Agreement within the provisions of the procurement law. Appellants assert that while the 1996 Agreement may arguably have been derived from the 1990 Amended License, its evolution from the 1982 License, and the substantial development of contractual terms since that time, precludes it from being viewed as a product of the 1982 License.

[23] Appellees disagree, arguing that the same basic obligations have been carried over from the 1982 License to the 1996 Agreement, specifically: the construction of a waste-to-energy facility, the supply of a minimum amount of solid waste, and the sale of electricity. In other words, despite the substantial modifications to the 1982 License, the 1996 Agreement substantively remains the same, and therefore can be properly characterized as an amendment to or mere continuation of the 1982 License. Thus, Appellees assert that no new contract was entered into after the effective date of the procurement law.

[24] The issue in dispute between the parties is whether the 1996 Agreement simply modified or completely replaced the original 1982 License. Although the precise legal term "novation" was not used by the parties, such legal concept is arguably operative in this case. A novation "is the substitution of a new obligation for an existing one." Title 18 GCA § 82501 (1994). Novation of a contract generally occurs in one of two ways. The first is by "replacement of an unexpired contract by another contract reached through renegotiation. . . ." *Williams Petroleum Co. v. Midland Coops.*, 679 F.2d 815, 819 (10th Cir. 1982); *see also* Title 18 GCA § 82502 (1994) ("Novation is made . . . [b]y the substitution of a new obligation between the same parties, with intent to extinguish the old obligation"). This is the interpretation of novation raised by Appellants, who contend that the 1982 License has been renegotiated and replaced by the parties' subsequent agreements. However, "[r]egardless of the extent to which a contract is modified, a novation cannot be found unless it be shown that the parties intended and agreed to extinguish the original contract." *Howard v. Amador*, 269 Cal. Rptr. 807, 817 (Ct. App. 1990). Appellants in this instance have offered only the substantial change in the contract's terms as proof that the parties entered into a new contract. There is no showing that the parties intended the subsequent modifications to extinguish and replace the already existing contract instead of merely supplementing and modifying it. In

fact, as pointed out by Appellees, the language of the 1982 License contemplated the execution of later, more detailed documents. Thus, we cannot find that the 1996 Agreement or even the 1990 Amended License constituted a novation of the 1982 License. A change in contractual terms alone, no matter how substantial, is not sufficient to support a finding of novation.

[25] Our inquiry into the novation issue, however, must include analyzing the second method of novation, which occurs where there is "the substitution of a new party concurrent with the release of an original party from liability." *Williams*, 679 F.2d at 819; *see also* 18 GCA § 82502 ("Novation is made . . . [b]y the substitution of a new debtor in place of the old one, with intent to release the latter"or "[b]y the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former."). Despite the parties' failure to directly address this aspect of novation, we find it within our discretion to now raise the matter. "[T]he construction of a written instrument, due to its status as a question of law, may be construed and its legal effect determined by the appellate court." *W-V Enters., Inc. v. Fed. Sav. & Loan Ins. Corp.*, 673 P.2d 1112, 1119 (Kan. 1983).

[26] The issue of whether a newly enacted law applies to an assigned contract is inextricably tied to the issue of whether a novation was effected by that assignment. *San Souci v. Division of Florida Land Sales & Condos.*, 448 So. 2d 1116, 1119-1120 (Fla. Dist. Ct. App. 1984). This is because "[a] statute in effect at the time of a novation will determine the rights and obligations of the parties to the novation even if the statute was not in effect at the inception of the original contract." *Jakobi v. Kings Creek Village Townhouse Ass'n*, 665 So. 2d 325, 327 (Fla. Dist. Ct. App. 1995). Moreover, we find the interest of justice so compelling in this instance that it justifies raising the novation question even at this late point in the litigation. The contract in question is a public contract to which the government is a party. The Legislature

determined in enacting extensive procurement regulations that the public had a vested interest in imposing strict bidding procedures on public contracts. In light of the above considerations, we raise the question of whether, in substituting of one party for another, specifically GRRP for IEEI, the parties intended to subsequently release IEEI of its obligations under the contract, thereby effecting a novation and bringing the 1996 Agreement within the provisions of the procurement law.

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[27] The execution of the 1996 Agreement confirms that the 1982 License was assigned by GEDA to GPI. However, an assignment of a contract is not synonymous with a novation. "An assignment differs from a novation in two ways: (1) an assignment creates no contract between lessor and assignee, and (2) an assignment does not discharge the assignor's original obligation to the lessor." *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946, 949-50 (W.D. Wash. 1986); *see also Wells Fargo*, 38 Cal. Rptr. 2d at 525.

[28] Here, a contract between GEDA and GRRP did result from the assignment of the 1982 License, as embodied by the 1996 Agreement. Nonetheless, the question that remains is whether, in the process of assigning the rights in the 1982 License, IEEI was also released from its obligations to GEDA. The contractual language contained in sections 14 and 15 of the 1990 Amended License indicate that a release of GEDA was intended. These provisions state:

> 14. Release of IEEI: . . . Upon the receipt of the sum of $255,000 from GPI, GEDA shall execute such full and complete releases of IEEI as GPI shall request, provided that IEEI releases GEDA from any and all claims and liability arising in any way from or related to the original License Agreement.
>
> 15. Condition of this Agreement: This Amendment is expressly made conditional upon the full and complete assignment of the 1982 license from IEEI to GPI, such that

IEEI will have no interest in the License, either as originally drafted or as amended.

Appellant's Excerpts of Record, tab 12 (Amended License Agreement, p. 5-6). From this language, the court must determine whether it "clearly appears" that the parties intended to extinguish and replace the 1982 License with the 1990 Amended License and 1996 Agreement. *Howard*, 269 Cal. Rptr. at 817.

Unfortunately, because this second method of novation was not presented to the trial court by the parties, the record before us is incomplete. While the contract requires GEDA to execute releases of IEEI, we have no record of whether releases were in fact executed by GEDA on IEEI's behalf. We could infer that IEEI was indeed relieved of its obligations under the 1982 License from the parties' subsequent conduct, particularly the termination of court proceedings between GEDA and IEEI, and the entering of the 1996 Agreement between only GEDA and GRRP. *See Swift v. Allan*, 128 A.2d 260, 263 (Md. 1957) ("[A]n intention to substitute a new obligation for an existing one may be gathered from the statements and conduct of the parties under all the circumstances of a particular case . . . ."). However, we decline to make such an inference in this instance. Instead, in order to avoid prejudicing the parties, we opt to allow them the opportunity to pass on the points of this issue. *See Office of Employee Relations v. Communications Workers of Am.*, 711 A.2d 300, 305 (N.J. 1998) ("Sometimes . . . courts introduce new issues when the interest of justice require, if the introduction will not prejudice the parties. If a court introduces a new issue, the better practice is to permit the parties to address it.") (citations omitted).

[29] Thus, we remand to the trial court the issue of whether the introduction of GRRP as a new party to the contract and the assignment to GRRP of the 1982 License brought the 1996 Agreement within the provisions of the procurement law.

2. Bond Issuance

[30] The next issue raised by Appellants is whether section 6.04(b) of the 1996 Agreement violates section 50103(f) of Title 12 GCA, and section 6 of Public Law 24-57. Section 6.04(b) of the 1996 Agreement states:

> [T]he Government agrees that it will cooperate with the Company to pursue the issuance by GEDA or another subdivision of the Government of Bonds in an amount sufficient to finance the maximum amount of the Facility Price . . . and the Financing Costs reasonably possible.

Appellants' Excerpts of Record, tab 12 (Solid Waste Construction and Service Agreement, § 6.04(b)). Appellants allege that this provision calls for GEDA to unlawfully disburse revenue bonds without the prior consent of the Legislature in violation of section 50103(f) of Title 12 GCA, which states that GEDA is "authorized to issue, sell, or dispose of revenue bonds and other obligations from time to time under such terms and conditions as the Guam Legislature, by appropriate legislation may prescribe." 12 GCA § 50103(f) (1998). Appellants also make the same argument with regard to section 6 of Public Law 24-57, which prohibits the disbursing of any funds by any government entity in furtherance of the 1996 Agreement.

[31] The trial court held that the 1996 Agreement did not require GEDA or the Government to unlawfully issue revenue bonds in violation of section 50103(f) of Title 12 GCA. Appellants argue that the trial court erred in its reading of section 6.04(b) of the 1996 Agreement, and assert that section 6.04(b) "*requires* GEDA or another subdivision of the Government of Guam issue bonds sufficient to finance the facility." Appellants' Brief, p. 5 (emphasis added). Because GEDA is not authorized to issue bonds to finance a waste-to-energy facility, Appellants contend that section 6.04 violates section 50103(f) of Title 12 GCA. We disagree with Appellants' interpretation.

[32] First, Appellants' arguments regarding GEDA's limited authority to issue bonds pursuant to section 50103(f) of Title 12 GCA is irrelevant, since it is the Government and not GEDA that has undertaken contractual obligations pursuant to section 6.04(b) of the 1996 Agreement. Second, the Government has not contracted to issue any bonds. It has merely agreed to "cooperate" or use its best efforts to pursue the issuance of bonds by a subdivision of the Government. Finally, as noted by both the trial court and GRRP, section 4.03(g) of the 1996 Agreement expressly requires the Government to obtain legislative approval before GEDA or any other political subdivision issues bonds, which directly undermines Appellees' contention that the contract "requires" an issuance of bonds without legislative approval. Therefore, it does not appear that section 6.04(b) of the 1996 Agreement violates section 50103(f) of Title 12 GCA.

3. Transfer of Land

[33] The next issue raised by Appellants is whether section 5.07(b) of the 1996 Agreement violates section 1800 of Title 1 GCA. Section 5.07(b) of the 1996 Agreement reads:

> The parties further acknowledge and agree that . . . the Government is to provide the Company with a mutually acceptable Facility Site, consistent with the understanding that the Company is the owner of the Facility for tax purposes.

Appellants' Brief, p. 7. Appellants argue that this provision violates section 1800 of Title 1 GCA, which states:

> Any plan or action . . . to . . . transfer any real property of the Government of Guam shall be transmitted to the Legislature which, by statute, may amend, approve, or disapprove the plan or the action taken. Any plan or taken action shall have no effect until legislative approval is obtained.

1 GCA § 1800 (2000).

[34] The trial court held that the 1996 Agreement did not authorize the transfer of land without legislative

approval, citing section 4.03(f) of the 1996 Agreement, which states:

> As of the Financing Date the Government shall have arranged to provide the Company with a mutually acceptable Facility Site, *in accordance with Section 6(b) of the Amended License* . . . .

Supplemental Excerpts of Record, tab 1 (Solid Waste Construction and Service Agreement, § 4.03(f)) (emphasis added). Section 6(b) of the 1990 Amended License reads:

> On or before the execution of the MSW Agreement, GEDA and GRRP shall enter into an agreement to provide GRRP with a mutually acceptable site of sufficient size for the design, construction and operation of the Facility for a mutually acceptable period. *The parties understand that the Guam legislature may have to approve the use of any such site.*

Appellants' Excerpts of Record, tab 12 (Amended License Agreement, § 6(b)) (emphasis added). Reading these two provisions together, the trial court concluded that GEDA and GRRP realized that the procurement of a facility site would be subject to legislative approval. While Appellants recognize that the parties contemplated the need for legislative approval prior to transferring any land, Appellants contend that the trial court erred in finding that contemplation was sufficient to satisfy section 1800 of Title 1 GCA. Because the parties already contracted to provide land, Appellants argue that actual approval is required. Appellants also point out that the agreement does not provide an alternative mode for procuring a facility site should the Legislature withhold its approval.

[35] Section 1800 of Title 1 GCA requires that "any plan or action" to transfer real property be transmitted to the Legislature for its review and approval. In this instance, section 5.07(b) of the 1996 Agreement provides that the Government is to provide GRRP with a facility site. No site has been selected nor have the terms of the transfer been memorialized. As noted by GRRP, section 5.07(c) of the 1996 Agreement clearly indicates that further negotiations are to take place before a facility site is selected.

Given that the location of the facility and the terms governing GRRP's occupation of that location are still undetermined, it would be premature to require the Government to seek legislative approval. Moreover, the trial court correctly concluded that section 4.03(f) of the 1996 Agreement and section 6(b) of the 1990 Amended License together express the parties' intent to obtain legislative approval before GRRP takes possession of any government land. While there is an expectation to transfer land, the Government has not contracted to transfer land and thus, we hold that the 1996 Agreement does not violate section 1800 of Title 1 GCA.

4. Contracts Clause

[36] The final issue we address is whether the trial court erred in finding that section 6 of Public Law 24-57 and Public Law 24-272 violate the Contracts Clause of the Organic Act, which provides that "[n]o . . . law impairing the obligation of contracts shall be enacted." Title 48 U.S.C. § 1421b(j) (West, WESTLAW, through July 22, 2004); *see* Guam Pub. L. 24-57:6 (June 30, 1997); Guam Pub. L. 24-272 (Oct. 2, 1998). Both public laws in question were enacted after the execution of the 1996 Agreement.

Section 6 of Public Law 24-57 states:

> The Governor of Guam and any line or autonomous agency of the government of Guam shall not, for the purposes of financing, funding, paying for or disbursing money pursuant to the proposed contract called the "Solid Waste Construction and Service Agreement" between the Government of Guam and Guam Resource Recovery Partners dated July 23, 1996, or any projects described in said contract, commit any funds, resources, assets, debts, obligations or property of the Government of Guam by any means . . . .

P.L. 24-57:6. Public Law 24-272 repealed and reenacted portions of Public Law 24-139. P.L. 24-272. The relevant effect of this re-enactment was twofold. First, it removed waste-to-energy facilities from the definition of Resource Recovery Facility, thereby precluding waste-to-energy facilities from being eligible

for permits under Public Law 24-139. Second, it removed GEDA's authorization to issue private activity bonds.

[37] The trial court held that both laws substantially impaired the Government's ability to perform under the 1996 Agreement since section 6 of Public Law 24-57 precluded the Government from committing any assets or property toward the fulfillment of the contract and Public Law 24-272 prevented the GEDA administrator from issuing a permit for the operation of a waste-to-energy facility. The court further found no evidence that the two laws furthered any public interest, and thus held that the impairment on the Government's ability to perform was neither reasonable or necessary.

[38] Appellants argue that neither public law can be found to violate the Contracts Clause because the state cannot unconstitutionally impair a contract that is illegal. Appellants also contend that there is no impairment of the 1996 Agreement because GRRP remains free to file suit against the Government for breach of contract and obtain damages. Last, Appellants argue that there is no impairment of the contract because the Legislature is already empowered to withhold its approval of the 1996 Agreement, and the public laws are a legitimate exercise of that power.

[39] Just this year, in *Rui One Corp. v Berkeley*, 371 F.3d 1137 (9th Cir. 2004) the Ninth Circuit reiterated the United States Supreme Court's three-step inquiry that governs challenges based on the Contracts Clause. In *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 103 S. Ct. 697 (1983), the Court determined "[t]he threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" (quoting *Allied Structural Steel Co. v. Spannaus*, 483 U.S. 234, 244, 98 S. Ct. 2716, 2722 (1978)). Next, "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public

purpose behind the regulation. . . ." *Energy Reserves*, 459 U.S. at 411-12, 103 S. Ct. at 704 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22, 97 S. Ct. 1505, 1517 (1977)). Finally, "[o]nce a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Energy Reserves*, 459 U.S. at 412, 103 S. Ct. at 705 (quoting *United States Trust Co*., 431 U.S. at 22, 97 S. Ct. at 1518).

[40] We first review section 6 of Public Law 25-57 under this framework. A law impairs a contractual obligation if it renders the obligation invalid, or releases or extinguishes it. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 431, 54 S. Ct. 231, 237 (1934). Here, section 6 of Public Law 24-57 prohibits the Government from expending any funds or utilizing any property in furtherance of the 1996 Agreement. Not only is this law specifically directed at this single contractual agreement, but if effectively freezes the Government's ability to perform under the agreement. The Government can no longer fulfill its duty to provide GRRP with a facility site, cooperate with GRRP in seeking the issuance of revenue bonds, or even allow GPA to purchase the energy produced by the plant.

[41] Upon determining there has been a substantial impairment, we look for the "significant and legitimate purpose" which "guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves*, 459 U.S. at 411-12, 103 S. Ct. at 704-05. Appellants fail to articulate any such public purpose. No legislative history or arguments by Appellants reveal any public interest that is served by this legislation.

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[42] Because we find that there is no "significant and legitimate public purpose" behind the enactment

of section 6 of Public Law 24-57, it is not necessary to reach the third step. Nevertheless, we note that because the Government is a party to the contract, we would not be required to "defer to legislative judgment as to the necessity and reasonableness" of the enactment. *United States Trust Co*., 431 U.S. at 22-23, 97 S. Ct. at 1518. Thus, without even a minimal showing of a significant and public purpose, the impairment of the 1996 Agreement cannot be justified. Thus, section 6 of Public Law 24-57 is void as it violates the Contracts Clause of the Organic Act.

[43] We next review Public Law 24-272 under the three-step framework. We agree with the trial court's conclusion that the invalidation of Public Law 23-139 would render the adverse effects of Public Law 24-272 moot. Public Law 24-272 repealed and reenacted Public Law 23-139. However, Public Law 23-139 was subsequently invalidated by this court in *Gutierrez v. Pangelinan*, 2000 Guam 11. Therefore, we hold that Public Law 24-272 is without legal effect.

IV.

[44] We hold that this court properly considered whether the 1996 Agreement was in violation of section 1423j of the Organic Act and section 22401 of Title 5 GCA and therefore, GRRP was not denied procedural due process. Thus, we **AFFIRM** our holding in 2003 Guam 13 that the terms of the 1996 Agreement violate section 1423j of the Organic Act and section 22401 of Title 5 GCA. However, we hold that the parties should be afforded the opportunity to address the issue of severability, and therefore, we **VACATE** our holding in 2003 Guam 13 declaring the 1996 Agreement null and void and further **VACATE** our reversal of the trial court's summary judgment. We **REMAND** the matter to the trial court for further findings and proceedings consistent with this opinion on the issue of severability.

[45] Turning to the remaining issues raised on appeal, but not previously addressed by this court, we hold, with regard to the alleged violation of Title 5 GCA section 5004(a), that the parties should be afforded the opportunity to address the novation issue raised by this court for the first time on appeal and thus, we **REMAND** such matter to the trial court for further findings and proceedings consistent with this opinion. We also find that Appellees have not attempted to issue any bonds or transfer any land without the approval of the Legislature and therefore, the trial court's findings in this regard are **AFFIRMED**. With respect to section 6 of Public Law 24-57 and Public Law 24-272, we find both laws to be invalid. Section 6 of Public Law 24-57 unconstitutionally impairs the Government's obligations under the 1996 Agreement, and therefore violates the Contracts Clause of the Organic Act. Further, Public Law 24-272 is void as a result of the invalidation of Public Law 23-139. Thus, the trial court's findings with respect to each of these public laws are also **AFFIRMED**.