



CARL T.C. GUTIERREZ  
GOVERNOR OF GUAM

Refer to  
Legislative Secretary

JUN 02 1997

The Honorable Antonio R. Unpingco  
Speaker  
Twenty-Fourth Guam Legislature  
Guam Legislature Temporary Building  
155 Hesler Street  
Agana, Guam 96910

Dear Speaker Unpingco:

Enclosed please find a copy of Bill No. 5 (LS), "AN ACT AUTHORIZING THE USE OF THE 'BUILD-OPERATE-TRANSFER' CONCEPT, OR A VARIANT THEREOF, FOR THE PURPOSE OF ALLOWING PRIVATE SECTOR FINANCING OF THE DESIGN, CONSTRUCTION AND OPERATION AND MAINTENANCE OF WATER AND WASTEWATER INFRASTRUCTURE PROJECTS.", which was vetoed and subsequently overridden by the Legislature on May 28, 1997. This legislation is now numbered **Public Law No. 24-37.**

Very truly yours,

  
Carl T. C. Gutierrez  
Governor of Guam

Attachment

00256

cc: The Honorable Joanne M. S. Brown  
Legislative Secretary

OFFICE OF THE LEGISLATIVE SECRETARY	
ACKNOWLEDGMENT RECEIPT	
Received By	<u>DSIT</u>
Time	<u>12:06 pm</u>
Date	<u>6-3-97</u>

Office of the Speaker  
ANTONIO R. UNPINGCO  
Date: 6/3/97  
Time: 1045  
Rec'd by: [Signature]  
Print Name: Charlene P. [Signature]

TWENTY-FOURTH GUAM LEGISLATURE  
1997 (FIRST) Regular Session

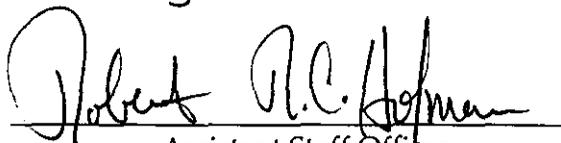
CERTIFICATION OF PASSAGE OF AN ACT TO THE GOVERNOR

This is to certify that Substitute Bill No. 5 (LS), "AN ACT AUTHORIZING THE USE OF THE "BUILD-OPERATE-TRANSFER" CONCEPT, OR A VARIANT THEREOF, FOR THE PURPOSE OF ALLOWING PRIVATE SECTOR FINANCING OF THE DESIGN, CONSTRUCTION AND OPERATION AND MAINTENANCE OF WATER AND WASTEWATER INFRASTRUCTURE PROJECTS," returned to the Legislature without approval of the Governor, was reconsidered by the Legislature and after such consideration, the Legislature did, on the 28th day of May, 1997, agree to pass said bill notwithstanding the objection of the Governor by a vote of twenty (20) members.

  
\_\_\_\_\_  
ANTONIO R. UNPINGCO  
Speaker

Attested:  
  
\_\_\_\_\_  
JOANNE M.S. BROWN  
Senator and Legislative Secretary

-----  
This Act was received by the Governor this 30<sup>th</sup> day of May, 1997, at 8:24 o'clock A.M.

  
\_\_\_\_\_  
Assistant Staff Officer  
Governor's Office

Date: \_\_\_\_\_

Public Law No. 24-37

TWENTY-FOURTH GUAM LEGISLATURE  
1997 (FIRST) Regular Session

**Bill No. 5 (LS)**

As substituted by the Committee on Rules,  
Government Reform and Federal Affairs.

Introduced by:

T. C. Ada

AN ACT AUTHORIZING THE USE OF THE  
"BUILD-OPERATE-TRANSFER" CONCEPT, OR A  
VARIANT THEREOF, FOR THE PURPOSE OF  
ALLOWING PRIVATE SECTOR FINANCING OF  
THE DESIGN, CONSTRUCTION AND  
OPERATION AND MAINTENANCE OF WATER  
AND WASTEWATER INFRASTRUCTURE  
PROJECTS.

1 BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:

2 Section 1. Legislative Findings. The Public Utility Agency of Guam  
3 (predecessor of the Guam Waterworks Authority "GWA") completed in 1992  
4 its Master Plan for the Island's water and wastewater infrastructure  
5 requirements to support projected service demands up to the year 2010.  
6 Although the master plan was completed about five (5) years ago, the relative  
7 magnitude of the infrastructure needs remains valid.

8 The capital improvement projects identified in the master plans are  
9 estimated to cost about Six Hundred Million Dollars (\$600,000,000.00) (in 1992  
10 dollars). Included, for example, are the expansion of the sewer collection and  
11 treatment system, especially in the northern part of Guam where Guam's  
12 underground water aquifer is located. These wastewater facility

1 improvements are essential for the protection of the aquifer, and the  
2 environment in general. The wastewater component of the capital  
3 improvement requirement is estimated to cost about Two Hundred Fifty  
4 Million Dollars (\$250,000,000.00).

5         Additionally, as Guam's population and economy grows, the demand  
6 for water will inevitably increase. But as the sustainable yield of the aquifer  
7 approaches its limit, surface water sources in southern Guam be developed as  
8 an alternative water source. The development of surface water sources, is  
9 estimated to cost about One Hundred Million Dollars (\$100,000,000.00) (in  
10 1992 dollars).

11         Finally, construction of water wells, transmission, storage and  
12 distribution components of the water system must be expanded and  
13 upgraded to effectively deliver the increased volumes of water produced in  
14 response to increased demands. This component of the capital improvement  
15 requirements is estimated to cost about Two Hundred Fifty Million Dollars  
16 (\$250,000,000.00).

17         Financial indicators suggest that the ability and available borrowing  
18 capacity of the government of Guam will not be able to support the amount of  
19 capital required. Notwithstanding, it is imperative that construction of the  
20 required infrastructure be accomplished.

21         **Section 2. Declaration of Policy.** It is the declared policy of the  
22 Territory of Guam to recognize the indispensable role of the private sector as  
23 the main engine for growth and development, and to provide the most  
24 appropriate incentives, to mobilize private resources, using the "Build-  
25 Operate-Transfer" concept, or variants thereof, for the purpose of financing

1 the design, construction and operation and maintenance of Guam's water and  
2 wastewater infrastructure expansion. These projects have traditionally been  
3 financed and undertaken by the government of Guam. Such incentives, aside  
4 from financial incentives as provided by law, shall include the elimination of  
5 bureaucratic "red tape," i.e. cumbersome administrative obstacles.

6 It is the intent of the government of Guam to accomplish the expansion  
7 and upgrade of Guam's public water and wastewater infrastructure through  
8 the accommodation of private sector initiatives and investments.

9 **Section 3. Definition of Terms.** The following terms used in this Act  
10 shall have the meaning stated below:

11 (a) **Private Sector Water and Wastewater Infrastructure**  
12 **Projects.** The general description of water and wastewater  
13 infrastructure projects traditionally financed and operated by the  
14 government, but which will now be wholly or in large part  
15 implemented by the private sector, as may be authorized by GWA  
16 pursuant to this Act. Such projects shall be undertaken through  
17 contractual arrangements as defined thereunder.

18 For the construction stage of these infrastructure projects, the  
19 project proponent obtains its own financing from domestic and/or  
20 foreign sources and engages to the maximum extent possible the  
21 services of a local contractor(s). In the case of off-island contractors,  
22 local residents shall be employed or hired, to the maximum extent  
23 possible, in the different phases of the construction where local skills are  
24 available.

1 Provided, finally, that projects may be financed partly from direct  
2 government of Guam appropriations, or in-kind contributions, not  
3 exceeding forty percent (40%) of the project cost, and the balance to be  
4 provided by the project proponent.

5 (b) **Build-Operate-Transfer ("BOT")**. A contractual arrangement  
6 whereby the project proponent, a Guam licensed business entity,  
7 undertakes the financing of the design and construction of new water  
8 and/or wastewater infrastructure facility(ies), and the operation and  
9 maintenance thereof. The services from these facilities are then sold to  
10 GWA who shall be the sole customer and who in turn is responsible for  
11 the distribution of services and collection of appropriate fees, rentals  
12 and charges thereof from GWA's consuming customers.

13 The water and/or wastewater facility is operated and maintained  
14 by the project proponent over a fixed term, not to exceed fifty (50) years,  
15 during which it is allowed to charge GWA appropriate fees, rentals and  
16 charges not exceeding those proposed in its bid or as negotiated and  
17 incorporated in the contract to enable the project proponent to recover  
18 its investment, and operating and maintenance expenses in the project.  
19 The project proponent transfers, in whole or in part in accordance with  
20 approved contract terms, the facility to the GWA at the end of the  
21 contract term.

22 BOT shall also include undertaking the financing of the design,  
23 renovation and replacement of equipment, of existing water and/or  
24 wastewater infrastructure facility(ies) and the operation and  
25 maintenance thereof.

1           (c) **Project Proponent.** The private sector entity, which shall  
2 have contractual responsibility for the water and/or wastewater  
3 infrastructure project and which shall have an adequate financial base  
4 to implement said project consisting of equity and firm commitments  
5 from reputable financial institutions to provide, upon award, sufficient  
6 credit lines to cover the total estimated cost of the project.

7           (d) **Contractor.** Any entity licensed under Guam laws, which  
8 may or may not be the project proponent, which shall undertake the  
9 actual design, construction and/or renovation of the project.

10          (e) **Facility Operator.** A company licensed under Guam laws,  
11 which may or may not be the project proponent, which is responsible  
12 for the operation and maintenance of the water and/or wastewater  
13 facility and compliance with the provisions of the Safe Drinking Water  
14 Act and other related regulations. The operator's labor force shall be at  
15 least sixty percent (60%) local residents.

16          (f) **Direct Government Guarantee.** An agreement whereby the  
17 government of Guam assumes responsibility for the repayment of debt  
18 directly incurred by the project proponent in implementing the project,  
19 in case of a loan default.

20          (g) **Construction.** Refers to new construction, refurbishment  
21 and/or expansion of an existing facility(ies), and related works and  
22 activities, including the necessary supply of equipment, materials, labor  
23 and services, and related items.

24          (h) **Guam Waterworks Authority ("GWA").** The government  
25 of Guam agency tasked with the mission of producing, treating,

1 transmitting, storing and distributing and selling water, and selling or  
2 disposing of wastewater, on Guam.

3 **Section 4. Private Initiative in Infrastructure.** The Guam Waterworks  
4 Authority ("GWA") is hereby authorized to enter into contract with any duly  
5 pre-qualified project proponent for the financing, design, construction,  
6 and/or operation and maintenance of any financially viable water and/or  
7 wastewater infrastructure facility authorized in this Act. GWA, when  
8 entering into such contracts, is enjoined to solicit the expertise of individuals,  
9 groups or corporations in the private sector who have extensive experience in  
10 undertaking water and/or wastewater infrastructure projects.

11 **Section 5. Priority Projects. (a) Project List.** GWA shall develop a  
12 prioritized list of water and wastewater infrastructure projects that may be  
13 financed, designed, constructed, renovated, operated and maintained by the  
14 private sector under the provisions of this Act.

15 **(b) Publication of Project List.** It shall be the duty of GWA to give wide  
16 publicity of this list of projects eligible for financing under this Act through  
17 publication in national and, where applicable, international newspapers, of  
18 general circulation once every six (6) months, for at least a one (1) year period,  
19 and official notification of interested project proponents registered with  
20 GWA. The list of all such infrastructure projects must be part of GWA's water  
21 and wastewater infrastructure master plan(s).

22 **Section 6. Unsolicited Proposals.** Unsolicited proposals for projects  
23 may be accepted by GWA on a negotiated basis. Provided, that all the  
24 following conditions are met:

1 (a) Such projects involve a new concept or technology and/or  
2 are not part of the list of priority projects,

3 (b) No direct government guarantee, subsidy or equity is  
4 required, and

5 (c) GWA has invited by publication in a newspaper of general  
6 circulation, comparative or competitive proposals, and no other  
7 proposal is received for a period of sixty (60) working days.

8 Provided, further, that in the event another proponent submits a lower  
9 price proposal, the original proponent shall have the right to match that price  
10 within thirty (30) working days.

11 **Section 7. Public Bidding of Projects.** Upon approval of the projects,  
12 as provided in Section 5 of this Act, GWA shall forthwith cause to be  
13 published in at least one (1) newspaper of general circulation and give notice  
14 to prospective proponents who have registered interest pursuant to Section 5  
15 of this Act, inviting all prospective project proponents to participate in a  
16 competitive public bidding for the projects so approved.

17 The contract shall be awarded to the bidder who, having satisfied the  
18 minimum financial, technical, organizational and legal standards required by  
19 this Act, has submitted the lowest bid and most favorable terms for the  
20 project, based on the present value of its proposed tolls, fees, rentals and  
21 charges over a fixed term for the facility to be constructed or rehabilitated  
22 and, operated and maintained according to the prescribed minimum design  
23 and performance standards, plans and specifications. For this purpose, the  
24 winning project proponent shall be automatically granted by GWA the  
25 franchise to operate and maintain the facility, including the collection of tolls,

1 fees, rentals and charges from its sole wholesale customer, GWA, in  
2 accordance with Section 5 hereof.

3 In all cases, a consortium that participates in a bid must present proof  
4 that the members of the consortium have bound themselves jointly and  
5 severally to assume responsibility for any project. The withdrawal of any  
6 member of the consortium prior to the implementation of the project could be  
7 ground for the cancellation of the contract.

8 The public bidding must be conducted under a two-envelope/two-stage  
9 system; the first envelope to contain the technical proposal and the second  
10 envelope to contain the financial proposal. The procedures for this system  
11 shall be outlined in the implementing rules and regulations of this Act.

12 A copy of each contract involving a project entered into under this Act  
13 shall forthwith be submitted to the Guam Legislature for its information."

14 **Section 8. Direct Negotiation of Contracts.** Direct negotiation shall be  
15 resorted to when there is only one (1) complying bidder left as defined  
16 hereunder:

17 (a) If, after advertisement, only one (1) contractor applied for  
18 pre-qualification and it meets the pre-qualification requirements, after  
19 which it is required to submit a bid proposal, which is subsequently  
20 found by GWA to be complying.

21 (b) If, after advertisement, more than one (1) contractor applied  
22 for pre-qualification, but only one (1) meets the pre-qualification  
23 requirements, after which it submits a bid proposal which is found by  
24 GWA to be complying.

1 (c) If, after pre-qualification of more than one (1) contractor,  
2 only one (1) submits a bid proposal which is found by GWA to be  
3 complying.

4 (d) If, after pre-qualification, more than one (1) contractor  
5 submit bids but only one (1) is found by GWA to be complying.

6 Provided, that any of the disqualified prospective bidders may appeal  
7 the decision of the GWA's Pre-qualification Bids and Awards Committee  
8 within fifteen (15) working days from the date of receipt of notice of  
9 disqualification by the disqualified bidder, to the General Manager of GWA.

10 Provided further, that GWA should act on the appeal within forty-five  
11 (45) working days from receipt thereof.

12 **Section 9. Repayment Scheme.** For the financing, design,  
13 construction, operation and maintenance of any infrastructure project  
14 undertaken through the Build-Operate-Transfer arrangement, or any of its  
15 variations pursuant to the provisions of this Act, the project proponent shall  
16 be repaid by authorizing it to charge and collect from GWA, its sole wholesale  
17 consumer, reasonable tolls, fees and rentals for the use of the project facility  
18 not exceeding those incorporated in the contract and, where applicable, the  
19 proponent may likewise be repaid in the form of a share in the revenue of the  
20 project.

21 Provided, that for negotiated contracts, and for projects which have  
22 been granted a natural monopoly or where the public has no access to  
23 alternative facilities, the Guam Public Utility Commission ("GPUC") shall  
24 approve the tolls, fees, rentals and charges to GWA based on a reasonable rate  
25 of return.

1            Provided further, that the imposition and collection of tolls, fees, rentals  
2 and charges shall be for a fixed term as proposed in the bid and incorporated  
3 in the contract, but in no case shall this term exceed fifty (50) years.

4            Provided further, that the tolls, fees, rentals and charges may be subject  
5 to adjustment during the life of the contract, based on a pre-determined  
6 formula using official price indices and included in the instructions to bidders  
7 and in the contract.

8            Provided also, that all tolls, fees, rentals and charges and adjustments  
9 thereof shall take into account the reasonableness of said rates to the end-  
10 users of private sector water and wastewater infrastructure.

11           Provided finally, that during the lifetime of the franchise, the project  
12 proponent shall undertake the necessary maintenance and repair of the  
13 facility in accordance with standards prescribed in the bidding documents  
14 and in the contract.

15           **Section 10. Contract Termination.** In the event that a project is  
16 revoked, canceled or terminated by the government through no fault of the  
17 project proponent or by mutual agreement, the government of Guam shall  
18 compensate said project proponent for its actual expenses incurred in the  
19 project, plus a reasonable rate of return thereon not exceeding that stated in  
20 the contract as of the date of such revocation, cancellation or termination.

21           In the event that the government defaults on certain major obligations in  
22 the contract, and such failure is not remediable, or if remediable shall remain  
23 unremedied for an unreasonable length of time, the project  
24 proponent/contractor may, by prior notice to GWA specifying the turn-over  
25 date, terminate the contract. The project proponent/contractor shall be

1 reasonably compensated by the government of Guam for equivalent or  
2 proportionate contract cost as defined in the contract.

3       **Section 11. Project Supervision.** Every infrastructure project  
4 undertaken under the provisions of this Act shall be in accordance with the  
5 plans, specifications, standards and costs approved by GWA and shall be  
6 under the supervision of GWA.

7       **Section 12. Investment Incentives.** Among other incentives, projects in  
8 excess of Twenty-five Million Dollars (\$25,000,000.00) shall be entitled to  
9 incentives as are currently provided by the Guam Economic Development  
10 Authority ("GEDA") to developers.

11       **Section 13. Implementing Rules and Regulations.** A committee  
12 composed of one (1) representative each from the Guam Waterworks  
13 Authority ("GWA"), Department of Public Works ("DPW"), the Guam  
14 Environmental Protection Agency ("GEPA"), University of Guam: Water,  
15 Energy, and Research Institute ("WERI"), Department of Land Management  
16 ("DLM"), Territorial Planning Commission ("TPC"), the Guam Economic and  
17 Development Authority ("GEDA"), and other concerned government  
18 agencies as the Governor may deem appropriate shall within one hundred  
19 and eighty (180) days from the effectivity of this Act, formulate and prescribe,  
20 after public hearing and publication as required by law, the implementing  
21 rules and regulations including, among others, the criteria and guidelines for  
22 evaluation of bid proposals, list of financial incentives and arrangements that  
23 the government of Guam may provide for the project, in order to carry out the  
24 provisions of this Act in the most expeditious manner. The Chairman of this  
25 committee shall be appointed by the Governor from its members.

1 From time to time the Committee may conduct, formulate and prescribe  
2 after due public hearing and publication, amendments to the implementing  
3 rules and regulations, consistent with the provisions of this Act.”

4 **Section 14. Repealing Clause.** All laws or parts of any law inconsistent  
5 with the provisions of this Act are hereby repealed or amended accordingly.

6 **Section 15. Separability Clause.** If any provision of this Act is held  
7 invalid, the other provisions not affected thereby shall continue in operation.

8 **Section 16. Effectivity Clause.** This Act shall take effect upon  
9 enactment.

Refer to  
Legislative Secretary

MAY 16 1997

The Honorable Antonio R. Unpingco  
Speaker  
Twenty-Fourth Guam Legislature  
Guam Legislature Temporary Building  
155 Hesler Street  
Agana, Guam 96910

OFFICE	OF THE LEGISLATIVE SECRETARY
	RECEIVED
	<i>[Signature]</i>
	5:23pm
Date	5-16-97

Dear Speaker Unpingco:

Enclosed please find a copy of Bill No. 5 (LS), "AN ACT AUTHORIZING THE USE OF THE 'BUILD-OPERATE-TRANSFER' CONCEPT, OR A VARIANT THEREOF, FOR THE PURPOSE OF ALLOWING PRIVATE SECTOR FINANCING OF THE DESIGN, CONSTRUCTION AND OPERATION AND MAINTENANCE OF WATER AND WASTEWATER INFRASTRUCTURE PROJECTS.", which I have **vetoed**.

I am in favor of the "build-operate-transfer" concept of private sector financing of water and waste water infrastructure projects, however, this particular legislation is flawed in such a way that changes need to be made before the concept is implemented.

We would be glad to work with the Committee on drafting a bill as soon as possible which could be readily signed. It is a consensus of opinion that the concept is a workable and desirable one, if the difficulties in language in this legislation can be ironed out.

The following are my objections to this legislation:

1. **The legislation appears to repeal all or a large portion of the procurement laws of the government of Guam.** On Page 12, lines 4- 5, there is a "repealing" section. That section states:

"All laws or parts of any law inconsistent with the provisions of this Act are hereby repealed or amended accordingly."

Office of the Speaker  
 ANTONIO R. UNPINGCO  
 Date: 5-16-97  
 Time: 9:15 pm  
 Rec'd by: am

This language is not specific to the Guam Waterworks Authority projects. It specifies that **all laws** inconsistent with the provisions of the Act are repealed or amended. Is it the intent of the legislation that all procurement laws of the government are repealed and would no longer apply to any procurement of the government? The procurement process specified in this legislation does not conform to the current procurement laws of Guam. In fact, the provisions of this legislation appear also to insert the bidding process back into procurement. This process has been repealed for a number of years, in favor of requests for proposals.

At the very least, the language is ambiguous concerning which laws are inconsistent with the provisions of this Act, and repealed. Since controversies will inevitably arise, what is consistent or inconsistent will be left up to a judge to decide.

This Section is a lawsuit in the making. Clauses in legislation which purport to repeal prior legislation, and yet do not refer specifically to which prior legislation, are ambiguous.

**2. This legislation would be costly to the government.** This legislation would be costly to the government. The government is underwriting the risk taken by the developer (project proponent) in this legislation, and giving benefits "up front" rather than requiring the project proponent to apply for the benefits. For example, the government is stating in the legislation on Page 11, lines 7-10, that a project proponent who proposes a project costing in excess of \$25 Million is **automatically entitled** to Guam Economic Development Authority (GEDA) Qualifying Certificates (QCs) without the usual scrutiny required by the Board of Directors of GEDA before these QCs are given out.

**3. Standards for "pre-qualifying" project proponents are unclear.** On page 7, lines 17-23, the standards are stated to be "the lowest bid and the most favorable terms". There is no manner of evaluating what would be the lowest bid and the most favorable terms, except to mention that they are based on "present value of its proposed tolls, fees, rentals and charges over a fixed term for the facility to be constructed or rehabilitated and, operated and maintained according to the prescribed minimum design and performance standards, plans and specifications."

4. It is unclear what "international" publications are acceptable for advertising a project. On page 6, line 17, the legislation allows publication of projects in international newspapers. Perhaps the legislation should indicate publication in "trade magazines", which would give notice to firms working in the field.

5. Government is guaranteeing all risk.

(a) Government guarantees risk upon termination of contract. On Page 10, lines 17-18, the legislation provides that in the case of the termination of a contract by mutual agreement, the government of Guam shall compensate the project proponent for all its expenses, plus a reasonable rate of return. It can be envisioned that a project proponent may want to walk away from an incomplete project, and the government may want them to walk away, yet an agreement terminating the contract by mutual agreement cannot be reached because the government is statutorily required to foot the bill for all of the risk taken by the project proponent. This is not a good deal for the government, and negates any negotiations which may be necessary when both parties desire to end their relationship.

(b) Government guarantees risk if there is a default. Additionally, if the government defaults, this legislation guarantees that the government will ensure the project proponent for any loses. See Page 10, line 25, to Page 11, line 2. Once again, no risk is taken by the project proponent. The government, in other words the people of Guam, are taking the financial risk and guaranteeing that any project proponent will not lose any money, no matter what type of job is performed on a project.

(c) There is no provision for providing a project that cannot be operated under regulations of Guam Environmental Protection Agency. This legislation does not provide for the case where a project proponent may construct a project which subsequently cannot be operated because it does not conform to the environmental requirements of law. Unlike other projects, a sewer project cannot be turned off if it is operating in a non-conforming manner, yet the government does not have redress under this legislation to keep this type of occurrence from happening.

6. Public Utilities Agency (PUC) becomes a party to the contract. This legislation effectively makes the Public Utilities Commission (PUC) a party to the contract between the government and any project proponent. No contract could be entered into before the PUC

"approved the tolls, fees, rentals and charges to the GWA based on a reasonable rate of return." It is desirable for the tolls, fees, rentals and charges to be based on a reasonable rate of return, yet the delay and red tape involved in the process would perhaps be cost-prohibitive to Guam Waterworks and to project proponents, who would have to pay for PUC hearings prior to the award or negotiation of contracts. These hearings are not inexpensive, as experienced by the Guam Power Authority and other regulated entities of the government.

**7. "Build-operate-transfer" is not the only contract arrangement authorized.** A "build-operate-transfer" arrangement can be a good contract arrangement for the government, yet this is not the only arrangement that can be negotiated under this legislation. Although a lengthy definition of what is meant by "build-operate-transfer" or "BOT", is set out on Page 4 of the bill, the bill does not require that the government enter into a BOT arrangement, or even a variant of a BOT arrangement. In fact, the definitions section of the bill does not really match the language used in the operative sections of the bill in all instances.

**8. "And/or" creates ambiguity.** also introduces uncertainty of meaning and a tendency to controversy and lawsuits. The judge in one court case in Wisconsin called this phrase a "Janus-faced verbal monstrosity, neither word nor phrase. . . a cunning device to conceal rather than express meaning. . . ." It is better that the word "or" be used instead, as it encompasses the complete meaning.

**9. "Territorial Planning Council" is correct name.** On a final note, on Page 11, line 16, the name of the "Territorial Planning Commission" should be corrected to "Territorial Planning Council", as the Commission is now known as the "Territorial Land Use Commission".

Very truly yours,

  
Carl T. C. Gutierrez  
Governor of Guam

Attachment

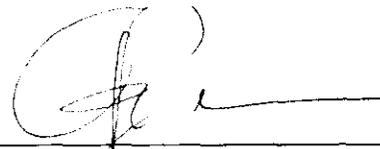
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cc: The Honorable Joanne M. S. Brown  
Legislative Secretary

TWENTY-FOURTH GUAM LEGISLATURE  
1997 (FIRST) Regular Session

CERTIFICATION OF PASSAGE OF AN ACT TO THE GOVERNOR

This is to certify that Substitute Bill No. 5 (LS), "AN ACT AUTHORIZING THE USE OF THE "BUILD-OPERATE-TRANSFER" CONCEPT, OR A VARIANT THEREOF, FOR THE PURPOSE OF ALLOWING PRIVATE SECTOR FINANCING OF THE DESIGN, CONSTRUCTION AND OPERATION AND MAINTENANCE OF WATER AND WASTEWATER INFRASTRUCTURE PROJECTS," was on the 6th day of May, 1997, duly and regularly passed.



ANTONIO R. UNPINGCO  
Speaker

Attested:



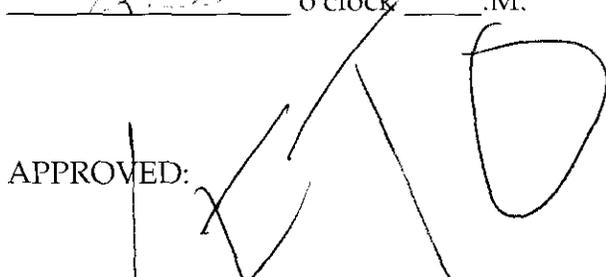
JOANNE M.S. BROWN  
Senator and Legislative Secretary

This Act was received by the Governor this 8th day of May, 1997, at  
12:35 o'clock PM M.



Assistant Staff Officer  
Governor's Office

APPROVED:



CARL T. C. GUTIERREZ  
Governor of Guam

Date: \_\_\_\_\_

Public Law No. \_\_\_\_\_

**24th Guam Legislature**  
**Committee on Rules, Government**  
**Reform and Federal Affairs**

*Senator Mark Forbes, Chairman*



**APR 14 1997**

Speaker Antonio R. Unpingco  
Twenty-fourth Guam Legislature  
155 Hesler Street  
Agana, Guam 96910

Dear Mr. Speaker:

The Committee on Rules, Government Reform and Federal Affairs, to which Bill No. 5 was referred, wishes to report back to the Legislature its recommendation **TO DO PASS BILL NO. 5**, as substituted, "An act authorizing the use of the "Build-Operate-Transfer" Concept, of a variant thereof, for the purpose of allowing private sector financing of the design, construction and operation and maintenance of water and wastewater infrastructure projects."

The voting record is as follows:

TO PASS

9

NOT TO PASS

0

ABSTAIN

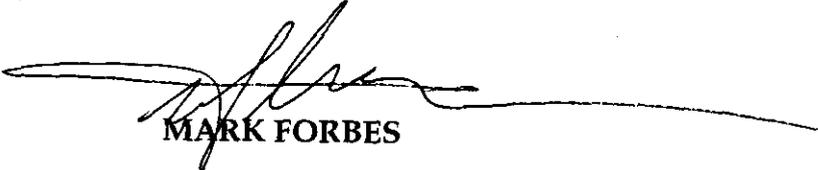
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TO PLACE IN INACTIVE FILE

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Copies of the Committee Report and other pertinent documents are attached.

Thank you and si Yu'os ma'ase for your attention to this matter.

  
**MARK FORBES**

Attachments

**24th Guam Legislature**  
**Committee on Rules, Government**  
**Reform and Federal Affairs**  
**Senator Mark Forbes, Chairman**

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**APR 14 1997**

**MEMORANDUM**

**TO:** Committee Members

**FROM:** Chairman *M*

**SUBJECT:** Committee Report - Bill No. 5, as substituted, "An act authorizing the use of the "Build-Operate-Transfer" Concept, of a variant thereof, for the purpose of allowing private sector financing of the design, construction and operation and maintenance of water and wastewater infrastructure projects."

Transmitted herewith for your information and action is the report on Bill No. 5, as substituted, from the Committee on Rules, Government Reform and Federal Affairs.

The Committee Report is accompanied by the following:

1. Bill No. 5, as substituted
2. Committee Voting Sheet
3. Testimony
4. Sign-in Sheet
5. Fiscal Note/ Fiscal Note Waiver
6. Public Hearing Notice

Should you have any questions regarding the report or accompanying documents, please do not hesitate to contact me.

Please take the appropriate action on the attached voting sheet. Your attention and cooperation in this matter is greatly appreciated.

Thank you and si Yu'os ma'ase.

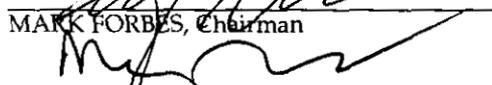
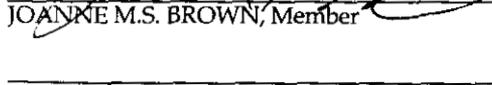
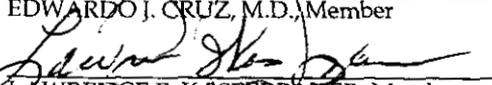
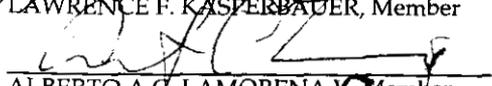
**MARK FORBES**

Attachments

**Committee on Rules, Government Reform and Federal Affairs**  
**Twenty-Fourth Guam Legislature**

**Voting Record**

**Bill No. 5**, as substituted, "An act authorizing the use of the "Build-Operate-Transfer" Concept, of a variant thereof, for the purpose of allowing private sector financing of the design, construction and operation and maintenance of water and wastewater infrastructure projects."

	<u>TO PASS</u>	<u>NOT TO PASS</u>	<u>ABSTAIN</u>	<u>INACTIVE FILE</u>
 MARK FORBES, Chairman	✓			
 ANTHONY C. BLAZ, Vice-Chairman	✓			
 ELIZABETH BARRETT-ANDERSON, Member	✓			
 JOANNE M.S. BROWN, Member	✓			
 FELIX PEREZ CAMACHO, Member				
 EDUARDO J. CRUZ, M.D., Member	✓			
 LAWRENCE F. KASPERBAUER, Member	✗			
 ALBERTO A.C. LAMORENA, Member	✓			
 CARLOTTA A. LEON GUERRERO, Member	✓			
 JOHN CAMACHO SALAS, Member	✓			
MARK C. CHARFAUROS, Member				
FRANCIS E. SANTOS, Member				
ANTONIO R. UNPINGCO, Ex-Officio Member				

**TWENTY-FOURTH GUAM LEGISLATURE**

**COMMITTEE ON RULES,  
GOVERNMENT REFORM & FEDERAL AFFAIRS  
SENATOR MARK FORBES, CHAIRMAN**

**Committee Report**

**on**

**Bill No. 5, as substituted, "An act authorizing the use of the  
"Build-Operate-Transfer" Concept, of a variant thereof, for the  
purpose of allowing private sector financing of the design,  
construction and operation and maintenance of water and  
wastewater infrastructure projects."**

## I. OVERVIEW

On March 19, 1997 the Committee on Rules, Government Reform and Federal Affairs conducted a public hearing on Bill No. 5 "An act authorizing the use of the "Build-Operate-Transfer" Concept, of a variant thereof, for the purpose of allowing private sector financing of the design, construction and operation and maintenance of water and wastewater infrastructure projects." The hearing took place at 9:00 a.m. in the Public Hearing Room of the Guam Legislative Building. Public Notice was given through an announcement in the March 13, 1997 issue of the Pacific Daily New.

Senators in attendance were:

- Senator Mark Forbes, Chairman
- Senator Joanne Brown, Member
- Senator Mark Charfauros, Member
- Senator Edwardo Cruz, Member
- Senator Larry Kasperbauer, Member
- Senator John Salas, Member
- Senator Tom Ada
- Senator Judith Won-Pat Borja

Appearing before the Committee to testify on the bill were:

- Mr. Dan Swavely, Guam Waterworks Authority Board Member
- Ms. Karen Storts, Guam Waterworks Authority Board Member
- Mr. Jordan Kaye, Chief Planner, Guam Environmental Protection Agency

Testimony received by the Committee after the public hearing:

- Mr. Richard Quintanilla, General Manager, Guam Waterworks Authority

## II. SUMMARY OF TESTIMONY

Mr. Dan Swavely testified in his capacity as a member of the GWA Board of Directors. He testified that the Board was **in favor** of the Bill which would allow GWA management to carve out certain functions in the operation, in particular expansion projects, which are important to carrying out mission of the Agency. When queried by Senator Mark Charfauros about the affect Bill 5 would have on rates, Mr. Swavely responded that rates would probably be reduced. One of the major premises would be to select a company that could do the same work better or cheaper than GWA.

Ms. Karen Storts, testified **in favor** of Bill No. 5 and echoed Mr. Swavely's comments relative to the Board. Additionally, Ms. Storts asked that the workscope of the project proponent include the design of the new facility.

Mr. Jordan testified that the GEPA is **in favor** of Bill No. 5. As a regulatory and enforcement agency, it is much easier to enforce environmental regulations with a private company than with a government agency.

Mr. Richard Quintanilla provided written testimony endorsing the concept of Bill No. 5. However, Mr. Quintanilla pointed out two areas of concern in the Bill. The GWA is given the authority to enter into contractual arrangements with any duly pre-qualified project proponent. However, the Governor of Guam is given the authorization to approve variations of such arrangements. Mr. Quintanilla requests that the following section of Section 3(a) be stricken:  
"and such other variations as may be approved by the Governor of Guam".

The second area of concern is the definition of "government of Guam". In order to avoid confusion in the event of a future dispute, Mr. Quintanilla recommends that the definition be modified to expressly define the term to mean the entire "government of Guam", and not just GWA.

### III. FINDINGS AND RECOMMENDATIONS

The Public Utility Agency of Guam (predecessor of the Guam Waterworks Authority "GWA") completed in 1992, its Master Plan for the island's water and wastewater infrastructure requirements to support projected service demands up to the year 2010.

The capital improvement projects (CIP) identified in the master plans are estimated to cost approximately \$600 million (in 1992 dollars). These CIPs are comprised of three components; water, surface water, and wastewater. The cost estimate of the components is \$250 million for water, \$100 million for surface water, and \$250 million for wastewater.

Financial indicators suggest that the ability and available borrowing capacity of the government of Guam may not be able to support the amount of capital required. Notwithstanding, it is imperative that construction of the required infrastructure be accomplished.

The Committee finds that Bill No. 5, as substituted, provides a suitable alternative by inviting private investors to utilize their financial resources and technological expertise to undertake the funding and operation of these vital CIP's identified by GWA. The remuneration to these investors will be the granting of a franchise to these revenue generating projects for periods up to 50 years.

Accordingly, the Committee on Rules, Government Reform and Federal Affairs recommends **TO DO PASS Bill No. 5, as substituted**, "An act authorizing the use of the "Build-Operate-Transfer" Concept, of a variant thereof, for the purpose of allowing private sector financing of the design, construction and operation and maintenance of water and wastewater infrastructure projects."



## PUBLIC UTILITY AGENCY OF GUAM

Government of Guam

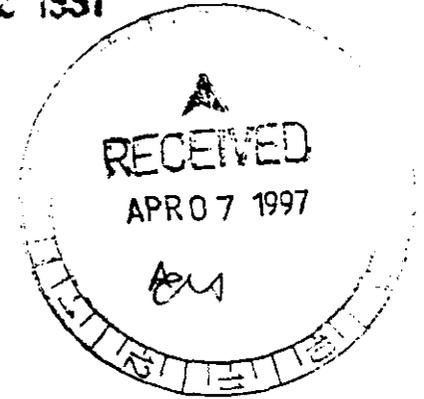
Post Office Box 3010, Agana, Guam 96910

Phone: (671) 647-7811 / 7823

Fax: (671) 649-0158

APR 02 1997

The Honorable Mark Forbes  
Chairman  
Committee on Rules, Government Reform  
and Federal Affairs  
24th Guam Legislature  
155 Hesler Street  
Agana, Guam 96910



Dear Senator,

Thank you for the opportunity to testify on this Bill. The Authority's board and management view the Build-Operate-Transfer ("BOT") concept as another tool to assist GWA in accomplishing its mission. Therefore as stated by Board members Karen Storts and Dan Swavely, GWA endorses the Bill.

While management was unable to testify before your committee, it has no less received due consideration and review from my office. The following are a few brief comments:

1. **Re. "Section 3. Definition of Terms":**

(a) **Private Sector Water and Wastewater Infrastructure projects.**

On page 6 of Bill 5, Section 4 (Private Initiative in Infrastructure) provides that GWA is authorized "to enter into contract with any duly pre-qualified proponent." This section appears to express that GWA does not need the approval of the Governor of Guam or the Bureau of Budget in order to enter into contracts for the construction or operation of the infrastructure facilities intended by Bill 5.

However, on page 3, lines 16-18, it is stated that infrastructure projects "shall be undertaken through contractual arrangements as defined thereunder and such other variations as may be approved by the Governor of Guam." This part is confusing and appears to conflict with the Section 4 Private Initiative Provision. If GWA has the authority to unilaterally contract for the infrastructure, why do "variations" require the approval of the Governor? Additionally, what type of projects are considered "variations" that require such approval?



Commonwealth Now!

We recommend that Section 3(a) and Section 4 of Bill 5 be clarified and amended to be consistent with each other. If it is the Legislature's intent to allow GWA to have the private initiative and discretion when entering into infrastructure contracts, then perhaps the clause stating "and such other variations as may be approved by the Governor of Guam" should be stricken.

**(f) Direct Government Guarantee.**

On page 5, lines 21-24, it is provided that the "government of Guam" assumes responsibility for the repayment of dept directly incurred by the project proponent in implementing the project, in case of a loan default.

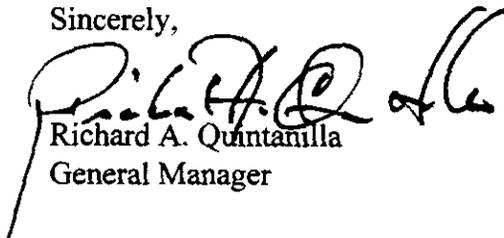
However, on page 10, lines 19-25 (re. Contract Termination), it is stated that the government of Guam is additionally responsible for costs incurred when a project is revoked, canceled, or terminated through no fault of the project proponent or by mutual agreement.

It should be noted on page 6, lines 4-7, "GWA" is specifically defined as a "government of Guam agency." There is a difference between a "government of Guam agency" and the "government of Guam." Payments made by the government of Guam, are paid out of the general fund, whereas payments made by GWA are paid by GWA. The guarantee clauses in Bill 5 state that the ultimate financial responsibility for the projects is on "the government of Guam." The guarantee clauses do not mention GWA by name.

In order to avoid confusion in the event of a future dispute, we recommend that a new definition be added to Bill 5 to expressly define that the term "government of Guam" means the entire government, and not just GWA.

I hope that these comments are helpful. Please call if you have any further questions.

Sincerely,



Richard A. Quintanilla  
General Manager

cc: Joanne M.S. Brown, Senator  
Thomas C. Ada, Senator



**FISCAL NOTE**  
**BUREAU OF BUDGET AND MANAGEMENT RESEARCH**

**BBMR-F7**

Bill No.: 5  
 Amendatory Bill: No

Date Received: March 12, 1997  
 Date Reviewed: March 17, 1997

Department/Agency Affected: Guam Waterworks Authority  
 Department/Agency Head: Richard Quintanilla  
 Total FY Appropriation to Date: \$31,130,000 (GWA Revenues )

**Bill Title (preamble):** AN ACT AUTHORIZING THE USE OF THE "BUILD-OPERATE-TRANSFER" CONCEPT, OR A VARIANT THEREOF, FOR THE PURPOSE OF ALLOWING PRIVATE SECTOR FINANCING OF THE CONSTRUCTION AND OPERATION & MAINTENANCE OF WATER AND WASTEWATER INFRASTRUCTURE PROJECTS.

Change in Law: N/A  
 Bill's Impact on Present Program Funding:  
 Increase: See attached Decrease \_\_\_\_\_ Reallocation \_\_\_\_\_ No Change \_\_\_\_\_  
 Bill is for:  
 Operations \_\_\_\_\_ Capital Improvement \_\_\_\_\_ Other \_\_\_\_\_

**FINANCIAL/PROGRAM IMPACT**

ESTIMATED SINGLE-YEAR FUND REQUIREMENTS (Per Bill)			
PROGRAM CATEGORY	GENERAL FUND	OTHER	TOTAL
Utilities and Infrastructure	See attached comments.		

ESTIMATED MULTI-YEAR FUND REQUIREMENTS (Per Bill)						
FUND	1st	2nd	3rd	4th	5th	TOTAL
GENERAL						
OTHER						
TOTAL						

FUNDS ADEQUATE TO COVER INTENT OF THE BILL? N/A IF NO, ADD'L AMOUNT REQUIRED: \_\_\_\_\_  
 AGENCY/PERSON/DATE CONTACTED: See attached comments.

ESTIMATED POTENTIAL MULTI-YEAR REVENUES						
FUND	1st	2nd	3rd	4th	5th	TOTAL
GENERAL FUND						
OTHER						
TOTAL						

ANALYST Carlos P. Bordallo DATE 3/19/97 DIRECTOR Joseph E. Rivera DATE MAR 20 1997  
 Carlos P. Bordallo JOSEPH E. RIVERA

### Comments on Bill 5

The Bill does not stipulate an outright appropriation, however provides that “projects may be financed partly from direct government of Guam appropriations, or in-kind contributions, not exceeding forty percent (40%) of the project costs, and the balance to be provided by the project proponent.” In addition, the direct government guarantee provision, which places the responsibility of repaying a debt upon the government should a proponent default, may have significant fiscal ramifications. The Bill does require that any facility constructed under the Build-Operate-Transfer be operated utilizing 60% local residents, which may stimulate employment. However, this is dependent upon the available work force and the skills required. Finally, incentives for projects, regardless of the amount, seem inappropriate if the government is to guarantee the financing of a project. Incentives should be utilized to entice potential investors into taking a risk with the hopes of realizing long term benefits.