

1 **GUAM DEPARTMENT OF EDUCATION**
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3 P.O. Box DE
4 Hagåtña, Guam 96910
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6 Email: legal-admin@gdoe.net

7 *Attorney for Guam Department of Education*

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

APR 27 2012

TIME: 4:20 PM BY: [Signature]

FILE NO OPA-PA-12-010

8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
9 **PROCUREMENT APPEAL**

10 IN THE APPEAL OF
11 ALLIED PACIFIC BUILDERS, INC.,
12
13 Appellant.

14 APPEAL NO. OPA-PA-12-010
15 **MOTION TO DISMISS,**
16 **MOTION FOR EXPEDITED DECISION**

17 Comes now the Guam Department of Education (“GDOE”) by and through its counsel
18 and files this Motion to Dismiss on the basis that Allied Pacific Builders, Inc. (“Appellant”)
19 failed to file a statement of the grounds for its appeal as required by 2 GAR, Div. 4, Ch. 12, §
20 12104.

21 Furthermore, GDOE files this Motion for Expedited Decision on the basis that GDOE
22 cannot move forward with the solicitations that are the subject of this appeal until this matter is
23 resolved before the Office of Public Accountability and the funding for those solicitations will
24 expire if not obligated by September 30, 2012.

25 Both Motions are supported by the Memorandum of Points and Authorities below.

26 **MEMORANDUM OF POINTS AND AUTHORITIES**

27 **MOTION TO DISMISS**

28 Appellant filed a protest with GDOE on January 5, 2012 regarding GDOE IFB 035-2011
and GDOE IFB 036-2011 (hereinafter referred to as “Protested IFBs”). GDOE responded to that
protest on April 3, 2012. Appellant then filed an appeal with the Office of Public Accountability
 (“OPA”) on April 13, 2012. As part of its appeal before the OPA and pursuant to 2 GAR Div. 4

1 §12104(b), Appellant is required to file “a concise, logically arranged, and direct statement of the
2 grounds for Appeal, a statement specifying the ruling requested,” and any supporting exhibits or
3 evidence to substantiate its claims. Though Appellant attached both its protest and GDOE’s
4 response with its appeal, it failed to provide any direct statement of the grounds for its appeal.

5 The requirement of 2 GAR § 12104(b)(2-3) for an appellant to explain its grounds for
6 appeal and to request a ruling is necessary in order for the purchasing agency to directly answer
7 any allegations in the appeal and respond specifically to an appellant’s request for relief from the
8 OPA. Without any specific charges by the Appellant, GDOE is unable to determine what charges
9 to answer. For this reason, GDOE respectfully requests that the OPA dismiss this appeal on the
10 basis that Appellant failed to comply with the requirements of 2 GAR § 12104.

11
12 **MOTION FOR EXPEDITED DECISION**

13 In addition to its Motion to Dismiss, GDOE respectfully submits this Motion For
14 Expedited Decision on the basis that the funds currently available for the Protested IFBs will be
15 lost if not obligated by September 30, 2012. The solicitations contained in the protested IFBs are
16 capital improvement projects that are discussed in Public Law 31-40, a copy of which is attached
17 herewith as Exhibit 1. Under P.L. 31-40, if the funds for the Protested IFBs are not obligated by
18 September 30, 2012 they will expire and the opportunity to purchase the services under the
19 Protested IFBs will be lost. Upon filing of this appeal and pursuant to 2 GAR § 9101(e), GDOE
20 issued a Stay of Procurement in both IFB 035-2011 and IFB 036-2011. GDOE is unable to
21 proceed with these procurements until this appeal is resolved.

22 Additionally, though the OPA has determined that expedited procurement procedures
23 under Public Law 31-196 will not apply in this matter (see email of April 19, 2012 from the OPA
24 to GDOE attached herewith as Exhibit 2), it should be noted that the projects solicited in the
25 Protested IFBs are of the type that the Legislature has determined are worthy of expedited
26 procurement procedures. The Guam Legislature reemphasized the importance of an expedited
27 determination of any protests of awards relating to capital improvement projects for GDOE. *See*

28

1 P.L. 31-196 § 8, a copy of which is attached herewith as Exhibit 3. GDOE acknowledges that
2 Appellant filed a letter of protest with GDOE on January 5, 2012, prior to P.L. 31-196 taking
3 effect. However, P.L. 31-196 makes clear that regardless of the protest procedures in Guam's
4 procurement law and regulations, it is in the best interest of the Territory that protests involving
5 capital improvement projects be determined in an expedited manner.

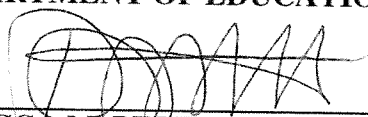
6 **CONCLUSION**

7 For the foregoing reasons, GDOE respectfully requests that this matter be dismissed. In
8 the event that the OPA determines not to dismiss this case, GDOE further requests that given the
9 deadlines contained in P.L. 31-40 and the time-sensitive nature of the funds available for this
10 procurement, that a determination of this appeal be made in an expedited manner.

11 Dated this 27th day of April, 2012.

12 Respectfully submitted,

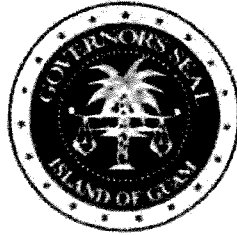
13 **GUAM DEPARTMENT OF EDUCATION**

14 
15 By: _____
16 **REBECCA M. PEREZ, ESQ.**
17 *Legal Counsel*

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27
28

EXHIBIT 1

EDDIE BAZA CALVO
Governor



RAY TENORIO
Lieutenant Governor

Office of the Governor of Guam

31-11-535

May 17, 2011

Honorable Judith T. Won Pat, Ed.D.
Speaker
I Mina'trentai Unu Na Liheslaturan Guåhan
155 Hesler Street
Hagåtña, Guam 96910


5/18/11
3:57 PM
D

Dear Madame Speaker:

Transmitted herewith is Substitute Bill No. 103-31 (COR) "AN ACT TO APPROPRIATE SIXTY MILLION EIGHTY EIGHT THOUSAND NINE HUNDRED THIRTY FIVE DOLLARS (\$60,088,935) TO THE GUAM DEPARTMENT OF EDUCATION FOR ONGOING AND CONTINUING CAPITAL IMPROVEMENT PROJECTS (CIPS), TECHNOLOGY UPGRADES AND EQUIPMENT PROJECTS", which I signed into law on May 16, 2011 as Public Law 31-40.

2011 MAY 19

Senseramente,


EDDIE BAZA CALVO

2011 MAY 19 AM 7:51
PR

Attachment: copy of Bill

535

I MINA'TRENTAI UNU NA LIHESLATURAN GUÅHAN
2011 (FIRST) Regular Session

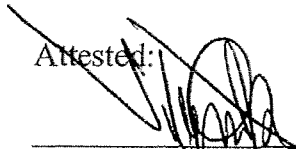
CERTIFICATION OF PASSAGE OF AN ACT TO *IMAGA'LAHEN GUÅHAN*

This is to certify that **Substitute Bill No. 103-31 (COR)**, "AN ACT TO APPROPRIATE SIXTY MILLION EIGHTY EIGHT THOUSAND NINE HUNDRED THIRTY FIVE DOLLARS (\$60,088,935) TO THE GUAM DEPARTMENT OF EDUCATION FOR ONGOING AND CONTINUING CAPITAL IMPROVEMENT PROJECTS (CIPs), TECHNOLOGY UPGRADES AND EQUIPMENT PROJECTS," was on the 2nd day of May, 2011, duly and regularly passed.

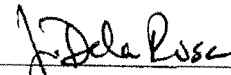


Judith T. Won Pat, Ed.D.
Speaker

Attested:


Tina Rose Muña Barnes
Legislative Secretary

This Act was received by *I Maga'lahaen Guåhan* this 5th day of May, 2011, at 09:55 o'clock A.M.


Assistant Staff Officer
Maga'lahaen's Office

APPROVED:


EDWARD J.B. CALVO
I Maga'lahaen Guåhan

Date: MAY 16 2011

Public Law No. 31-40

I MINA'TRENTAI UNU NA LIHESLATURAN GUÅHAN
2011 (FIRST) Regular Session

Bill No. 103-31 (COR)

As substituted by Committee on Appropriations, Taxation,
Public Debt, Banking, Insurance, Retirement, and Land,
and amended on the Floor.

Introduced by:

v. c. pangelinan
Judith T. Won Pat, Ed.D.
T. C. Ada
V. Anthony Ada
F. F. Blas, Jr.
B. J.F. Cruz
Chris M. Dueñas
Judith P. Guthertz, DPA
Sam Mabini, Ph.D.
T. R. Muña Barnes
Adolpho B. Palacios, Sr.
Dennis G. Rodriguez, Jr.
R. J. Respicio
M. Silva Tajjeron
Aline A. Yamashita, Ph.D.

**AN ACT TO APPROPRIATE SIXTY MILLION EIGHTY
EIGHT THOUSAND NINE HUNDRED THIRTY FIVE
DOLLARS (\$60,088,935) TO THE GUAM DEPARTMENT
OF EDUCATION FOR ONGOING AND CONTINUING
CAPITAL IMPROVEMENT PROJECTS (CIPs),
TECHNOLOGY UPGRADES AND EQUIPMENT
PROJECTS.**

BE IT ENACTED BY THE PEOPLE OF GUAM:

Section 1. Legislative Statement and Intent. The 111th United States

Congress enacted the American Recovery and Reinvestment Act (ARRA) of 2009

1 for the purpose of providing economic stimulus and relief to states and taxpayers.
2 In enacting ARRA, the primary goal of its framers was to provide a quick infusion
3 of cash to state and local governments for the preservation and creation of jobs,
4 thus stimulating the economy. *I Liheslaturan Guåhan* agrees with the economic
5 basis of the following approach and seeks to promote the principles and objectives
6 of this federal legislation at the local level.

7 *I Liheslaturan Guåhan* finds that the U.S. Department of Education
8 (USDOE) approved the Guam Department of Education (GDOE) State Fiscal
9 Stabilization Fund (SFSF) Phase I and Phase II application which budgets Forty
10 One Million Seventy Three Thousand Three Hundred Seventy Dollars
11 (\$41,073,370) for the modernization, renovation and repair of public educational
12 facilities used primarily for classroom instruction that are most in need of
13 modernization, renovation and repair; Twenty Six Million Three Hundred
14 Nineteen Thousand Four Hundred Fourteen Dollars (\$26,319,414) for Technology
15 Upgrades, Financial Management Information System (FMIS) and Consultant
16 Services; and Eight Million Three Hundred Fifty Thousand Dollars (\$8,350,000)
17 for administrative services of a Third Party Fiduciary Agent (TPFA) required by
18 the USDOE. The GDOE, which was awarded the SFSF funds two (2) years ago,
19 has experienced difficulty in obligating and expending the funds prior to the
20 September 2011 deadline. In failing to obligate and expend the funds, the GDOE
21 shall forfeit the funds earmarked to improve the physical infrastructure of our
22 educational institutions and other projects.

23 The management of the GDOE cites the legal review of procurement
24 contracts, applicable to all government of Guam entities, as a bottleneck in the
25 obligation and the expenditure of the funds. In citing the following provision, the
26 GDOE has requested exemption to the legal review requirement within the

1 procurement statutes and to preclude the legal right of bidders to protest bid
2 awards.

3 *I Liheslaturan Guåhan* affirms that the GDOE has *not* presented a
4 compelling reason to merit exemption from the procurement statutes, which were
5 crafted to protect the public interest in contractual negotiations. Furthermore, *I*
6 *Liheslaturan Guåhan* finds that the following solution to GDOE’s difficulties to
7 expend the funds represents a dangerous precedent whereby legislative remedies
8 are sought for administrative issues.

9 *I Liheslaturan Guåhan* wherever possible seeks a win-win approach to
10 problems facing our community and thus finds that the difficulty of the GDOE to
11 expend ARRA SFSF funds presents an opportunity for such a solution. *I*
12 *Liheslaturan Guåhan* recognizes that the following approach is consistent with the
13 spirit of *Inafa’maolek* and is an example of a bi-partisan approach to solving
14 problems because “*the greatness of Guam transcends all political lines.*”

15 In granting the following budgetary mechanisms, *I Liheslaturan Guåhan* is
16 providing a solution and creating the opportunity for the chief executive and
17 GDOE to request the USDOE to reprogram Sixty Million Eighty Eight Thousand
18 Nine Hundred Thirty Five Dollars (\$60,088,935) of the ARRA SFSF grant
19 earmarked for Capital Improvement Projects, Technology Upgrades, Science,
20 Technology, Engineering & Math (STEM) CIPs and Equipment for the payment of
21 personnel cost for FY 2011.

22 The following approach will *not* reduce or redirect funds due to the GDOE
23 for repairs of educational institutions and other projects. Rather, the approach
24 seeks to guarantee that the GDOE *not* lose ARRA SFSF funds due to failure to
25 expend the funds by December 2011, and ensure that GDOE complies with local
26 procurement laws. In doing so, the approach merely utilizes the ARRA SFSF
27 funds for salaries and benefits of school-based teachers, administrators and support

1 staff and appropriates and reserves the funds transferred for Technology Upgrades,
2 Equipment and Capital Improvement Projects as they become shovel ready.

3 *I Liheslaturan Guåhan* finds that the use of ARRA SFSF funds for GDOE's
4 payroll will provide the following advantages to GDOE, as well as the General
5 Fund:

- 6 • Approximately fourteen (14) pay periods of salaries and benefits for
7 the GDOE will be covered;
- 8 • Reporting requirements for expenditures of GDOE payroll will be less
9 burdensome to the administrative infrastructure of the department;
- 10 • The GDOE will be able to preserve and retain jobs, consistent with
11 the overarching principle of ARRA;
- 12 • The GDOE will *not* need to seek an exemption from the procurement
13 statutes;
- 14 • The risk of losing ARRA SFSF funds due to inability to expend funds
15 or due to procurement challenges will be abated;

16 Many of the priorities set forth by *I Liheslaturan Guåhan* and *I Maga'låhen*
17 *Guåhan* enacted into law through the General Appropriations Act of 2011 remain
18 unfulfilled due to redirecting budgeted cash collections for other purposes. *I*
19 *Liheslaturan Guåhan shall* require stringent conditions of depositing
20 reimbursements from USDOE into a trust account in order to ensure and reaffirm
21 its commitment to education by providing safeguards to the funds transferred to be
22 used in FY 2011 and beyond.

23 The USDOE has required that Guam obligate the funds for the proposed
24 projects no later than September 2012, or Guam DOE risks being ordered to
25 reimburse ARRA/SFSF funds for failure of maintenance of effort. Following the
26 appropriation of funds in this Act, it will be beyond the Organic Act authority of *I*

1 *Liheslaturan Guåhan* (the Guam Legislature) to ensure the funds are obligated for
2 the authorized projects on time. In light of the extreme hardship that
3 reimbursement of Sixty Million Dollars (\$60,000,000) will impose on all the
4 people of Guam, *I Liheslatura* (the Legislature) must emphasize and caution the
5 Guam Education Board and the Executive Branch as to the huge risk of loss Guam
6 faces if the improvements are not made by the deadline and consistent with all
7 other terms of the agreement.

8 **Section 2. Creation of the Adequate Education Act Trust Account.**

9 (a) There is hereby created, separate and apart from all other funds of the
10 government of Guam, a trust account known as the Adequate Education Act Trust
11 Account (Trust Account). The Trust Account *shall not* be commingled with the
12 General Fund or any other funds of the government of Guam, and it *shall* be
13 maintained in a separate bank account, administered by a trustee that is selected in
14 accordance with the government of Guam procurement rules and regulations. The
15 Trust Account's interest and investment earnings *shall* be continuously
16 appropriated to the Department of Administration for the payment of the GDOE-
17 Guam Power Authority Promissory Note. Upon full payment of the Promissory
18 Note, succeeding interest and investment earnings *shall* be continuously
19 appropriated to the GDOE for maintenance and repair of its facilities.

20 (b) Monies deposited into the Trust Account *shall* be invested or
21 reinvested into interest bearing instruments, United States treasury notes,
22 investment grade and insured corporate notes, and other like instruments which are
23 readily convertible to cash needed to pay for projects approved in the ARRA SFSF
24 Phase I and Phase II grant application, including any subsequent amendments
25 approved by USDOE in accordance with the appropriation in Section 3(a) of this
26 Act.

1 (c) Monies deposited into the Trust Fund *shall not* be subject to any
2 transfer authority of *I Maga'lahañ Guðhan* or any representative of the Guam
3 Department of Education.

4 **Section 3. Appropriation.** Upon USDOE approval to amend the Phase I
5 and Phase II ARRA SFSF grant application, whereby, the amount of Sixty Million
6 Eighty Eight Thousand Nine Hundred Thirty Five Dollars (\$60,088,935) of federal
7 funds originally allocated for Capital Improvement Projects, Technology Upgrades
8 and Science, Technology, Engineering & Math (STEM) CIPs and Equipment is
9 reprogrammed to Salaries and Benefits resulting in a reimbursement of funds
10 appropriated and expended in Section 2 of Chapter II, Part I of Public Law 30-196,
11 the reimbursement of Sixty Million Eighty Eight Thousand Nine Hundred Thirty
12 Five Dollars (\$60,088,935) from the SFSF grant authorized by the USDOE
13 pursuant to the expenditure of local funds and certified by the TPFA *shall* be
14 deposited to the Trust Account. The use of the reimbursed funds in the Trust
15 Account *shall* be pursuant to the following amounts and requirements:

16 (a) Sixty Million Eighty Eight Thousand Nine Hundred Thirty Five
17 Dollars (\$60,088,935) is appropriated from the Adequate Education Act
18 Trust Account to the Guam Department of Education in Object Classes 230,
19 250 and 450 as follows: object class 230 (Contracts) - Thirty Five Thousand
20 Dollars (\$35,000); object class 250 (Equipment) - Three Million Fifty
21 Thousand Dollars (\$3,050,000); and object class 450 (Capital Outlay) - Fifty
22 Seven Million Three Thousand Nine Hundred Thirty Five Dollars
23 (\$57,003,935).

24 (b) the appropriation to Object Classes 230, 250 and 450 in this
25 Section *shall* be continuing appropriations for the GDOE and *shall* be
26 earmarked for Capital Improvement Projects, Technology Upgrades and
27 Science, Technology, Engineering & Math (STEM) CIPs and Equipment

1 approved by USDOE contained in the ARRA SFSF Phase I and Phase II
2 grant application, including any subsequent amendments approved by
3 USDOE; provided, that all these appropriations *shall* expire if *not* obligated
4 by September 30, 2012.

5 (c) GDOE *shall* report to *I Maga'lahi* and *I Liheslatura* on a
6 monthly basis as to the obligation and expenditure of the funds from the
7 Trust Fund and the completion of the ARRA/SFSF projects.

8 **Section 4.** §3108 of Title 17, Guam Code Annotated, is hereby *enacted* to
9 read:

10 “§3108. **Attorney for the Board.** The Board may employ an
11 attorney(s) to assist and represent it in all matters that concern the Board and
12 the GDOE.”

13 **Section 5. Severability.** *If* any provision of this Law or its application to
14 any person or circumstances is found to be invalid or contrary to law, such
15 invalidity shall *not* affect other provisions or applications of this Law which can be
16 given effect without the invalid provisions or application, and to this end the
17 provisions of this Law are severable.

EXHIBIT 2

----- Forwarded message -----

From: **Llewelyn Terlaje** <lterlaje@guamopa.org>
Date: Thu, Apr 19, 2012 at 5:29 PM
Subject: RE: OPA-PA-12-010
To: rebecca.perez@gdoe.net
Cc: "Rodalyn Marquez (E-mail)" <rmarquez@guamopa.org>, Joy Bulatao <jbulatao@guamopa.org>

Hafa Adai Ms. Perez:

Per our Hearing Officer, Mr. Camacho, OPA-PA-12-010 will be handled in accordance with our existing rules of procedure instead of the procedures set forth in P.L. 31-196. I will be faxing a scheduling order for a status meeting next week in which this matter will be discussed.

Regarding the appellant's email address it is: genaro@alliedpacificbuilders.com.

Thank you.

Llewelyn Restuvog Terlaje, CGAP

Office of Public Accountability
Tel. (671) 475-0390 ext. 217
Fax (671) 472-7951

This Email transmission and accompanying attachment(s) may contain confidential or privileged information. If you are not the intended recipient of this Email, please inform the sender and delete it and any other electronic or hard copies immediately. Do not distribute or disclose the contents to anyone. Thank You.

From: Rebecca M. Perez (Attorney) [<mailto:rebecca.perez@gdoe.net>]
Sent: Wednesday, April 18, 2012 11:32 AM
To: Rodalyn Marquez
Cc: Legal Admin; Marcus Y. Pido
Subject: OPA-PA-12-010

Hafa Adai Ms. Marquez –

I am counsel for the Guam Department of Education.

With regard to OPA Appeal No. OPA-PA-12-010, filed by Allied Pacific Builders Inc., please advise whether this matter will be handled pursuant to the expedited procurement procedures put in place by Public Law 31-196.

Additionally, please provide me with an email address for the Appellant so that I may copy it on any communications with your office.

Thank you.

Rebecca M. Perez
Legal Counsel
Guam Department of Education

Exhibit 2

EXHIBIT 3

1 withdraw bond proceeds to all appointed trustees, co-trustees or other
2 fiduciaries (trustee). The written request shall unequivocally state the
3 purpose of said withdrawal specific to the authorized use mandated or
4 selected pursuant to § 1512.3(2) of Article 5, Chapter 1, Title 5, Guam Code
5 Annotated. The trustee *shall* provide a copy of *all* documents submitted by
6 the DOA to withdraw funds to *I Maga'lahen Guåhan* and to the Speaker of *I*
7 *Liheslaturan Guåhan* five (5) days prior to the disbursement of request
8 funds.”

9 **Section 8. Protest Procedure for Procurement for Capital**
10 **Improvement Projects for the Guam Department of Education.**

11 (a) Notwithstanding any other provision of the Guam Procurement
12 Law and any rules promulgated therefore, *if* an actual or non-selected
13 vendor, contractor, or service provider is aggrieved by an award or a
14 contract funded, in whole or in part, by funds allotted to the Guam
15 Department of Education for Capital Improvement Projects and air
16 conditioning repair and maintenance, the procedure for protest outlined in
17 this Section *shall* apply and *shall* be the exclusive means available to
18 resolve the concerns of persons aggrieved in connection with awards or
19 solicitations involving Capital Improvement Projects and air conditioning
20 repair and maintenance, in whole or in part. The protest *shall* be submitted
21 to the Public Auditor who may settle and resolve a protest by one (1) or
22 more of the following means:

- 23 (1) amending or canceling the solicitation;
24 (2) terminating the contract that was awarded;
25 (3) declaring the contract null and void from the time of its
26 award; *or*

1 (4) affirming the contract award decision. If the protest is
2 *not* resolved by mutual agreement, the Public Auditor *shall* issue a
3 decision, in writing, within *no more than* ten (10) working days of
4 receipt of the protest. The decision *shall* state the reasons taken.
5 A copy of the written decision *shall* be mailed, using certified
6 mail, *or* otherwise furnished to the vendor, contractor, or service
7 provider who initiated the protest, the person awarded the contract,
8 and to all other non-selected bidders or offerors.

9 (b) For purposes of this Section, the determination of facts and
10 decision by the Public Auditor for the resolution of protests *shall* be final
11 and conclusive with *no* right of appeal *or* judicial review. The fact that a
12 protest has been filed pursuant to this Section *shall not* stay the procurement
13 process or award of any contract, whether in whole or in part, *unless* so
14 ordered by the Public Auditor. A request for reconsideration *shall also not*
15 stay the award of any contract, whether in whole or in part, *unless* so
16 ordered by the Public Auditor. This Section is repealed effective December
17 31, 2012.

18 **Section 9.** §1515(i)(2)(G), Article 5, Chapter 1, Title 5 of the Guam Code
19 Annotated is hereby *repealed and re-enacted* to read as follows:

20 “(G) for the purposes of issuing a loan of no less than Five Million
21 Dollars (\$5,000,000) to the Guam Fishermen’s Cooperative Association
22 (GFCA) for the development of the Greg D. Perez Marina Economic
23 Enhancement Master Plan. The loan *shall* be structured and administered
24 by the Guam Economic Development Authority (GEDA) for the term of up
25 to forty (40) years at a maximum interest rate of no more than Four percent