

**Presentation of Attorney General Claude Earl Walker
Thirty-First Legislature of the Virgin Islands
Earle B. Ottley Legislative Chambers, St. Thomas, VI
Wednesday, October 5, 2016**

Good morning Mr. Chairman, Senators, legislative staff, and to those of you in the listening and viewing audience. My name is Claude Earl Walker and I am the Virgin Islands Attorney General, and seated next to me is Pamela Tepper—the Solicitor General. It is a pleasure and an honor to be here before you today to provide testimony on Bill No. 31-0365.

The purpose of this proposed legislation, among other things, is to allow executive agencies to enter into multiyear contracts “without necessarily providing funding for the entire term of the contract;” mandating that a termination clause be included in the contract if funds are not available for the continuation of the contract in a given fiscal year; allowing for a discretionary provision which would allow the government to terminate the contract if subsequent appropriations were not allocated for the contract; and mandating that a cancellation payment be made available to the contractor should funds not be allocated in subsequent fiscal years. The Department of Justice (“Department”) is in full support of any measure that would make the contracting and procurement process here in the territory more efficient, however, we do not believe this proposed Bill would have that effect—and to some degree, would make the process more difficult to navigate and understand.

To begin, it should be noted that the Department finds the language in proposed subsection (b) and (d) somewhat confusing. In subsection (b) it states that “[a] multiyear contract entered into under the authority of this section must include a clause that provides that the contract shall be terminated if funds are not made available for the continuation of the contract in a fiscal year

covered by the contract.” (emphasis added). Then in subsection (d) it states that “[a] multiyear contract may provide that performance under the contract after the first year of the contract is contingent on the appropriation of funds. . . .” (emphasis added). Why would it be mandatory that a contract be terminated if funds were not available in one fiscal year, but be discretionary for subsequent fiscal years? In any event, the government already routinely incorporates in all of its contracts a clause that states something to this effect: “This Contract shall be subject to the availability and appropriation of funds and the approval of the Governor.”

Another area of concern for the Department rests in proposed section (a)(1) where it states that an executive agency may enter into a multiyear contract if “funds are available and obligated for the contract, for the full period of the contract or for the first fiscal year in which the contract is in effect, and for the estimated costs associated with a necessary termination of the contract. . . .” First, it needs to be made clear that existing law already mandates that funds must be available—either in full or for the first portion of the contract. 33 V.I.C. § 3101 states that:

No officer or employee of the Virgin Islands shall make or authorize an expenditure from, or create or authorize an obligation under, any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the government in any contract or obligation for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Second, the Department is not clear what the drafters intended by the phrase “estimated costs associated with a necessary termination.” Does this simply refer to the cancellation payment that is suggested in proposed subsection (d), or does this refer to any possible costs that may arise from a termination of the contract—such as poor workmanship by the contractor, breach of contract, or natural disaster? If it is referring to the cancellation payment that must be made pursuant to subsection (d), then the Department would like to point out that the government does not currently pay

contractors any cancellation payments—nor should it. After all, it would be somewhat antithetical to suggest that the government does not have enough funding to continue with a contract, and, yet, at the same time has sufficient funds to pay a contractor for services not rendered under a cancelled contract. Instead, the government has standard language in each of its contracts that states a “contractor shall be entitled to receive payment for services provided to the date of termination, including payment for the period of the THIRTY (30) day notice.” On the other hand, if the “estimated costs” in proposed subsection (a)(1) are referring to any number of unexpected costs that may arise under a terminated contract then it should be pointed out that this would be an almost impossible task to try to calculate. One cannot allocate a set dollar figure for a virtually limitless number of scenarios that may arise along with their associated costs.

Also particularly concerning is proposed subsection (c). It states:

Before a contract described in subsection (b) which contains a clause setting forth a cancellation ceiling in excess of \$10,000,000 may be awarded, the executive agency shall give written notification of the proposed contract and of the proposed cancellation ceiling for that contract to Legislature [*sic*] of the Virgin Islands.

What is a “cancellation ceiling”—it is not defined anywhere? Does it mean the “termination costs” described in subsection (b) or does it mean the “cancellation payment” described in subsection (d)? Regardless, the Department is somewhat perplexed as to how this dollar amount was reached. In a territory that very rarely enters into \$10,000,000 fully-performed contracts, it is mystifying that this Bill would allow for a \$10,000,000 “cancellation ceiling.” This is an exorbitant amount of money to contemplate putting in any contract, and to not have a clear understanding as to what it really means is discomfoting.

In short, the Department has truly struggled with the overall language and intent of this proposed legislation, and, as such, cannot support or advocate for its passage at this time. With that,

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I would like to, again, thank the Committee for allowing me to provide testimony on Bill No. 31-0365, and I am available for any questions the members may have.