

**NPM No. 06-2017**

2 May 2017

**HON. ANNELI R. LONTOC**

*Undersecretary for Road Transportation and Infrastructure*  
**DEPARTMENT OF TRANSPORTATION (DOTr)**  
Columbia Tower Wack-wack,  
Ortigas Avenue, Mandaluyong City



**Re: Applicability of Republic Act (RA) No. 9184 in the Selection of a  
Technical Support Consultant funded through a World Bank Loan**

Dear Undersecretary Lontoc:

This refers to your letter requesting for guidance on addressing the following issues encountered by the DOTr relative to its procurement activities undertaken in accordance with the World Bank Guidelines on the Selection and Employment of Consultants (Guidelines), thus:

1. Whether the Bids and Awards Committee (BAC) is permitted to apply the provisions of RA 9184 in place of the World Bank Guidelines;
2. Whether RA 9184 may apply suppletorily to the World Bank Guidelines;
3. Whether the DOTr can directly negotiate, as approved by World Bank, with a bidder despite submitting a financial proposal above the Agency Estimate; and
4. Whether a No Objection Letter (NOL) issued by the World Bank supersedes the procedural or documentary requirements of RA 9184.

As represented, the DOTr entered into a Loan Agreement with the World Bank for the funding of the Cebu Bus Rapid Transit (BRT) Project. One of the conditions under the Loan Agreement involves engaging the services of a Technical Support Consultant, which will be procured pursuant to the World Bank Guidelines. In the course of the procurement process, DOTr received two (2) proposals, but only one (1) bidder complied with the technical requirements. Upon approval by the World Bank, DOTr proceeded to open the Financial Proposal of the remaining bidder, who submitted a bid price exceeding the ABC of the project.

The procurement process was delayed due to changes in the DOTr officials and personnel, such that the members of the Bids and Awards Committee (BAC) responsible for the procurement activity were replaced. A new set of BAC members was designated that


subsequently recommended that the bidding process be declared a failure since the financial proposal submitted exceeded the approved budget for the contract (ABC) of the project and the results of the Technical Evaluation were not approved by the HOPE. The new BAC applied the provisions of RA 9184 and its revised Implementing Rules and Regulations (IRR)<sup>1</sup> in making its recommendations since the World Bank Guidelines, according to the new BAC, appear silent in addressing the findings.

By reason of the proposed cancellation and rebidding for the procurement of the Technical Support Consultant, the DOTr received a letter from the World Bank that a No Objection Letter (NOL) will not be issued as regards the BAC decision to reject all proposals and to conduct a rebidding. The World Bank also informed the DOTr that the BAC should proceed with the negotiations with the sole bidder despite submitting a bid in excess of the ABC. Hence, this request.

### **Applicability of RA 9184 vis-à-vis Loan Agreements with an International Financing Institution (IFI) -**

As a general rule, the provisions of RA 9184 and its IRR shall apply in the “[p]rocurement of Infrastructure Projects, Goods and Consulting Services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or-controlled corporations and local government units.”<sup>2</sup>

It bears stressing, however, that as an exception to the rule, Section 4 of RA 9184 likewise provides that Treaties, International or Executive Agreements entered into by the Government must be observed and adhered to. This obligation is in accordance with the principle of *pacta sunt servanda*, a legal principle which essentially requires that international agreements be performed in good faith by the contracting parties. Under this legal maxim, a state which has contracted valid international obligations is even bound to make in its legislations such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.<sup>3</sup>

In the case of *Land Bank of the Philippines v. Atlanta Industries, Inc.*<sup>4</sup>, the Supreme Court, citing *Department of Budget and Management Procurement Service v. Kolonwel Trading*<sup>5</sup> and *Abaya v. Ebdane*<sup>6</sup>, held that a foreign loan agreement entered into by the Government with an International Financing Institution (IFI) partakes of the nature of an executive or international agreement within the purview of Section 4 of RA 9184, and that the procurement processes and procedures identified therein, as in the case of a World Bank (International Bank for Reconstruction and Development) Loan, shall govern the procurement activity necessary to implement the project. It was further emphasized that the Government, as a borrower, is bound to perform in good faith its duties and obligations under a Loan Agreement pursuant to the international legal principle of *panct sunt servanda*, thus: 

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<sup>1</sup> As amended by the 2016 Revised Implementing Rules and Regulations of RA 9184 which took effect on 28 October 2016.

<sup>2</sup> Section 4 of RA 9184.

<sup>3</sup> NPM 115-2012, dated 13 September 2012.

<sup>4</sup> G.R. No. 193796, dated 2 July 2014.

<sup>5</sup> 551 Phil. 1030 (2007.)

<sup>6</sup> 544 Phil. 645 (2007).

Considering that Loan Agreement No. 4833-PH expressly provides that the procurement of the goods to be financed from the loan proceeds shall be in accordance with the IBRD Guidelines and the provisions of Schedule 4, and that the accessory SLA contract merely follows its principal's terms and conditions, **the procedure for competitive public bidding prescribed under RA 9184 therefore finds no application to the procurement of goods for the Iligan City Water Supply System Development and Expansion Project.** The validity of similar stipulations in foreign loan agreements requiring the observance of IBRD Procurement Guidelines in the procurement process has, in fact, been previously upheld by the Court in the case of Department of Budget and Management Procurement Service (DBM-PS) v. Kolonwel Trading, viz.:

The question as to whether or not foreign loan agreements with international financial institutions, such as Loan No. 7118-PH, partake of an executive or international agreement within the purview of Section 4 of R.A. No. 9184, has been answered by the Court in the affirmative in [Abaya v. Sec. Ebdane, Jr., 544 Phil. 645 (2007)]. **Significantly, Abaya declared that the RP-JBIC loan agreement was to be of governing application over the CP I project and that the JBIC Procurement Guidelines, as stipulated in the loan agreement, shall primarily govern the procurement of goods necessary to implement the main project.**

Under the fundamental international law principle of *pacta sunt servanda*, which is in fact embodied in the afore-quoted Section 4 of R.A. No. 9184, the RP, as borrower, bound itself to perform in good faith its duties and obligation under Loan No. 7118-PH. **Applying this postulate in the concrete to this case, the IABAC was legally obliged to comply with, or accord, primacy to, the WB Guidelines on the conduct and implementation of the bidding/procurement process in question.** (Emphasis supplied)

Anent the jurisprudential precepts and guideposts presented *vis-à-vis* the applicability of RA 9184 and its associated rules, we further provide the following considerations: (1) as already mentioned, where the executive or international agreement (Loan Agreement) expressly provides for the use of the IFI procurement guidelines for the procurement of goods, infrastructure projects or consulting services, the procuring entity shall apply the relevant procurement rules embodied in the IFI guidelines, in this case – the World Bank Procurement Guidelines; (2) where pursuant to the Loan Agreement a hybrid condition exists, as when there is co-financing, such that it is so provided in the Loan Agreement that for projects funded by the IFI, the latter's procurement rules and guidelines shall apply, and for those funded through Government funds, RA 9184 and its allied rules shall be utilized; and, (3) when there is no specific mention or when the Loan Agreement is silent as to which procurement rules and guidelines shall apply, RA 9184 and its IRR shall apply in consonance with the rule that RA 9184 shall be observed in the procurement of goods, infrastructure projects and consulting services, regardless of the source of funds, whether local or foreign.

by all branches and instrumentalities of government, its department, offices, and agencies, including government-owned and/or controlled corporations and local government units.<sup>7</sup>

Simply stated, RA 9184 and its IRR apply to government procurement activities regardless of source of funds, but recognize the application of any Treaty or International or Executive Agreement, to which the government is a signatory, particularly when the Treaty or International or Executive Agreement expressly provides the use of a separate set of procurement rules and regulations other than those provided in RA 9184 and its IRR,<sup>8</sup> such as the Loan Agreement with the World Bank. On the other hand, RA 9184 and its IRR shall apply if the Treaty, International Agreement, or Executive Agreement expressly provides its applicability; or when the Treaty, International Agreement, or Executive Agreement are silent or has failed to identify the applicable procurement procedure to be utilized.

### **Application of RA 9184 in lieu of World Bank Guidelines**

As already mentioned, a Loan Agreement executed with an IFI, such as the World Bank, is considered an executive or international agreement, where the principle of *pacta sunt servanda* applies, and thus, shall be accorded full respect and recognition. There is nothing in RA 9184 or its associated rules that would allow departure from this longstanding principle of international law. Additionally, it is worthy to point out that a duly executed Loan Agreement is a binding contract, which is the law between or among the parties privy to the contract, such that the stipulations, covenants, agreements and conditions embodied therein shall be faithfully complied with, and failure to do so would be tantamount to breach and abandonment of the concomitant obligations.

Hence, if the Loan Agreement already provides for the guidelines or rules to govern the procurement activity for the project, *i.e.* World Bank Procurement Guidelines, such procurement guidelines shall apply and lawfully govern the procurement activities covered by such agreement.

### **Suppletory Application of RA 9184**

In *GSIS v. Villaviza*<sup>9</sup>, the Supreme Court had the opportunity to define the word “suppletory” as “supplying deficiencies”. In line with this definition, a rule, statute, or guideline may only be applied when there is an insufficiency, deficiency or gap in the applicable primary rule, statute or guideline. In this case, and as represented by DOTr, the World Bank is already categorical on its position based on their own procurement guidelines and allied rules, such that World Bank’s position is to proceed negotiation with the sole qualified bidder, despite the contention of the DOTr BAC, and that it will not issue an NOL should DOTr BAC proceed with the decision to reject all proposals and to conduct a rebidding of the contract.

At this juncture, it is opportune to stress that it is not within the ambit of our authority to determine whether the World Bank procurement guidelines is insufficient or lacking to address a particular circumstance or situation during a procurement activity, such that RA 9184 and its associated rules apply. What is clear per DOTr’s representation is that the

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<sup>7</sup> Section 4, RA 9184

<sup>8</sup> PM 01-2013, dated 1 March 2013.

<sup>9</sup> G.R. No. 180291, dated 27 July 2010, citing Merriam Webster’s Collegiate Dictionary, 10<sup>th</sup> Edition, p. 1184.

World Bank has already provided its categorical position on the matter applying its procurement guidelines and allied issuances, thereby expressly signifying the applicability of its procurement guidelines.


### **Financial Proposal Above the Agency Estimate**

In procurement activities undertaken in accordance with RA 9184, a ceiling for bid prices is observed in accordance with Section 31 of RA 9184 and its IRR. In this regard, Section 31.1 of the IRR provides that the ABC serves as the upper limit for acceptable bid prices such that if a bid price is higher than the ABC, the bidder is automatically disqualified. For Foreign-funded Procurement, however, the ABC refers to the “cost estimate” prepared by the Procuring Entity and approved by the foreign government/foreign or international financing institution as specified in the Treaty or International or Executive Agreement.<sup>10</sup>

The ABC as ceiling for bid prices applies only for projects procured through RA 9184 and its IRR; or, in case the World Bank allows the use of ABC as ceiling for bid prices subject to compliance with the conditions provided in Section 31.2<sup>11</sup> of the IRR of RA 9184. It is worthy to emphasize, however, that the Government of the Philippines and the IFI may agree to waive these conditions pursuant to the stipulations, covenants and conditions in the Loan Agreement. Thus, the DOTr can directly negotiate with a bidder despite submitting a financial proposal above the “agency estimate” or “cost estimate” if allowed by the World Bank pursuant to the terms and conditions of the Loan Agreement.

### **No Objection Letter Issued by the World Bank**

Pursuant to Section 37.1.4 of the IRR of RA 9184, an NOL is not among the documentary requirements needed in order for a contract to be awarded. A contract awarded under RA 9184 must only comply with the requirements stated therein. However, considering the applicability of the World Bank procurement guidelines for projects funded through the proceeds of the Loan Agreement, the issuance of an NOL is necessary in accordance with the World Bank Guidelines,<sup>12</sup> specifically when a rejection of bids is contemplated, thus:

2.34 Before all the proposals are rejected and new proposals are invited, the Borrower shall notify the Bank, indicating the reasons for rejection of all proposals, and **shall obtain the Bank’s no objection before proceeding** 

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<sup>10</sup> Section 5(b) of the 2016 of the revised IRR of RA 9184.

<sup>11</sup>For Foreign-funded Procurement, the ABC shall be applied as the ceiling for acceptable bid prices: *Provided*, That the following conditions are met:

a) Bidding Documents are obtainable free of charge on a freely accessible website. If payment of Bidding Documents is required by the procuring entity, payment could be made upon the submission of bids.

b) The procuring entity has procedures in place to ensure that the ABC is based on recent estimates made by the engineer or the responsible unit of the procuring entity and that the estimates are based on adequate detailed engineering (in the case of works) and reflect the quality, supervision and risk and inflationary factors, as well as prevailing market prices, associated with the types of works or goods to be procured.

c) The procuring entity has trained cost estimators on estimating prices and analyzing bid variances. In the case of infrastructure projects, the procuring entity must also have trained quantity surveyors.

d) The procuring entity has established a system to monitor and report bid prices relative to ABC and engineer’s/procuring entity’s estimate.

e) The procuring entity has established a monitoring and evaluation system for contract implementation to provide a feedback on actual total costs of goods and works.

<sup>12</sup> Clause 2.34, 2014 World Bank Guidelines for the Selection and Employment of Consultants.

**with the rejection and the new process.** The new process may include revising the RFP, including the TOR, the short list, and the budget. These revisions shall be agreed upon with the Bank. (Emphasis supplied)

As the phrase connotes, a “no objection” signifies assent, consent or agreement to a certain identified act or omission. Hence, if a “no objection” is issued, the intuitive conclusion is that the act or omission is being assented, consented or agreed to. It bears stressing, however, that we are not in the position to determine the effect of the issuance or non-issuance of an NOL with regard to a procurement activity undertaken in accordance with the World Bank Guidelines, it is best that this matter be presented to the World Bank for appropriate consideration.

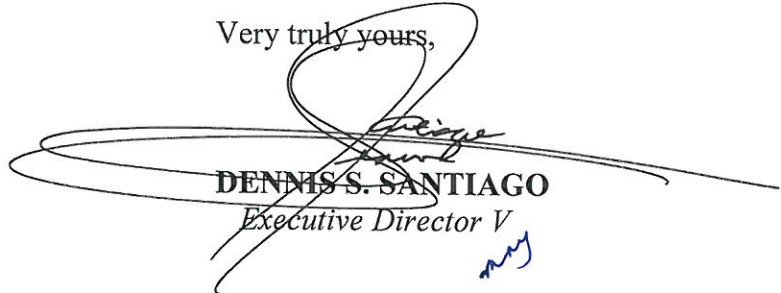
### Summary

Anent all the foregoing, we provide the following summary of discussions, thus:

1. RA 9184 and its IRR apply to government procurement activities regardless of source of funds, but recognize the application of any Treaty or International or Executive Agreement, to which the government is a signatory, particularly when the Treaty or International or Executive Agreement expressly provides the use of a separate set of procurement rules and regulations other than those provided in RA 9184 and its IRR, such as the Loan Agreement with the World Bank;
2. If the Loan Agreement already provides for the guidelines or rules to govern the procurement activity for the project, *i.e.* World Bank Procurement Guidelines, such procurement guidelines shall apply and lawfully govern the procurement activities covered by such agreement;
3. A rule, statute, or guideline may be applied suppletorily when there is insufficiency, deficiency or gap in the existing primary rule, statute or guideline. If there is none, the perceived insufficiency, deficiency or gap need not be filled. In this case, and per DOTr’s representation, the World Bank has already provided its categorical position on the proposed rejection of the bid applying its procurement guidelines and allied issuances, thereby expressly signifying the applicability of its procurement rules;
4. The DOTr can directly negotiate with a bidder despite submitting a financial proposal above the “agency estimate” or “cost estimate” if allowed by the World Bank under the terms and conditions of the Loan Agreement and the World Bank Procurement Guidelines; and
5. Pursuant to Section 37.1.4 of the IRR of RA 9184, an NOL is not among the documentary requirements needed in order for a contract to be awarded. However, considering the applicability of the World Bank procurement guidelines for projects funded through the proceeds of the Loan Agreement, the issuance of an NOL is necessary in accordance with the World Bank Guidelines

We hope that our advice provided sufficient guidance on the matter. Please note that this opinion is being rendered on the basis of the facts and particular situation presented, and may not be applicable given a different set of facts and circumstances. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,



**DENNIS S. SANTIAGO**  
*Executive Director V*

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