

NPM No. 014-2017

27 October 2017

HON. ANGELO C. VERNAN
General Manager
CEBU PORT AUTHORITY (CPA)
CIP Complex, Serging Osmena Boulevard,
North Reclamation Area, Cebu City

Re: Applicability of Republic Act (RA) No. 9184 to Contract of Lease

Dear General Manager Vernan:

This refers to the Honorable General Manager's request for opinion on whether the proposed Contract of Lease between the CPA and the Oriental Port and Allied Services Corporation (OPASCOR), the cargo handling service provider for all foreign cargoes and foreign vessels at the Cebu International Port (CIP), Port of Cebu, is covered by the Government Procurement Reform Act or Republic Act No. (RA) 9184, the Build-Operate-Transfer Law or RA 6957¹ as amended by RA 7718, or by Executive Order (EO) No. 301, Series of 1987².

As represented, there is already a proposed Memorandum of Agreement (MOA) between the CPA and the OPASCOR, which includes the provision on leasing of certain areas at the CIP. This MOA was reviewed by the Office of the Government Corporate Counsel (OGCC), stating among others:

CPA may lease out to private entities, the areas within its territorial jurisdiction including the water areas...

...

In the subject proposal, the cost of construction of the facilities shall solely be borne by the proponent in exchange for a 50% discount on fees, tolls, and charges it may be obliged to pay during the period of the lease. The proponent merely seeks to recoup the cost of construction and earn profits or returns for its investments.

...

Further, it bears stressing that OPASCOR under its 14 February 2003, "*Contract for Cargo Handling Services*," and its amendments dated 26 February 2005, with CPA, which you provided us, manages and operates the arrastre and stevedoring and related cargo handling services for all vessels at CIP. As part of its undertaking as port manager and operator of the CIP, is to

¹ An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for the Other Purposes.

² Decentralizing Actions on Government Negotiated Contracts, Lease Contracts and Records Disposal.

share in the development, construction, maintenance of port facilities, and in the repair of operational facilities thereat. In this instance, OPASCOR is merely complying with its contractual commitment.

Pursuant to the Contract of Lease, the Lessee shall construct at its own cost and without right of reimbursement at the said submerged land/water area an additional port facility at the CIP. Hence, the CIP will not incur expenditures for the proposed improvements. Further, as payment for the lease, the Lessee shall be charged a monthly rental of PhP54,000.00 for twenty-five (25 years), including the maintenance cost of the new facility.

It is also stated in the letter that the area subject of the proposed Contract of Lease, where OPASCOR intends to make improvements as a property lessee and cargo handling operator, is within the CIP's exclusive area of operation of OPASCOR pursuant to its *Contract for Cargo handling Services* with CPA. Therefore, the grant of a lease contract to other parties, with right to possess, to make improvements and operate the same, may be an encroachment or violative of OPASCOR's *Contract for Cargo handling Services* at the CIP. Hence, this request.

At the outset, we wish to inform you that the Government Procurement Policy Board (GPPB) and its Technical Support Office (TSO) render policy and non-policy opinions, respectively, on matters purely pertaining to the interpretation of the procurement law and its associated rules and regulations, which excludes actual controversies such as the conduct of the bidding process by the BAC. Additionally, the determination of the legality and/or validity of the actions and decisions of the BAC including contracts emanating therefrom is not within the express mandate of the GPPB.

Without touching on the legality, and validity of the method to be used in the proposed leased contract with OPASCOR, we shall discuss the concepts of procurement, Contract of Lease under EO 301, and Build-Operate-Transfer law relative to the transaction to be undertaken by CPA.

Government Procurement

Procurement is defined as the acquisition of goods, consulting services, and the contracting for infrastructure projects by the procuring entity.³ In the process of acquisition, public funds are disbursed by the government. Hence, for as long as public funds are utilized or is contemplated to be spent for any procurement activity, it shall fall within the ambit of the present procurement law. Corollarily, if the government transaction or activity does not involve use of public funds, such transaction or activity is not within the purview and coverage of RA 9184 and its IRR. Thus, there are two important elements to be considered in determining whether the activity is considered procurement within the coverage of RA 9184 and its IRR, thus:

1. The activity involves the acquisition of goods, consulting services, and the contracting for infrastructure projects; and
2. Public funds are utilized or is contemplated to be spent.

³ Section 5(aa) of RA 9184.

Consequently, the law and its IRR cover the acquisition by government of goods, civil works, and consulting services, which contemplates procurement of projects to be funded by public funds.⁴

Lease of Government Property for Private Use

In a prior opinion⁵, we had the occasion to explain that:

Leasing out of government-owned properties does not involve the acquisition of any particular equipment, material, or personal property or a contractual service such as janitorial, security and related services. Moreover, this kind of transaction does not involve any construction, improvement, rehabilitation or other activity which would fall under the definition of the term civil works, nor a contract for the performance of services such as advisory, review, design, management, or other service which would fall under the concept of consulting services. Accordingly, by the nature and peculiarity of this government contract, leasing out of government building remains to be governed by Executive Order No. 301, Series of 1987 (E.O. 301) particularly Section 7 thereof.

... As such, the DPWH guidelines (Guidelines Implementing E.O. 301) provide that it is the official duly authorized by law to enter into contracts, having custody and administration of the building/space to be rented out that enters into contract as lessor thereof, subject to the approval of the head of agency concerned. Moreover, this transaction is in the category of lease of things and hence, suppletorily governed by the provisions on lease found in the Civil Code.

From the foregoing, EO 301, Series of 1987, applies if government-owned buildings or space is leased out for private use. This has been reinforced by Commission on Audit Circular Nos. 88-282⁶ and 88-282A, which provides for the *Uniform Standard/Guidelines to Determine the Reasonableness of the Terms and Rentals Rates of Lease Contracts for Private or Government Building/Spaces*.

Public-Private Partnership Projects

If an acquisition does not involve expenditure of funds in relation to an identified appropriation, RA 9184 and its revised IRR do not apply. In line with this, Section 4.4 of the revised IRR states that it shall not apply to activities involving public-private sector infrastructure or development projects and other procurement covered by RA 6957, as amended by RA 7718, except those portions financed by the government.⁷ This law applies if the project involves financing, construction, operation and maintenance of any financially viable infrastructure or development facility through any of the projects authorized under RA 6957, as amended.

⁴ *Department of Foreign Affairs and Bangko Sentral ng Pilipinas v. Hon. Franco T. Falcon and BCA International Corporation*, G.R. No. 176657, 1 September 2010.

⁵ NPM 043-2004, dated 30 March 2004.

⁶ December 22, 1987.

⁷ NPM 129-2012, dated 16 October 2012.

On the other hand, for “projects where the government entity partners with the private sector entity, where the latter shoulders the cost or where the former is set to earn or profit rather than spend public funds, commonly termed as Public-Private Partnership (PPP), it is advisable to look into the applicability of the BOT Law or EO 423 relative to the Guidelines and Procedures for Entering into Joint Venture Agreements Between Government and Private Entities (JV Guidelines).”⁸

However, it is not within the mandate of GPPB-TSO to render opinions with regard to the coverage, application or interpretation of BOT Law, NEDA JV Guidelines nor EO 301 as the execution and implementation of these kinds of government contracts are subject to the expertise or jurisdiction of other government agencies, *i.e.* Public-Private Partnership Center of the Philippines or Commission on Audit. The arrangement between CPA and OPASCOR does not fall within the coverage of RA 9184 and its IRR, but could be regarded as a contractual arrangement and relationship between the private entity and the government under other laws depending on the exact nature of the transaction. Please note, however, that a thorough study of the Contract is necessary to ensure that the best terms for the government will be provided under the contract, and the terms and conditions are advantageous to the government.

In addition, it is within the government agency’s authority, function, and discretion to decide on which modality to undertake insofar as the implementation of the project is concerned, taking into consideration the results of the project’s feasibility study, appropriateness of the contractual arrangement, best value, and needs, among others.

Summary

Anent all the foregoing, and based on the Honorable General Manager’s representations, the proposed Memorandum of Agreement does not involve the acquisition of goods and expenditure on the part of CPA that is covered by RA 9184 and its associated 2016 revised IRR. Under the circumstances presented, the transaction may fall under other laws depending on the exact nature of the project, which CPA must carefully review, subject to the standard budgeting, accounting and auditing rules and regulations of government.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is issued on the basis of particular facts and situations presented, and may not be applicable given a different set of facts and circumstances. Should there be other concerns, please do not hesitate to contact us.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director V

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⁸*Ibid*