

**NPM No. 142-2016**

29 December 2016

**ATTY. LEILANI D. CAPULE**  
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**DEVELOPMENT BANK OF THE PHILIPPINES (DBP)**  
DBP Head Office  
Sen. Gil Puyat Ave., cor. Makati Ave.,  
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**Re: Multi-Year Contracts; Foreign Bidder**

Dear Atty. Capule:

This refers to your electronic mail (e-mail) requesting confirmation on the following matters:

1. Maximum year of the annual maintenance contract in case of multi-year contracts; and
2. Definition of Foreign and Local Bidder.

In your e-mail, you made a discussion on the provisions of the 2016 revised IRR pertaining to Multi-Year Contracts. You also mentioned that based on your understanding, that in the same procurement for consulting services, the procuring entity can enter into a multi-year contract for the annual maintenance of the system and the cost will be included in the ABC of the same procurement for consulting services. It was also disclosed that you have consulted with the DBM that the equivalent document mentioned in the definition of the "Approved Budget for the Contract" is the GOCC's Board approval in order that the cost of the multi-year contract be included in the succeeding annual budget.

**Multi-Year Contract**

DBM Circular No. 2004-12, which prescribes the guidelines and procedures for the issuance of a Multi-Year Obligation Authority, defined Multi-Year Contract as a contract for Multi-Year Projects, the implementation of which will take more than one (1) year to complete and require multi-year appropriations. It will be noted that the coverage of this DBM Circular, and the later DBM Circular Letter,<sup>1</sup> only includes National Government Agencies, Constitutional Offices and State Universities and Colleges.

<sup>1</sup> DBM Circular Letter No. 2015-7, June 3, 2015.

Pursuant to the Circular, covered procuring entities may procure and enter into multi-year contracts, subject to applicable rules and regulations governing multi-year obligations. This was recognized under Sections 5 and 7.6 of the 2016 Revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184. Also relevant are GPPB Circular Nos. 01-2009 and 2010-9, and DBM Memorandum dated 18 October 2010, which state that the Multi-Year Obligational Authority must first be secured prior to the conduct of procurement. This is in line with the policy that the budget must be fully appropriated at the start of the procurement process to ensure that there is sufficient appropriation for the project before the procurement activity is commenced.

Analogously applying the DBM Circular in the case presented by DBP, and assuming the DBP Board approves the execution of a Multi-Year Contract, DBP can no longer adopt a Multi-Year Contract approach at this point as the consulting services for the customized IT System has already been procured, when it is a requirement that the approval to enter into such contract must be secured prior to the conduct of the procurement process.

On the other hand, RA 9184 and its 2016 Revised IRR are silent as regards the maximum number of years the annual maintenance contract can be procured. As such, the duration of the Multi-Year Contract will depend on the sound discretion of the Procuring Entity subject to government budgeting, accounting and auditing rules, and depending on its necessity subject to the approval of the HOPE, in DBP's case, its Board.

#### **Definition of Local/Foreign Bidder**

The Guidelines in the Determination of Eligibility of Foreign Suppliers, Contractors and Consultants to Participate in Government Procurement Projects<sup>2</sup> (*Guidelines for brevity*) provides for an operational definition of local and foreign consultants, contractors and suppliers. We note that your query pertains to the procurement of consulting services. Thus, we shall limit our discussion to local and foreign consultants.

Section 3.4 of the Guidelines defines a local consultant as an individual, sole proprietorship, partnership, corporation or joint venture as provided in Section 24.3.1 of the IRR of RA 9184 and complying with the relevant requirements therein. On the other hand, Section 3.1 thereof the term foreign consultant refers to an individual, sole proprietorship, partnership, corporation or joint venture other than those provided under Section 24.3.1 of the IRR of RA 9184 and complying with the relevant requirements therein.

Based on the foregoing, the following are considered as local consultants for purposes of participating in government procurement:

1. Duly licensed Filipino citizens/sole proprietorships;
2. Partnerships duly organized under the laws of the Philippines and of which at least sixty percent (60%) of the interest belongs to citizens of the Philippines;
3. Corporations duly organized under the laws of the Philippines and of which at least sixty percent (60%) of the outstanding capital stock belongs to citizens of the Philippines;

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<sup>2</sup> Issued through GPPB Resolution No. 18-2005 dated 12 September 2005.

4. Cooperatives duly organized under the laws of the Philippines, and of which at least sixty percent (60%) belongs to citizens of the Philippines; or
5. Persons/entities forming themselves into a joint venture, i.e., a group of two (2) or more persons/entities that intend to be jointly and severally responsible or liable for a particular contract: Provided, however, That Filipino ownership or interest thereof shall be at least sixty percent (60%). For this purpose, Filipino ownership or interest shall be based on the contributions of each of the members of the joint venture as specified in their JVA.

For those individual, sole proprietorship, partnership, corporation or joint venture not falling under the above-enumeration, they shall be considered as foreign bidders. It bears stressing that under Section 24.3.3 of the 2016 Revised IRR of RA 9184, foreign consultants may be hired in the event Filipino consultants do not have the sufficient expertise and capability to render the services required under the project, as determined by the HOPE, subject to the submission of documents in accordance with Section 37.1.4(a)(iv) of the 2016 Revised IRR of RA 9184.

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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