

NPM No. 04-2010

GPPB-TSO FILE COPY

25 January 2010

MR. CARLOS S. SALAZAR

Administrator

NATIONAL IRRIGATION ADMINISTRATION

National Government Center

EDSA, Diliman, Quezon City

Re : Agency-to-Agency Agreements

Dear Sir :

We respond to your letters dated 9 October 2009 and 13 January 2010 seeking confirmation on whether the National Irrigation Administration (NIA) may directly engage NIAConsult, Inc. (NIAConsult) under Section 53.5 (or Agency-to-Agency Agreement) of the revised Implementing Rules and Regulations (IRR) of Republic Act No. 9184 (RA 9184).

As per your representation, NIAConsult is a wholly-owned subsidiary of NIA created under the Corporation Code. It provides technical assistance to NIA only in rare instances when the required expertise could not be provided by NIA due to the resignations or early retirements of its own technical personnel.

Under Section 53.5 of the IRR, government owned and controlled corporations (GOCCs) formed under the Corporation Code are excluded from the definition of agency, and thus, not qualified to act as servicing agencies in Agency-to-Agency Agreements. Based on the opinion¹ of the Office of the Government Corporate Counsel (OGCC), however, GOCCs formed under the Corporation Code may still enter into Agency-to-Agency agreements with another GOCC provided that a parent-subsiary relationship exists between the two. Therefore, as long as the parent owns directly or indirectly more than half of the voting power of its subsidiary, then it may directly engage the services of said subsidiary.

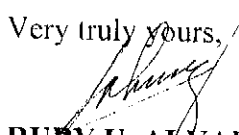
From the foregoing, it is our considered opinion that NIA may enter into an Agency-to-Agency Agreement with NIAConsult for the provision of feasibility and detailed engineering studies. NIA is also advised to comply with the conditions

¹ OGCC Opinion No. 213, 26 September 2007.

outlined in Sections 5 and 6 of the Implementing Guidelines on Agency-to-Agency Agreements issued by the GPPB.²

We hope to have provided sufficient guidance on the matter. Should you have additional concerns, please do not hesitate to contact us.

Very truly yours,


RUBY U. ALVAREZ
Executive Director III

² GPPB Resolution No. 018-2007, dated 31 May 2007.



Republika ng Pilipinas
Department of Agriculture
Pambansang Pangasiwaan ng Patubig
(NATIONAL IRRIGATION ADMINISTRATION)
Lungsod ng Quezon

**LABANAN
ANG
KAHIRAPAN**



Office Address: National Government Center
EDSA, Diliman, Quezon City, Philippines
Telephone Nos.: (02) 929-6071 to 78

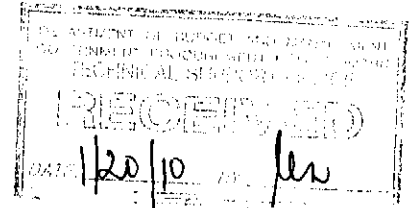
Telefax No. (632) 928-9343
TIN No. 000-916-415

January 13, 2010

ATTY. RUBY U. ALVAREZ

Executive Director

Government Procurement Policy Board-Technical Services Office
Unit 2506 Raffles Corporate Center,
F. Ortigas Jr. Road, Ortigas Center,
Pasig City



**SUBJECT: Request for Opinion re Provision of Technical Assistance being rendered by
NIAConsult, Inc. to the National Irrigation Administration**

Dear Madam:

May we respectfully follow-up your response to our request for GPPB's Opinion dated October 8, 2009, a copy of which is attached and self-explanatory.

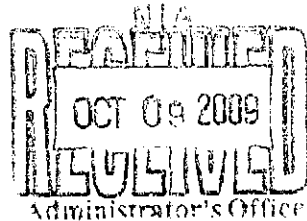
We have several projects in the National Irrigation Administration's (NIA) pipeline that are urgently requiring Feasibility Studies and Detailed Engineering Studies and we will again need the services of NIACONSULT, Inc., for reasons cited in the attached October 8, 2009 letter, to assure their timely completion.

Thus, we direly need said requested GPPB Opinion for our guidance before we continue engaging the services of NIACONSULT, which we hope will be favorable to serve as our legal basis in taking advantage of the technical capabilities of our own creation and lone and wholly-owned subsidiary corporation.

We reiterate of our anticipation for your usual prompt action on this request. Best regards.

Very truly yours,


CARLOS S. SALAZAR
Administrator



October 8, 2009

ATTY. RUBY U. ALVAREZ

Executive Director

Government Procurement Policy Board-Technical Services Office

Unit 2506 Raffles Corporate Center,

F. Ortigas Jr. Road, Ortigas Center,

Pasig City

SUBJECT: Request for Opinion re Provision of Technical Assistance being rendered by NIAConsult, Inc. to the National Irrigation Administration

Dear Madam:

May we respectfully seek the opinion of your good office as to whether or not the Provision of Technical Assistance for the Detailed Engineering Study of five (5) Small Reservoir Irrigation Projects (SRIPs) which is covered by a Memorandum of Agreement (MOA) between the National Irrigation Administration (NIA) and NIAConsult, Incorporated (NIAConsult), copy of which is attached as Annex "A," may be considered as an Agency-to-Agency Agreement where no public bidding is required.

As a backgrounder, NIA is a government-owned and controlled corporation with original charter while NIAConsult is a wholly-owned (100%) subsidiary of the former and was created pursuant to the provision of the Corporation Code. Thus, a parent-subsidary relationship exists between the two (2) corporations where arrangements such as the foregoing MOA were implemented by said GOCCs for various projects.

From time to time, less than ten (10) occurrences since NIACONSULT's creation in 1980, NIA turns to its subsidiary NIAConsult for urgent Feasibility and Detailed Engineering Studies that are supposed to be undertaken in-house by the NIA but which it could not do so since we were, many years ago, extremely affected by resignations and early retirements of our more technically capable personnel who sought better employment elsewhere, more so now with the implementation of the Rationalization Plan, and that some expertise required in the conduct of FS and DE Projects are no longer available within NIA.

These Studies were/covered by a Memoranda of Agreement (MOA) for Technical Assistance, literally "Assistance" by a Subsidiary to its Mother Corporation on a (Direct) Cost Plus (20%) basis, and approved by the governing Board of Directors of the NIA.

We wish to inform you that no public bidding was conducted with respect to the foregoing MOA. This is the situation not only for the aforesaid SRIPs Project but likewise for all other

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Projects entrusted to NIAConsult by the NIA for implementation. This scenario/arrangement is justified in view of the following reasons:

- a) NIAConsult's engagements in projects of the NIA cannot be categorized as "Consulting Services Contracts" since these are mere *technical assistance* where a subsidiary (such as NIAConsult) is rendering service to its mother corporation (such as NIA) for a minimal fee. The NIA Projects undertaken or being undertaken by NIACONSULT (less than 10 NIA Projects in NIACONSULT's 28 years of existence) are only those that NIA should undertake in-house but due to its limited technical capability and manpower resources, NIA could not afford to do so. Hence, NIA has to tap NIAConsult whose expertise in these areas is recognized not only locally but internationally as well.
- b) NIAConsult is a creation of and is the sole and wholly-owned subsidiary corporation of the NIA. As stated above, NIAConsult has a significant track record in providing expert services to international lending institutions, foreign governments and private clients. Recognizing this, NIA thus makes use of the same expertise which is being availed of locally and internationally, and accordingly asked NIAConsult to render "technical assistance" to it. As a mere Technical Assistance, i. e., "assisting", "helping" or "aiding" the mother corporation NIA, it is our humble view that this will not require public bidding.
- c) We also deem the technical assistance arrangements that we are having with NIACONSULT as "advantageous" to NIA and the government as it is economical and efficient as shown by the following data:

Project	Type	NEDA Ceiling (% of Project Cost)	NIACONSULT's MOA Amount (% of Project Cost)
Re-Conduct of the FS for Jalaur River Multipurpose Project, Stage II	Feasibility Study	3%	0.12%
Updating of the FS for the Balog-Balog Multipurpose Project	Feasibility Study	3%	0.05%
Detailed Engineering Study for 5 SRIPs	Detailed Engineering	6%	1.552%

Indeed, engaging the services of NIAConsult for activities that should be otherwise undertaken by NIA in-house as explained is not only economical but is also efficient and will hasten project implementation. Thus, NIA (and the government for that

matter) is placed at a greatly advantaged position because the service is guaranteed to be efficient at a reasonably low price.

- d) Likewise, we have relied, in utmost good faith, on precedents regarding the engagement of the services of NIAConsult by NIA without the benefit of competitive bidding. The Office of the Government Corporate Counsel (OGCC) previously opined that the *"Memorandum of Agreement being between NIA and its subsidiary corporation, the inclusion of strict protective clauses and standard contract provisions therein may be dispensed with" and "After a Perusal of the proposed Agreement, we find no legal impediment to the execution of the same."* For your reference and consideration, please find appended as Annexes "A" and "B" OGCC's CR No. 232, Series of 1997 (July 11, 1997) for the Casecan Multipurpose Irrigation and Power Project (CMIPP) and CR No. 032, Series of 1999 (February 17, 1999) for FS of 20 Small Reservoir Irrigation Projects (SRIPs).

Relative to the foregoing, it is worth to note the following laws/issuances/policies and discussion on procurement of government projects:

1. Section 53(e) of the Implementing Rules and Regulations (IRR) of Republic Act No. 9184 includes purchases of goods from another Agency of the Government as one of the modes of Negotiated Procurement.
2. Resolution No. 13 – 2007 of the Government Procurement Policy Board (GPPB) amended Section 53(e) of the IRR so as to include Infrastructure Projects and Consulting Services, as well as to include the provision that *"For purposes of this paragraph, the term agency shall exclude GOCCs incorporated under Batas Pambansa Blg. 168, otherwise known as the Corporation Code of the Philippines."*
3. GPPB Resolution 18-2007 approved the Implementing Guidelines on Agency-to-Agency Arrangements under Section 53(e) of the IRR-A of R.A. 9184, which provides, among others, that:

"Servicing Agency shall refer to the Agency which delivers the goods, undertakes the Infrastructure Projects, or provide the consulting services."

"However, in accordance with Section 53(e) of the IRR-A of R.A. 9184, as amended, GOCCs under Batas Pambansa blg. 168 or the Corporation Code of the Philippines, which are vested with proprietary functions to enable them to compete with the private sector, are excluded from the definition of Servicing Agency, and thus, not qualified to act as Servicing Agency under the 1st paragraph of Section 53(2) of the IRR-A of R.A. 9184."
4. GPPB's Opinion NPM-021-2008, stating, among others, that *"Note that the OGCC has already opined that GOCCs formed under the Corporation Code may enter into agency-to-agency agreements with another GOCC as long as a parent-subsidiary relationship exists between the two."*

The above was further explained in a one-day GPPB Consultation on the Implementing Rules and Regulations of RA 9184 which was conducted with the heads of procuring entities (HOPE) and members of the Bids and Awards Committee (BAC) of Government Owned and Controlled Corporations (GOCCs), and held at the Crowne Plaza Hotel in Pasig City on January 28, 2009, where a participant queried as follows:

"Agency-to-Agency: does not cover corporations created under BP 168; supposing that the corporation is 100% owned by the procuring entity, will that 100%-owned subsidiary undergo the regular competitive bidding when that subsidiary has been purposely created to undertake projects which could not be done by the PE, for example, putting up branches by the bank which was required by BSP?"

To which Executive Director Ruby Alvarez of the GPPB-TSO responded that *"Agency-to-agency: the OGCC rendered an opinion on this and said you don't have to bid if you are a 100% subsidiary of the procuring agency. But if that subsidiary wants to service agencies other than the agency that created it, the subsidiary will have to undergo the bidding process like any other suppliers."*

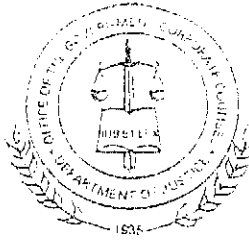
With the foregoing discussion and provisions of law/issuances/policies cited, may we respectfully seek the confirmation of your good office if the execution of the MOA abovementioned effectively satisfies the requirements on Agency-to-Agency Arrangements as contained in GPPB Resolution No. 18-2007 dated 31 May 2007; and that GPPB Opinion NPM-021-2008 likewise applies to NIAConsult, Inc. and all other 100% owned SEC-registered subsidiaries of parent GOCCs.

We anticipate your usual prompt action on this request. Best regards.

Very truly yours,


CARLOS S. SALAZAR
Administrator

CSL-MS



REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF JUSTICE
OFFICE OF THE GOVERNMENT CORPORATE COUNSEL

5th and 6th Floors,
PHILIPPINE SUGAR CENTER
North Avenue, Diliman
Quezon City

CONTRACT REVIEW NO. 232
Series of 1997

July 11, 1997

Mr. Eduardo P. Corsiga
President
Niaconsult, Inc.
3rd Floor, Diversified Crops Irrigation
Engineering Center
NIA Compound, EDSA, Quezon City

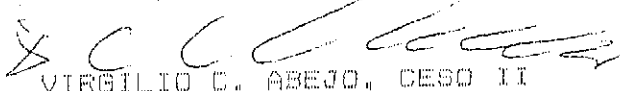
Re: Proposed Memorandum of Agreement
between NIA and NIA Consult, Inc.

Sir:

With reference to your request for review of the subject Memorandum of Agreement for the proposed rendition by the latter of a Technical Assistance on the Preparatory Works, Detailed Engineering and Construction Quality Assurance for the Irrigation Component of the Casacnan Multi-Purpose Irrigation and Power Component Project, we suggest that the usual recital of parties be incorporated before the whereas Clauses. After a perusal of the proposed Agreement, we find no legal impediment to the execution of the same. The terms and conditions thereof governing the duties of the respective parties are in order. The agreement being between NIA and its subsidiary corporation, the inclusion of strict protective clauses and standard contract provisions may be dispensed with. The cost is left blank in paragraph 5. It is understood that this review does not pass upon the reasonableness of the consideration.

The proposed Agreement may therefore be given due course, after you shall have filled the blank spaces in paragraphs 5, the signing page, and acknowledgement portion.

Very truly yours,


VIRGILIO C. ABEJO, CESO II
Deputy Government Corporate Counsel
Officer - In - Charge

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REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF JUSTICE
OFFICE OF THE GOVERNMENT CORPORATE COUNSEL
5th and 6th Floors
SUGAR REGULATORY ADMINISTRATION
North Avenue, Diliman
Quezon City

CONTRACT REVIEW NO. 032
Series of 1999

17 February 1999

AG

Mr. ANTONIO A. GALVEZ
President
NIACONSULT, Inc.
3/F Irrigation Engineering Center
NIA Compound, Epifanio Delos Santos Avenue
Diliman, Quezon City



RE: Memorandum of Agreement for the
Provision of Technical Assistance
to the Small Reservoir Irrigation Project (SRIP)

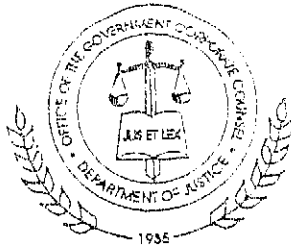
Sir:

With reference to your request for our review of the subject Memorandum of Agreement (MOA) to be executed by and between the National Irrigation Administration (NIA) and NIACONSULT, Inc., we find the terms and conditions thereof generally in order as they are basically the same as those of a previous MOA, subject of our Contract Review No. 232, Series of 1997. The Agreement being between NIA and its subsidiary corporation, the inclusion of strict protective clauses and standard contract provisions therein may be dispensed with.

However, for the better protection of the parties' interests, as a matter of form and for purposes of clarity and uniformity, hereunder are our comments and suggestions:

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1. In the recital of the parties, add "who is duly authorized of the purpose of this Agreement" after the names of the signatories thereto;

2. In the first "WHEREAS" clause, 1st line, change "to provide" to "in providing";

3. Section 1.02(a), 1st line, insert "written" between "prior" and "approval"; after "NIA," insert "and for valid reasons";

4. *Omnibus* corrections for purposes of uniformity: (a) "Services" and "Assignment" must be capitalized; (b) add the word "hereof" to all references to the annexes; (c) references to the "MOA" should be "this Agreement" or "hereof"; (d) "progress statement/s" should appropriately be referred to as "progress billing/s";

5. In section 2.03, 2nd line, the word "there" should be "their"; 3rd line, delete "in its judgment" and "most likely";

6. In section 2.04, 3rd and 4th lines, change "course" to "execution";

7. In section 2.05(a), 2nd line, delete "that";

8. In section 2.06 on Delays, incorporate a provision imposing some reasonable amount for delays due to the fault of NIAC; same section, sub-paragraph (b), 5th line, add a comma (,) after "possible" and delete "MOA";

9. In section 2.09, 7th line, add, "be" after "to";

10. Section 3.02 should be revised to read as follows:

"The NIA shall designate its Representative who will be duly empowered and authorized to take and implement decisions on organizational, logistical, financial, administrative and technical matters essential for the execution of the SERVICES, including those which are brought to its attention by the NIAC Representative. Except as may be agreed or directed by the NIA



Representative, all correspondences and references to the NLA shall be directed through the said Representative."

11. In section 4.01(a), 2nd line, "15%" should be "fifteen percent (15%)"; subparagraph (c), 1st line, "use" should be "exert"; and subparagraph (d), 4th line, "allowances" should be "amounts" and in 5th line, "made" should be "paid";

12. Section 4.03(a), 2nd line, delete "etc.";

13. In section 4.04(a), as a rule, advance payment is not allowed in Government contracts; the reason or basis for the advance payment of twenty percent (20%) should be stated or justified and the same should be incorporated therein; subparagraph (b), 1st line, "written" should be "set"; in 2nd line, insert "monthly" after "equal";

14. In section 4.05(a), 2nd sentence, insert "the first" after "end of" and delete number "1"; and subparagraph (b), 2nd line, "originals" should be "original copies";

15. In section 4.06, 2nd line, add "and verified by the NLA" after "NIAC"; and in the last line, add "of Account" after "Statement";

16. In section 5.02, fill-up the blank;

17. In section 5.03(b), last line, add "to" after "referred";

18. In section 6.02(a), last sentence is incomplete and should be revised;

19. In section 6.03(j), 3rd line, "to" should be "of";

20. Section 7.04 should be revised to read as follows:

"Section 7.04 Governing Laws

"This Agreement shall be governed by and construed in accordance with the laws of the Philippines and any dispute between the parties shall be settled by arbitration in accordance

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with Presidential Decree No. 242, in conjunction with Executive Order No. 292, otherwise known as the 'Administrative Code of 1987.'"

21. In the Acknowledgment, (a) add, "representing the National Irrigation Administration" or "NIACONSULT, Inc.", as the case maybe, after the names of the signatories thereto; and "and that of the entities they respectively represent" after the word "deed".

Subject to compliance with the foregoing suggestions and comments, the proposed Memorandum of Agreement may be given due course.

Very truly yours,

~~_____~~
JUN N. VALERIO
Government Corporate Counsel

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under the rule of law

FROM :

FAX NO. :

JAN. 27 2002 10:29F

956 2741-44

Atty MS Jo



REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF JUSTICE
OFFICE OF THE GOVERNMENT CORPORATE COUNSEL
3rd Floor MWSS Administration Building, Katipunan Road
Balara, Quezon City

OPINION NO. 213
Series of 2007

26 September 2007

MR. CLARITO L. MAGSINO
President & CEO
DBP DATA CENTER, INC.
22/F Pacific Star Building
Sen. Gil Puyat Avenue
Makati City

29 OCT 2009 Dave

Re : Legal opinion on the amendments to Section 53 of the
Implementing Rules and Regulations Part A of
Republic Act No. 9184

Gentlemen:

This refers to your request for legal opinion as regards the Government Procurement Policy Board (GPPB) Resolution No. 03-2007 ("Resolution"), otherwise known as "Amending Section 53 (e) of IRR-A of R.A. 9184 to include Infrastructure Projects and Consulting Services", the relevant portion of which is quoted hereunder:

"e) Procurement of infrastructure, consulting services and goods from another agency of the Government, such as the PS-DBM, which is tasked with a centralized procurement of

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Series of 2002



26 Sep 2002
Page 7

commonly used Goods for the government in accordance with Letters of Instruction No. 755 and Executive Order No. 349 series of 1989. For purposes of this paragraph, the term agency shall exclude GOCCs incorporated under Batas Pambansa Blg. 168, otherwise known as the Corporation Code of the Philippines.

In order to hasten project implementation, agencies which may not have the proficiency or capability to undertake a particular procurement, as determined by the head of the procuring entity concerned, may request other agencies to undertake such procurement for them, or at their option, recruit and hire consultants or procurement agents to assist them directly and/or train their staff in the management of the procurement function."

Your office has expressed the view that said Resolution has a debilitating impact on Data Center, Inc.'s (DCI) operations as the sole provider of information technology (IT) services to its parent company, the Development Bank of the Philippines (DBP). Said Resolution effectively disallows DCI to negotiate with the bank for services it was originally envisioned to perform. Furthermore, in the event DBP decides to open its need for IT services to a public bidding, DCI shall be deemed ineligible to bid under Rule XV on Disclosure of Relations of IRR-A of R.A. 9184 since DCI's Board of Directors and stockholders are also the senior officers of the DBP.

Your concern is whether the GPPB has the power to make distinctions under the IRR as to whom the provisions of R.A. 9184 shall apply since Section 4 of R.A. 9184¹ does not make a distinction on the types of government-owned or controlled corporations (GOCC) covered by said law.

Section 63, Article XX of R.A. 9184 outlines the general functions of the GPPB as follows:

¹ Section 4 of R. A. 9184 provides:

"Sec.4. Scope and Application. - This Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, its department, offices and agencies, including government-owned and controlled corporations and local government units, subject to the provisions of Commonwealth Act. NO. 138. x x x."

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"SEC. 63. Organization and Functions. - A Government Procurement Policy Board (GPPB) is hereby established to: (a) protect national interest in all matters affecting public Procurement, having due regard to the country's regional and international obligations; (b) **formulate and amend, whenever necessary, the IRR and the corresponding standard forms for Procurement;** (c) ensure that Procuring Entities regularly conduct Procurement training programs and prepare a Procurement operations manual for all offices and agencies of government; and (d) conduct an annual review of the effectiveness of this Act and recommend any amendments thereto, as may be necessary." (emphasis supplied)

By express provision of R. A. 9184, the GPPB has the power to make rules and regulations to protect national interest in all matters affecting public procurement. However, it may make only such rules and regulations as are within the limits of the power granted to it. In addition, such rules and regulations should be uniform in operation, reasonable, and not unfair or discriminatory. The Supreme Court, in the case of *JMM Promotion and Management, Inc., and Kary International, Inc., vs. Court of Appeals*,² recognized and upheld the right to classify, thus -

" x x x the Constitution does not forbid classification for so long as such classification is based on real and substantial differences having a reasonable relation to the subject of the particular legislation. If classification is germane to the purpose of the law, concerns all members of the class, and applies equally to present and future conditions, the classification does not violate the equal protection guarantee."

The 1987 Constitution of the Philippines recognizes the difference between a GOCC with original charters from a GOCC created through the general corporation law (Section 2 [1], Article IX and Section 16, Article XII, 1987 Constitution). The civil service system applies to GOCCs with original charters while the Labor Code of the Philippines applies to GOCCs incorporated under the Corporation Code of the Philippines.³ The 1987 Constitution further provides that GOCCs may be

² G.R. No. 120095, August 5, 1996.

³ Section 2 [1], Article IX, 1987 Constitution in relation with Section 6, Labor Code.

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Opinion No. 213
Series of 2007



created by special charter in the interest of common good and subject to the test of economic viability.⁴ The GOCCs must show capacity to function efficiently in business and that they should not go into activities which the private sector can do better.⁵ Moreover, economic viability is more than financial viability but also includes capability to make profit and generate benefits not quantifiable in financial terms.⁶ In addition, the Corporation Code likewise expressly recognizes that GOCCs created by special laws or charters shall be governed by the provisions of the special law or charter creating them or applicable to them.⁷

It can be surmised that the rationale of the GPPB in excluding GOCCs incorporated under the Corporation Code under Section 53 (e) of the IRR-A is for these corporations to bid and compete with the private sector in all government procurement activity. It is the declared principle of Government to make procurement competitive by extending equal opportunity to enable private contracting parties who are eligible to participate in public bidding.⁸ These GOCCs cannot be given greater rights, powers or privileges than any other corporation which might be organized under the Corporation Code.

Moreover, the remaining requisites laid down by the Supreme Court in the above-mentioned case have been sufficiently met. The subject resolution is not limited to existing conditions only and that same is not being made to apply to DCI alone, but to all entities of the same class. Considering the foregoing premises, the distinction made by the GPPB as regards GOCCs organized under the Corporation Code in Resolution No. 03-2007 is well-founded.

In the instant case, the Articles of Incorporation of DCI provides that its Primary Purpose is "to engage in electronic data processing and related services." Its Secondary Purposes are as follows: 1) to help monitor the flow of records and accounts of the different corporations, firms and entities engage in business in the Philippines; 2) to encourage the development of information systems to provide data and information needed for the business of a particular firm, corporation or entity; 3) to provide the mechanism for the effective evaluation of EDP and related programs for the efficient and economical realization of business objectives; and 4) to perform such other services related thereto. The Articles of Incorporation of DCI

⁴ Section 16, Article XII, 1987 Constitution.

⁵ Bernas, Joaquin, *The 1987 Constitution of the Philippines: A Commentary*, 1996 Edition, at p. 1050.

⁶ *Ibid.*

⁷ Section 4, Corporation Code.

⁸ Section 3, R.A. 9184.

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further shows that there exist a parent-subsidary relationship between DBP and DCI. In fact, DCI's Board of Directors and stockholders are senior officials of DBP.

Under the Implementing Rules and Regulations of the Securities Regulations Code, the term "control" is the power to govern the financial and operating policies of an enterprise so as to obtain benefits from its activities. Control is presumed to exist when the parent owns, directly or indirectly through subsidiaries, more than half of the voting power of an enterprise unless, in exceptional circumstances, it can be clearly demonstrated that such ownership does not constitute control.

Based on the foregoing, since DBP has the power of control over its subsidiary, i.e., the power to direct or cause the direction of the management and policies of its subsidiary either through the ownership of the shares or by existence of a contract, DBP may negotiate directly with DCI to render IT services. Section 33 of the Corporation Code recognizes as valid a contract between two (2) or more corporations which have interlocking directors (i.e., one some or all of the directors in one corporation is/are also director/s in another corporation) as long as there is no fraud and the contract is fair and reasonable under the circumstances. However, we suggest that this matter be confirmed before the CPPB as the policy-making body on public procurement as an exception to Resolution No. 03-2007.

Please be guided accordingly.

Very truly yours,

ALBERTO C. AGRA
Government Corporate Counsel

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under the rule of law



Republika ng Pilipinas
Department of Agriculture
Pambansang Pangasiwaan ng
(NATIONAL IRRIGATION ADMINISTRATION)
Lungsod ng Quezon

Hycee

Pls. draft response, as discussed.

RJ 10/15/09

Office Address: National Government Center
EDSA, Diliman, Quezon City, Philippines
Telephone Nos.: (02) 929-6071 to 78

October 8, 2009

ATTY. RUBY U. ALVAREZ

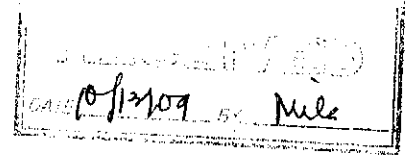
Executive Director

Government Procurement Policy Board-Technical Services Office

Unit 2506 Raffles Corporate Center,

F. Ortigas Jr. Road, Ortigas Center,

Pasig City



SUBJECT: Request for Opinion re Provision of Technical Assistance being rendered by NIAConsult, Inc. to the National Irrigation Administration

Dear Madam:

May we respectfully seek the opinion of your good office as to whether or not the Provision of Technical Assistance for the Detailed Engineering Study of five (5) Small Reservoir Irrigation Projects (SRIPs) which is covered by a Memorandum of Agreement (MOA) between the National Irrigation Administration (NIA) and NIAConsult, Incorporated (NIAConsult), copy of which is attached as Annex "A," may be considered as an Agency-to-Agency Agreement where no public bidding is required.

As a backgrounder, NIA is a government-owned and controlled corporation with original charter while NIAConsult is a wholly-owned (100%) subsidiary of the former and was created pursuant to the provision of the Corporation Code. Thus, a parent-subsidiary relationship exists between the two (2) corporations where arrangements such as the foregoing MOA were implemented by said GOCCs for various projects.

From time to time, less than ten (10) occurrences since NIACONSULT's creation in 1980, NIA turns to its subsidiary NIAConsult for urgent Feasibility and Detailed Engineering Studies that are supposed to be undertaken in-house by the NIA but which it could not do so since we were, many years ago, extremely affected by resignations and early retirements of our more technically capable personnel who sought better employment elsewhere, more so now with the implementation of the Rationalization Plan, and that some expertise required in the conduct of FS and DE Projects are no longer available within NIA.

These Studies were/covered by a Memoranda of Agreement (MOA) for Technical Assistance, literally "Assistance" by a Subsidiary to its Mother Corporation on a (Direct) Cost Plus (20%) basis, and approved by the governing Board of Directors of the NIA.

We wish to inform you that no public bidding was conducted with respect to the foregoing MOA. This is the situation not only for the aforesaid SRIPs Project but likewise for all other

Projects entrusted to NIAConsult by the NIA for implementation. This scenario/arrangement is justified in view of the following reasons:

- a) NIAConsult's engagements in projects of the NIA cannot be categorized as "Consulting Services Contracts" since these are mere **"technical assistance"** where a subsidiary (such as NIAConsult) is rendering service to its mother corporation (such as NIA) for a minimal fee. The NIA Projects undertaken or being undertaken by NIACONSULT (less than 10 NIA Projects in NIACONSULT's 28 years of existence) are only those that NIA should undertake in-house but due to its limited technical capability and manpower resources, NIA could not afford to do so. Hence, NIA has to tap NIAConsult whose expertise in these areas is recognized not only locally but internationally as well.
- b) NIAConsult is a creation of and is the sole and wholly-owned subsidiary corporation of the NIA. As stated above, NIAConsult has a significant track record in providing expert services to international lending institutions, foreign governments and private clients. Recognizing this, NIA thus makes use of the same expertise which is being availed of locally and internationally, and accordingly asked NIAConsult to render "technical assistance" to it. As a mere Technical Assistance, i. e., "assisting", "helping" or "aiding" the mother corporation NIA, it is our humble view that this will not require public bidding.
- c) We also deem the technical assistance arrangements that we are having with NIACONSULT as "advantageous" to NIA and the government as it is economical and efficient as shown by the following data:

Project	Type	NEDA Ceiling (% of Project Cost)	NIACONSULT's MOA Amount (% of Project Cost)
Re-Conduct of the FS for Jalaur River Multipurpose Project, Stage II	Feasibility Study	3%	0.12%
Updating of the FS for the Balog-Balog Multipurpose Project	Feasibility Study	3%	0.05%
Detailed Engineering Study for 5 SRIPs	Detailed Engineering	6%	1.552%

Indeed, engaging the services of NIAConsult for activities that should be otherwise undertaken by NIA in-house as explained is not only economical but is also efficient and will hasten project implementation. Thus, NIA (and the government for that

matter) is placed at a greatly advantaged position because the service is guaranteed to be efficient at a reasonably low price.

- d) Likewise, we have relied, in utmost good faith, on precedents regarding the engagement of the services of NIAConsult by NIA without the benefit of competitive bidding. The Office of the Government Corporate Counsel (OGCC) previously opined that the *"Memorandum of Agreement being between NIA and its subsidiary corporation, the inclusion of strict protective clauses and standard contract provisions therein may be dispensed with"* and *"After a Perusal of the proposed Agreement, we find no legal impediment to the execution of the same."* For your reference and consideration, please find appended as Annexes "A" and "B" OGCC's CR No. 232, Series of 1997 (July 11, 1997) for the Casecan Multipurpose Irrigation and Power Project (CMIPP) and CR No. 032, Series of 1999 (February 17, 1999) for FS of 20 Small Reservoir Irrigation Projects (SRIPs).

Relative to the foregoing, it is worth to note the following laws/issuances/policies and discussion on procurement of government projects:

1. Section 53(e) of the Implementing Rules and Regulations (IRR) of Republic Act No. 9184 includes purchases of goods from another Agency of the Government as one of the modes of Negotiated Procurement.
2. Resolution No. 13 – 2007 of the Government Procurement Policy Board (GPPB) amended Section 53(e) of the IRR so as to include Infrastructure Projects and Consulting Services, as well as to include the provision that *"For purposes of this paragraph, the term agency shall exclude GOCCs incorporated under Batas Pambansa Blg. 168, otherwise known as the Corporation Code of the Philippines."*
3. GPPB Resolution 18-2007 approved the Implementing Guidelines on Agency-to-Agency Arrangements under Section 53(e) of the IRR-A of R.A. 9184, which provides, among others, that:

"Servicing Agency shall refer to the Agency which delivers the goods, undertakes the Infrastructure Projects, or provide the consulting services."

"However, in accordance with Section 53(e) of the IRR-A of R.A. 9184, as amended, GOCCs under Batas Pambansa blg. 168 or the Corporation Code of the Philippines, which are vested with proprietary functions to enable them to compete with the private sector, are excluded from the definition of Servicing Agency, and thus, not qualified to act as Servicing Agency under the 1st paragraph of Section 53(2) of the IRR-A of R.A. 9184."
4. GPPB's Opinion NPM-021-2008, stating, among others, that *"Note that the OGCC has already opined that GOCCs formed under the Corporation Code may enter into agency-to-agency agreements with another GOCC as long as a parent-subsidiary relationship exists between the two."*

The above was further explained in a one-day GPPB Consultation on the Implementing Rules and Regulations of RA 9184 which was conducted with the heads of procuring entities (HOPE) and members of the Bids and Awards Committee (BAC) of Government Owned and Controlled Corporations (GOCCs), and held at the Crowne Plaza Hotel in Pasig City on January 28, 2009, where a participant queried as follows:

"Agency-to-Agency: does not cover corporations created under BP 168; supposing that the corporation is 100% owned by the procuring entity, will that 100%-owned subsidiary undergo the regular competitive bidding when that subsidiary has been purposely created to undertake projects which could not be done by the PE, for example, putting up branches by the bank which was required by BSP?"

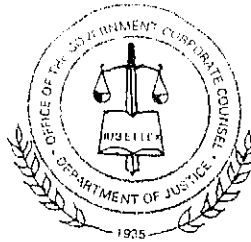
To which Executive Director Ruby Alvarez of the GPPB-TSO responded that *"Agency-to-agency: the OGCC rendered an opinion on this and said you don't have to bid if you are a 100% subsidiary of the procuring agency. But if that subsidiary wants to service agencies other than the agency that created it, the subsidiary will have to undergo the bidding process like any other suppliers."*

With the foregoing discussion and provisions of law/issuances/policies cited, may we respectfully seek the confirmation of your good office if the execution of the MOA abovementioned effectively satisfies the requirements on Agency-to-Agency Arrangements as contained in GPPB Resolution No. 18-2007 dated 31 May 2007; and that GPPB Opinion NPM-021-2008 likewise applies to NIAConsult, Inc. and all other 100% owned SEC-registered subsidiaries of parent GOCCs.

We anticipate your usual prompt action on this request. Best regards.

Very truly yours,


CARLOS S. SALAZAR
Administrator



REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF JUSTICE
OFFICE OF THE GOVERNMENT CORPORATE COUNSEL
5th and 6th Floors,
PHILIPPINE SUGAR CENTER
North Avenue, Diliman
Quezon City

CONTRACT REVIEW NO. 232
Series of 1997

July 11, 1997

Mr. Eduardo P. Corsiga
President
Niaconsult, Inc.
3rd Floor, Diversified Crops Irrigation
Engineering Center
NIA Compound, EDSA, Quezon City

Re: Proposed Memorandum of Agreement
between NIA and NIA Consult, Inc.

Sir:

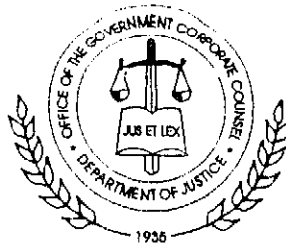
With reference to your request for review of the subject Memorandum of Agreement for the proposed rendition by the latter of a Technical Assistance on the Preparatory Works, Detailed Engineering and Construction Quality Assurance for the Irrigation Component of the Casecanan Multi-Purpose Irrigation and Power Component Project, we suggest that the usual recital of parties be incorporated before the whereas Clauses. After a perusal of the proposed Agreement, we find no legal impediment to the execution of the same. The terms and conditions thereof governing the duties of the respective parties are in order. The agreement being between NIA and its subsidiary corporation, the inclusion of strict protective clauses and standard contract provisions may be dispensed with. The cost is left blank in paragraph 5. It is understood that this review does not pass upon the reasonableness of the consideration.

The proposed Agreement may therefore be given due course, after you shall have filled the blank spaces in paragraphs 5, the signing page, and acknowledgement portion.

Very truly yours,

VIRGILIO C. ABEJO, CESO II
Deputy Government Corporate Counsel
Officer - in - Charge

.....committed to uphold justice
under the rule of law



REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF JUSTICE
OFFICE OF THE GOVERNMENT CORPORATE COUNSEL
5th and 6th Floors,
SUGAR REGULATORY ADMINISTRATION
North Avenue, Diliman
Quezon City

CONTRACT REVIEW NO. 032
Series of 1999

17 February 1999

Q. Galvez

Mr. ANTONIO A. GALVEZ
President
NIACONSULT, Inc.
3/F Irrigation Engineering Center
NIA Compound, Epifanio Delos Santos Avenue
Diliman, Quezon City



RE: Memorandum of Agreement for the
Provision of Technical Assistance
to the Small Reservoir Irrigation Project (SRIP)

Sir:

With reference to your request for our review of the subject Memorandum of Agreement (MOA) to be executed by and between the National Irrigation Administration (NIA) and NIACONSULT, Inc., we find the terms and conditions thereof generally in order as they are basically the same as those of a previous MOA, subject of our Contract Review No. 232, Series of 1997. The Agreement being between NIA and its subsidiary corporation, the inclusion of strict protective clauses and standard contract provisions therein may be dispensed with.

However, for the better protection of the parties' interests, as a matter of form and for purposes of clarity and uniformity, hereunder are our comments and suggestions:

Atty. ...

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1. In the recital of the parties, add “who is duly authorized of the purpose of this Agreement” after the names of the signatories thereto;

2. In the first “WHEREAS” clause, 1st line, change “to provide” to “in providing”;

3. Section 1.02(a), 1st line, insert “written” between “prior” and “approval”; after “NIA,” insert “and for valid reasons”;

4. *Omnibus* corrections for purposes of uniformity: (a) “Services” and “Assignment” must be capitalized; (b) add the word “hereof” to all references to the annexes; (c) references to the “MOA” should be “this Agreement” or “hereof”; (d) “progress statement/s” should appropriately be referred to as “progress billing/s”;

5. In section 2.03, 2nd line, the word “there” should be “their”; 3rd line, delete “in its judgment” and “most likely”;

6. In section 2.04, 3rd and 4th lines, change “course” to “execution”;

7. In section 2.05(a), 2nd line, delete “that”;

8. In section 2.06 on Delays, incorporate a provision imposing some reasonable amount for delays due to the fault of NIAC; same section, sub-paragraph (b), 5th line, add a comma (,) after “possible” and delete “MOA”;

9. In section 2.09, 7th line, add, “be” after “to”;

10. Section 3.02 should be revised to read as follows:

“The NIA shall designate its Representative who will be duly empowered and authorized to take and implement decisions on organizational, logistical, financial, administrative and technical matters essential for the execution of the SERVICES, including those which are brought to its attention by the NIAC Representative. Except as may be agreed or directed by the NIA

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Representative, all correspondences and references to the NIA shall be directed through the said Representative.”

11. In section 4.01(a), 2nd line, “15%” should be “fifteen percent (15%)”; subparagraph (c), 1st line, “use” should be “exert”; and subparagraph (d), 4th line, “allowances” should be “amounts” and in 5th line, “made” should be “paid”;

12. Section 4.03(a), 2nd line, delete “etc.”;

13. In section 4.04(a), as a rule, advance payment is not allowed in Government contracts; the reason or basis for the advance payment of twenty percent (20%) should be stated or justified and the same should be incorporated therein; subparagraph (b), 1st line, “written” should be “set”; in 2nd line, insert “monthly” after “equal”;

14. In section 4.05(a), 2nd sentence, insert “the first” after “end of” and delete number “1”; and subparagraph (b), 2nd line, “originals” should be “original copies”;

15. In section 4.06, 2nd line, add “and verified by the NIA” after “NIAC”; and in the last line, add “of Account” after “Statement”;

16. In section 5.02, fill-up the blank;

17. In section 5.03(b), last line, add “to” after “referred”;

18. In section 6.02(a), last sentence is incomplete and should be revised;

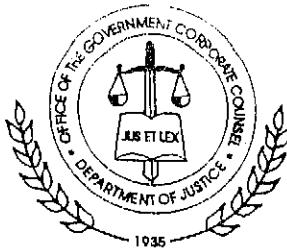
19. In section 6.03(j), 3rd line, “to” should be “of”;

20. Section 7.04 should be revised to read as follows:

“Section 7.04 Governing Laws

“This Agreement shall be governed by and construed in accordance with the laws of the Philippines and any dispute between the parties shall be settled by arbitration in accordance

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under the rule of law*

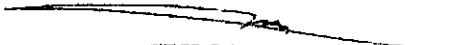


with Presidential Decree No. 242, in conjunction with Executive Order No. 292, otherwise known as the 'Administrative Code of 1987'."

21. In the Acknowledgment, (a) add, "representing the National Irrigation Administration" or "NIACONSULT, Inc.", as the case maybe, after the names of the signatories thereto; and "and that of the entities they respectively represent" after the word "deed".

Subject to compliance with the foregoing suggestions and comments, the proposed Memorandum of Agreement may be given due course.

Very truly yours,


JUN N. VALERIO
Government Corporate Counsel

*.....committed to uphold justice
under the rule of law*

NPM No. 21-2008

16 September 2008

MR. CLARITO L. MAGSINO
President and CEO
DBP DATA CENTER, INC.
22/F Pacific Star Building
Sen. Gil J. Puyat Avenue
Makati City

Re : Definition of Agency under GPPB Resolution No. 03-2007

Dear Mr. Magsino:

We refer to the following:

- (a) Letters dated 21 August 2008, 4 February 2008, and 27 November 2007 addressed to Sec. Rolando G. Andaya, Jr., as Chairman of the Government Procurement Policy Board (GPPB); and
- (b) Letter dated 16 November 2007 addressed to the Technical Support Office of the GPPB.

In sum, DBP Data Center, Inc. (DCI) questions the validity of GPPB Resolution No. 03-2007, which excludes government owned and/or controlled corporations (GOCCs) from the definition of "agency", for the following reasons:

- (a) The legal maxim that "where the law does not distinguish, neither should we distinguish" applies to this case;
- (b) The distinction between GOCCs incorporated under the Corporation Code and those created by virtue of a special law is not germane to the purpose or rationale of Republic Act (R.A.) No. 9184; and
- (c) As applied in transactions between DCI and its parent company, the Development Bank of the Philippines (DBP), such amendment has the absurd effect of (i) defeating the performance by DCI of its primary mandate to service the information technology requirements of DBP; and (ii) forcing DCI to deal with DBP and other government agencies only through competitive bidding even if no financial prejudice would be incurred by them in its transactions with DCI.

Consequently, DCI requests for the deletion of the distinction between GOCCs incorporated under the Corporation Code and those created by special law under GPPB Resolution No. 03-2007, or in the alternative, that said resolution be suspended pending further study. It further warns of its resolve to dissolve its Bids and Awards Committee since said distinction, if not deleted, has the alleged effect of removing GOCCs incorporated under the Corporation Code from the coverage of R.A. No. 9184.

Please be advised that your concerns were raised to the Inter-Agency Technical Working Group (IATWG) of the GPPB for resolution. After deliberations, and bearing in mind the policy rationale behind GPPB Resolution No. 03-2007 and the opinion of the Office of the Government Corporate Counsel (OGCC) dated 26 September 2007,¹ we regret to inform you that the IATWG is of the considered view that the foregoing reasons cited are not sufficient to warrant the amendment of the definition of "agency" under GPPB Resolution No. 03-2007.

With respect to your first and second contentions, the IATWG takes note of the legal opinion of the OGCC that the GPPB, by express provision of R.A. No. 9184, has the quasi-legislative power to formulate and amend the implementing rules and regulations of R.A. No. 9184. Such power includes the right to classify as long as the distinction is germane to the purpose of the law, concerns all members of the class, and applies equally to present and future conditions.

Consequently, applying said conditions to this particular case, the OGCC ruled that the distinction between GOCCs formed under the Corporation Code and those with special charters is grounded on the 1987 Constitution and is germane to the declared principle of competitiveness in government procurement under R.A. No. 9184.

The 1987 Constitution of the Philippines recognizes the difference between a GOCC with original charter from a GOCC created through the general corporation law (Section 2 [1], Article IX and Section 16, Article XII, 1987 Constitution) . . .

It can be surmised that the rationale of the GPBB in excluding GOCCs incorporated under the Corporation Code under Section 53 (e) of the IRR-A is for these corporations to bid and compete with the private sector in all government procurement activity. It is the declared principle of Government to make contracting parties who are eligible to participate in public bidding. These GOCCs cannot be given greater rights, powers or privileges than any other corporation which might be organized under the Corporation Code.

Moreover the remaining queries laid down by the Supreme Court in the above-mentioned case have been sufficiently met. The subject resolution is not limited to existing conditions only and that same is not being made to apply to DCI alone, but to all entities of the same class. **Considering the foregoing premises, the distinction made by the GPPB as regards GOCCs organized**

¹ OGCC Opinion No. 213, s. 2007, addressed to Mr. Clarito L. Magsino, as President and CEO of DBP Data Center, Inc.

under the Corporation Code in Resolution No. 03-2007 is well-founded.
[Emphasis supplied]

Anent your last contention, the IATWG likewise notes that the OGCC has already opined that GOCCs formed under the Corporation Code may enter into agency-to-agency agreements with another GOCC as long as a parent-subsidiary relationship exists between the two. Thus, contrary to the allegations of DCI, GPPB Resolution No. 03-2007 does not render nugatory the primary mandate of DCI, which is to service the information technology requirements of DBP, its parent company.

In ending, it bears stressing that the general mode for government procurement under R.A. No. 9184 is public bidding. Thus, there is no need to justify why GOCCs formed under the Corporation Code are required to bid and compete with the private sector in their dealings with government. Rather, it is for DCI to explain why GOCCs formed under the Corporation Code should be exempt from the requirement of public bidding, and thus, preferred from all other bidders in government transactions.

Very truly yours,

RUBY U. ALVAREZ
Executive Director III