

NPM No. 22-2010

GPPB-TSO FILE COPY

7 July 2010

MR. DANIEL I. LANDINGIN

Acting Administrator

LOCAL WATER UTILITIES ADMINISTRATION

P.O. Box 34 U.P. Post Office, Katipunan Avenue,
Balara, Quezon City

**Re: Supplier's Credit with Foreign Government or International
Financing Institutions**

Dear Mr. Landingin,

We respond to your letter dated 13 April 2010, which we received last 11 May 2010, requesting for our opinion on the following:

- (a) Whether procurement of specified water supply equipment pursuant to a foreign loan or supplier's credit falls within the coverage of Republic Act (R.A.) 9184; and
- (b) If yes, whether the Local Water Utilities Administration (LWUA) can resort to the alternative method of Direct Contracting or Limited Source Bidding.

Anent the first query, you mentioned that LWUA has the authority to enter into foreign loans under Section 73 of Presidential Decree No. 198 or the Provincial Water Utilities Act of 1973, as amended. Included in this authority is the option to enter into supplier's credits or deferred payment arrangements with foreign governments or international financing institution. The Office of the Government Corporate Counsel (OGCC) describes supplier's credit as a mode or scheme of payment where "the availment thereof presumes that there is always a selected or chosen supplier."¹

R.A. 9184 applies to all procurement of goods, infrastructure projects, and consulting services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, including government owned or controlled corporations.² An exception is provided in the last sentence of Section 4, R.A. 9184 which mandates due deference to any treaty or international or executive agreement affecting procurement. Thus,

¹ OGCC Opinion No. 041, s. 2010 dated 30 March 2010. This opinion delves with the same issues raised by LWUA in letter dated 13 April 2010.

² Section 4, R.A. 9184.

R.A. 9184 shall apply to the purchase of water supply equipment even via supplier's credit unless said agreement qualifies as a treaty, international or executive agreement³ and explicitly prescribes that purchase shall be made from a selected supplier. As aptly stated by the OGCC:

To answer your query therefore, in the procurement of water equipment regardless of whether the scheme of payment is by way of a supplier's credit, the selection of the supplier is generally covered by R.A. 9184. Public bidding is required unless the exceptions in said law apply and any of the alternative mode of payment (sic) is allowed. If the procurement however is funded by a foreign loan which qualifies as an executive agreement under Section 4 of R.A. 9184 afore-cited and the loan agreement either prescribes a procedure for procuring the water equipment or provides that the water equipment shall [be] procured only from specific sources of suppliers, then the agreement shall be observed.⁴

At this point, please allow us to amplify the discussion by stating that the Government Procurement Policy Board (GPPB) discourages the practice of entering into supply-driven contracts or arrangements where the supplier has been predetermined prior to execution of the financing agreement.⁵ Even the OGCC notes the critical distinction between selection of the supplier and the payment or funding scheme, as follows:

x x x Supplier's credit is merely a mode or scheme of payment and the availment thereof presumes that there is always a selected or chosen supplier. It is however in the selection of the supplier that the applicability of RA 9184 is pertinent or crucial. Otherwise stated, the selection of the supplier and the payment or funding scheme are two different things.⁶

Procuring entities should thus be cautious about entering into supply contracts masquerading as financing agreements. The GPPB believes that these contracts do not promote the principles espoused by R.A. 9184 and that public officers who enter into these contracts must be accountable for these decisions. This policy is embodied in Section 4.3 of the revised Implementing Rules and Regulations (IRR) of R.A. 9184, which reads:

Consistent with the policies and principles set forth in Sections 2 and 3 of this IRR, the GOP negotiation panels shall adopt, as its default position, use of this IRR, or at the very least, selection through competitive bidding, in all Foreign-funded Procurement. If the Treaty or International or Executive Agreement states otherwise, then the negotiating panels shall explain in writing the reasons therefor.

With respect to the second query, we concur with the opinion of the OGCC that the alternative mode of Direct Contracting may only be resorted to if any of the following conditions prescribed under Section 50 of the IRR exists:

³ Definition of Treaty, International or Executive Agreements is found in Section 5 (cc), (v), and (l), respectively.

⁴ OGCC Opinion No. 041, s. 2010, at 3.

⁵ GPPB Policy Matter No. 001-2008 dated 25 January 2009 addressed to the Department of Public Works and Highways.

⁶ OGCC Opinion No. 041, at 3.

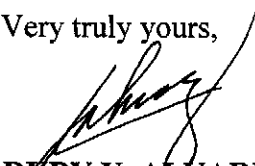
- (a) Procurement of goods of proprietary nature which can be obtained only from the proprietary source, *i.e.*, when patents, trade secrets, and copyrights prohibit others from manufacturing the same item;
- (b) When the procurement of critical components from a specific supplier is a condition precedent to hold a contractor to guarantee its project performance, in accordance with the provisions of its contract; or
- (c) Those sold by an exclusive dealer or manufacturer which does not have sub-dealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the GOP.

Limited Source Bidding, on the other hand, may only be employed under any of the following conditions:

- (a) Procurement of highly specialized types of goods (*e.g.*, sophisticated defense equipment, complex air navigation systems, coal) and consulting services where only a few suppliers or consultants are known to be available, such that resorting to the public bidding method will not likely result in any additional suppliers or consultants participating in the bidding; or
- (b) Procurement of major plant components where it is deemed advantageous to limit the bidding to known qualified bidders in order to maintain uniform quality and performance of the plant as a whole.

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

Very truly yours,



RUBY U. ALVAREZ
Executive Director III

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