



Department of Budget and Management
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE

NPM No. 38-2013

22 April 2013

MR. LORENZO C. DRAPETE

Director

Budget and Management Bureau-F

DEPARTMENT OF BUDGET AND MANAGEMENT

4/F Boncodin Hall, General Solano Street,
San Miguel, Manila

Re : Procurement Agent (PA)

Dear Director Drapete:

This refers to your letter dated 2 April 2013, which we received on 16 April 2013, seeking the opinion of this office relative to the issue on whether the Light Rail Transit Authority (LRTA) may request the Department of Transportation and Communications (DOTC) to be its Procurement Agent.

As represented, the LRTA and DOTC entered into a Memorandum of Agreement (MOA) wherein the former agreed that the latter's Bids and Awards Committee (BAC) shall undertake the procurement and/or bidding process of the LRTA Rehabilitation Projects. In a letter dated 10 January 2012, the Commission on Audit (COA) raised the concern that the DOTC-BAC has gone beyond its authority in conducting the procurement for LRTA. In this regard, DOTC requested the opinion of the Department of Justice, which responded that the procuring entity may avail the services of procurement agent provided that it failed to properly constitute its BAC or cannot constitute its BAC for lack of personnel. Nonetheless, the DOJ advised the DOTC to obtain the opinion of this office since the Government Procurement Policy Board (GPPB) has the primary competence and jurisdiction to apply and interpret the rules on procurement.

Section 53.6 of the revised Implementing Rules and Regulations (IRR) of Republic Act No. (RA) 9184 provides that Negotiated Procurement (Procurement Agent) may be resorted to by procuring entities **"which may not have the proficiency or capability to undertake a particular procurement, as determined by the Head of the Procuring Entity (HOPE) concerned."** In such case, the procuring entity may request other agencies of the Government to undertake their procurement activities.

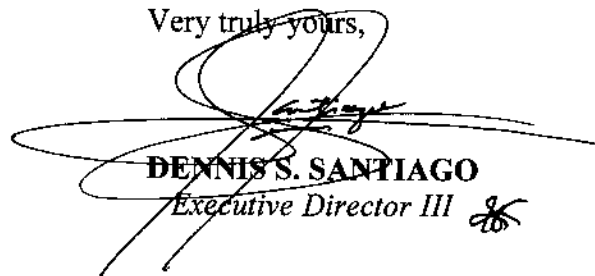
The engagement of a PA is available as an alternative procurement modality upon the determination by the HOPE that the procuring entity does not have the proficiency or capability to undertake a particular procurement. The lack of capability is exhibited in instances when the procuring entity fails to or cannot properly constitute a BAC due to lack

of personnel, as mentioned in our previous opinions.¹ We wish to clarify, however, that failure to constitute a BAC is only one situation where Section 53.6 finds application. Section 53.6 may also apply in cases where a BAC is validly constituted, but due to the number of bidding activities to be undertaken by the procuring entity; magnitude and complexity of the project; experience of the members of the BAC; location and situs of both the principal and the agent; and, other valid and reasonable circumstances, the procuring entity may not have the proficiency or capability to undertake the particular procurement activity.

It should be noted that resort to Section 53.6 of the IRR is couched upon the condition that there is a general determination of lack of proficiency or capability by the procuring entity to undertake a particular procurement. It does not qualify or limit the lack of proficiency or capability to specific circumstances. Thus, it is our view that LRTA may request DOTC to be its PA, provided that the LRTA has determined that it lacks the proficiency or capability to undertake the LRTA Rehabilitation Projects, which need not be based solely on LRTA's failure to constitute its BAC. It must be emphasized, however, that in the conduct of the actual procurement, the PA should strictly apply the rules and procedures embodied in RA 9184 and its IRR.

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

Very truly yours,



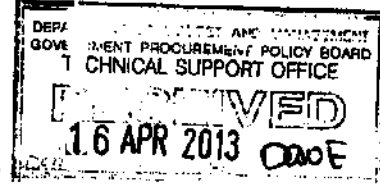
DENNIS S. SANTIAGO
Executive Director III

¹ Non Policy Matter Nos. 076-2012 (20 June 2012), 143-2012 (5 November 2012), and 026-2010 (13 August 2010).



REPUBLIC OF THE PHILIPPINES

Department of Budget and Management
Malacañang, Manila



April 2, 2013

ATTY. DENNIS S. SANTIAGO

Executive Director
Government Procurement Policy Board (GPPB)
2506 Raffles Corporate Tower
F. Ortigas Jr. Road
Ortigas, Pasig City

Sir:

This pertains to the letter dated February 20, 2013 from Secretary Leila M. De Lima of the Department of Justice (DOJ) advising Undersecretary Jose Perpetuo M. Lotilla of the Department of Transportation and Communications (DOTC) to obtain your position and/or opinion on whether LRTA can request DOTC to be its Procurement Agent.

The DOTC and Light Rail Transit Authority (LRTA) executed a Memorandum of Agreement (MOA) dated February 8, 2012 (Annex A) wherein the latter agreed that the DOTC through its Bids and Awards Committee (BAC) shall undertake the procurement and/or bidding process of the LRTA Rehabilitation Projects in the total amount of P1.8 Billion.

In a letter dated January 10, 2012 from the Commission on Audit (COA) to LRTA (Annex B), the COA raised an issue on the procurement of goods by the DOTC on behalf of LRTA. As indicated therein, the DOTC-BAC has gone beyond its authority in conducting the procurement for LRTA and that the same violates Section 11.2.2 of the Revised Implementing Rules and Regulations (IRR) of Republic Act (R.A.) No. 9184¹.

Per representation, DOTC has the authority to conduct the bidding for the rehabilitation projects of the LRTA by virtue of the executed MOA. DOTC was appointed by LRTA as its procurement agent and thus, it was duly authorized to undertake the bidding. For clarification, the DOTC requested the opinion of the DOJ in its letter dated January 28, 2013 (Annex C).

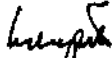
Secretary Leila M. De Lima responded to the DOTC in its letter dated February 20, 2013 (Annex D) stating that the Procuring Entity may pursue to avail the services of a Procurement Agent provided that it failed to properly constitute its BAC or cannot

¹ Government Procurement Reform Act

constitute its BAC due to lack of personnel. However, the DOJ still advised the DOTC to obtain the opinion of your office considering that the issue involves the interpretation and application of R.A. 9184 and its IRR.

Inasmuch as the GPPB is in the best position to clarify the provisions of RA 9184 in relation to the instant case of the LRTA, may we refer herein letter for your comments/opinion as basis of our recommendation.

Very truly yours,



LORENZO C. DRAPETE
Director