



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

**NPM No. 60-2013**

26 June 2013

**MR. TERESO O. PANGA**  
*Deputy Director General for Policy and Planning*  
**PHILIPPINE ECONOMIC ZONE AUTHORITY (PEZA)**  
Roxas Blvd. cor. San Luis St., Pasay City

**Re: Lease Concession Agreement**

Dear Deputy Director General Panga:

This is in response to your letter dated 20 May 2013, which we received 24 May 2013, seeking our opinion on whether the privatization of the distribution systems of PEZA in the public economic zones through a lease concession agreement is subject to the provisions of Republic Act (RA) No. 9184 and its revised Implementing Rules and Regulations (IRR).

It is represented that PEZA received a proposal from the Mactan Electric Company, Inc. (MECO) to take-over the power distribution business in Mactan Economic Zone (MEZ) through a Lease Concession Agreement with PEZA for the next twenty five (25) years. The question now is whether the privatization of PEZA's distribution system in MEZ through a lease concession agreement is a transaction that is subject to the provisions of RA 9184.

**Application of RA 9184 and its revised IRR**

Procurement is defined under Section 5(n) of RA 9184 as the acquisition of goods, consulting services, and the contracting for infrastructure projects by government agencies. Such acquisition entails use of funds, regardless of source, in accordance with the methods and procedures laid down in the rules. Simply put, procurement only applies to cases where public funds are to be allocated and utilized for government procurement activities. In other words, for as long as public funds is utilized or is contemplated to be spent for any procurement activity, it shall fall within the ambit of the present procurement law.<sup>1</sup> Conversely, if the government transaction or activity does not involve use of public funds, such transaction or activity will not be covered by RA 9184. In line with this, Section 4.4 of the IRR of RA 9184 states that it shall not apply to activities involving public-private sector infrastructure or development projects and other procurement covered by RA 6957<sup>2</sup>, as amended by RA 7718, except those portions financed by the government.

<sup>1</sup> NPM No. 141-2004, dated 5 November 2004.

<sup>2</sup> An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector and for Other Purposes.

## **Applicability of BOT Law or JV Agreements**

In case of 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 RA 6957, as amended by RA 7718, otherwise known as the BOT Law, and Executive Order (EO) No. 423, Series of 2005<sup>3</sup>, relative to the Guidelines and Procedures for Entering into Joint Venture Agreements Between Government and Private Entities<sup>4</sup> (JV Guidelines).

The BOT Law covers private sector infrastructure or development projects<sup>5</sup>, *i.e.*, projects normally financed and operated by the public sector, but which will now be wholly or partly implemented by the private sector.<sup>6</sup> On the other hand, the JV Guidelines govern the engagement of a private entity by a government entity as a partner in a JV, an arrangement whereby a private sector entity or a group of private sector entities on one hand, and a government entity or a group of government entities on the other hand, contribute money/capital, services, assets, or a combination of any or all of the foregoing, to undertake an investment activity for the accomplishment of a specific goal, with the end view of facilitating private sector initiative in a particular industry or sector.<sup>7</sup>

In a BOT contract, the responsibility of funding the activities for the implementation of a project is transferred to the private partner, unlike in procurement activities where it is the government entity that appropriates budget to cover the costs of the project. However, in a JV Agreement, the partners pool in funds, assets, capital, or service for the attainment of a specific investment goal or purpose. In both these transactions, the government does not engage a private entity to deliver or perform an obligation, but instead, establishes partnership with a private entity that either assumes the costs of the project or infuses capital for its operation in pursuit of a common objective or goal.

Since the Lease Concession Agreement between PEZA and MECO involves the operation, maintenance and improvement of the distribution system in MEZ by MECO, subject to revenue sharing, turn-key agreement, and distribution of assets to PEZA, including the residual value of fully depreciated assets, upon expiration or termination of the contract, without expenditure of public funds on the part of PEZA, we are of the considered view that the relationship, transaction or endeavor is not covered by RA 9184 and its IRR.

Accordingly, it is advisable to look into the applicability of the RA 6957<sup>8</sup>, as amended by RA 7718, otherwise known as the BOT Law, and Executive Order (EO) No. 423, Series of 2005<sup>9</sup>, relative to the JV Guidelines, inasmuch as the privatization of PEZA's distribution system in MEZ through a Lease Concession Agreement may be most

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<sup>3</sup> Repealing Executive Order No. 109-A dated September 18, 2003, Prescribing the Rules and Procedures on the Review and Approval of all Government Contracts to Conform with RA No. 9184, otherwise known as the "Government Procurement Reform Act".

<sup>4</sup> Issued by the National Economic and Development Authority pursuant to Section 8 of EO 423.

<sup>5</sup> Section 1.2 of the Revised IRR of RA 6957, as amended by RA 7718.

<sup>6</sup> Section 2 of RA 6957, as amended by RA 7718.

<sup>7</sup> Section 5.7 of the Revised JV Guidelines.

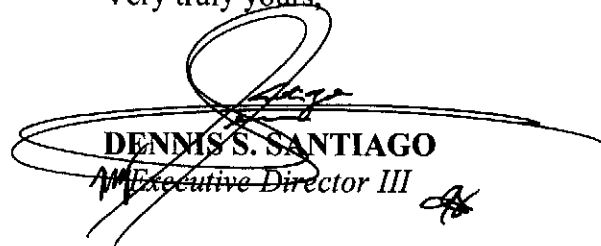
<sup>8</sup> An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector and for Other Purposes.

<sup>9</sup> Repealing Executive Order No. 109-A dated September 18, 2003, Prescribing the Rules and Procedures on the Review and Approval of all Government Contracts to Conform with RA No. 9184, otherwise known as the "Government Procurement Reform Act".

appropriately conducted following PPP-related laws, rules, and regulations, such as BOT Law or JV Guidelines.

We hope that our advice provided sufficient guidance on the matter. Please note that this opinion is being rendered on the basis of the facts and particular situation presented, and may not be applicable given a different set of facts and circumstances. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,



**DENNIS S. SANTIAGO**  
*Executive Director III*

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