



NPM No. 115-2012

13 September 2012

MR. BALTAZAR N. ENDRIGA

President

CREDIT INFORMATION CORPORATION (CIC)

Room 2004 Atlanta Centre, 31 Annapolis Street,
Greenhills, San Juan City

**Re: Scope and Application of Republic Act (RA) No. 9184¹ and
its Revised Implementing Rules and Regulations (IRR)²**

Dear Mr. Endriga:

We respond to your letter dated 13 August 2012, requesting our opinion on whether the procurement by the CIC of consulting services through the International Finance Corporation (IFC) facility necessitates the application of RA 9184 and its revised IRR, particularly, the rules on competitive bidding.

It is represented that CIC shall set up a national credit bureau in the Philippines in accordance with RA 9510³. In organizing the same, it seeks to procure the services of internationally recognized credit bureau outsource providers. However, before CIC can procure such services, the preparation of a technically sound Request for Proposal (RFP) for service providers shall be necessary, which can only be done by an entity with proven track record, such as IFC, which is recognized to have expertise and success in performing similar projects in other developing economies. In addition, IFC commits to shoulder fifty percent (50%) of the cost of its consulting services through a Grant, equivalent to an estimated amount of Two Hundred Thousand United States (US) Dollars (\$200,000.00).

It was further represented that should CIC proceed to contract IFC's consulting services without having to go through the rudiments of competitive bidding, the process of preparing the RFP for service providers would be expedited to a greater extent.

Hence, inquiry is made on whether there is a need for CIC to undergo the process of competitive bidding in procuring the services of IFC, or, in view of the Grant offered by the latter, CIC may be exempted from the provisions of RA 9184 and its IRR. AD

¹ The *Government Procurement Reform Act*, 26 January 2003.

² GPPB Resolution 03-2009, 22 July 2009.

³ The *Credit Information System Act*, 31 October 2008.

Competitive Bidding

At the onset, we wish to stress the declared policy of the Government of the Philippines (GOP) that procurement of infrastructure projects, goods and **consulting services** shall be competitive and transparent, and therefore shall go through **public bidding**, except as otherwise provided under RA 9184 and its revised IRR.⁴

Public bidding, as used interchangeably with competitive bidding, refers to a method of procurement which is open to participation by any interested party and which consists of the following processes: advertisement, pre-bid conference, eligibility screening of prospective bidders, receipt and opening of bids, evaluation of bids, post-qualification, and award of contract.⁵

Hence, in the procurement of consulting services, requiring adequate external technical and professional expertise that are beyond the capability and/or capacity of the GOP to undertake⁶, the procuring entity shall adopt **competitive bidding as the general mode of procurement**.

Compliance with Procurement Method Embodied in the Loan or Grant Agreement; Pacta Sunt Servanda

We are mindful of your representation that IFC offers a Grant equivalent to half the costs of the consulting services it will render. We are also aware that the IFC is an International Financing Institution (IFI) which is a member of the World Bank Group⁷, and which offers investment, advisory, and asset management services to encourage private sector development in developing countries⁸. Consequently, an agreement will necessarily be crafted for purposes of embodying the partial Grant offered by such IFI.

It is stated that "treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, modus vivendi and exchange of notes" all refer to "international instruments binding at international law."⁹ It is further explained that [a]lthough these instruments differ from each other by title, they all have common features and international law has applied basically the same rules to all these instruments. These rules are the result of long practice among the States, which have accepted them as binding norms in their mutual relations. Therefore, they are regarded as international customary law."¹⁰

Please note that as a rule, observance of Treaties, International or Executive Agreements are within the province of Section 4 of the revised IRR of RA 9184, which mandates that *[a]ny Treaty or International or Executive Agreement to which the GOP is a signatory affecting the subject matter of the RA 9184 and its revised IRR shall be observed*. This is in accordance with the principle of **pacta sunt servanda** - international agreements must be performed in good faith, which is one of the oldest and most fundamental rules in international law. Under this maxim, a state which has contracted valid international obligations is bound to make in its legislations such modifications as may be necessary to

⁴ Section 2, Revised IRR of RA 9184.

⁵ Section 5(h), Revised IRR of RA 9184.

⁶ Section 5(i), Revised IRR of RA 9184

⁷ http://en.wikipedia.org/wiki/world_bank_group

⁸ <http://www1.ifc.org>

⁹ Plaridel M. Abaya, et.al. vs. Hon. Secretary Hermogenes E. Ebdane, Jr., G.R. No. 167919 14 February 2007, citing <http://untreaty.un.org/English/guide.asp>

¹⁰ *Ibid.*

ensure the fulfilment of the obligations undertaken. For this reason, **the legislative trend in the area of government procurement is to exempt international agreements from the application of our domestic procurement laws.**¹¹

Thus, whatever guidelines or procedures stated in the international agreement embodying the Grant of IFC to CIC shall be faithfully observed. Consequently, unless the Treaty or International or Executive Agreement expressly provides the use of foreign government/foreign or IFI procurement procedures and guidelines, RA 9184 and its revised IRR shall apply to Foreign-funded Procurement for goods, infrastructure projects, and consulting services by the GOP.¹²

As a matter of fact, during the Loan or Grant Agreement negotiations, it must be emphasized *that the GOP negotiating panels shall adopt, as its default position, use of RA 9184 and its IRR, or at the very least, selection through competitive bidding, in all Foreign-funded Procurement.*¹³

Application of RA 9184 and its revised IRR vis-à-vis Loan or Grant Agreement

Considering, however, that the procurement of consulting services shall be partly funded by the IFI and partly, by the GOP, there is question of which procurement rules should apply, *i.e.*, that of the GOP or that of the IFI.

It is our considered view that: (1) where the international agreement expressly provides for the use of IFI procurement procedures and guidelines to **specific items stated in the agreement**, their rules shall apply to such specific items being procured pursuant with Section 4 of the revised IRR of RA 9184; (2) there could also be a situation where, pursuant to the Loan or Grant Agreement, a hybrid condition exists, where, for projects funded by the IFI, the latter's procurement rules and guidelines shall apply; and for those funded through GOP funds, GOP procurement law and associated rules shall be utilized; and, (3) **if there are no specifications as to which items the Grant would apply, domestic procurement rules and guidelines shall apply.** This is in consonance with the rule that RA 9184 shall be observed in the procurement of infrastructure projects, goods, and consulting services, regardless of the source of funds, whether local or foreign, by all branches and instrumentalities of government, its department, offices, and agencies, including government-owned and/or controlled corporations and local government units.¹⁴

In sum, the international agreement should expressly provide that the Grant extended by IFC will apply to particular items of the consultancy service to be procured. In this case, the components which are IFC-granted shall be governed by the procurement procedures and guidelines prescribed by IFC. On the other hand, GOP-funded components shall be governed by RA 9184 and its revised IRR, and shall adopt the rules on competitive bidding, or alternative methods of procurement¹⁵, if applicable. However, in the event that the international agreement completely fails to express its own guidelines on procurement, the entire procurement of the consultancy service shall follow our domestic procurement rules embodied in RA 9184 and its associated IRR.

¹¹ NPM 062-2004, 6 May 2004.

¹² Section 4.3, revised IRR of RA 9184.

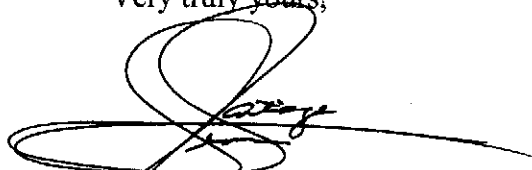
¹³ *Id.*

¹⁴ Section 4, RA 9184

¹⁵ Rule 16, Revised IRR of RA 9184.

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

Very truly yours,



DENNIS S. SANTIAGO
Executive Director III

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