

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

Unit 2506 Raffles Corporate Center, Emerald Avenue, Ortigas Center, Pasig City
Telefax Nos. (02) 900-6741 to 44

NPM No. 127-2004

September 29, 2004

MR. PRISCO D. NILO

Deputy Director for Operations and Services
Officer-in-Charge
Philippine Atmospheric, Geophysical and
Astronomical Services Administration
PAGASA Central Office Building,
Science Garden Complex, Agham Road,
Diliman, Quezon City

Re : Applicability of Republic Act 9184 and its Implementing Rules and Regulations Part A to Foreign-Funded Procurement Activities

Dear Deputy Director Nilo:

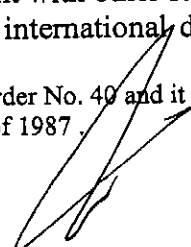
This refers to your letter dated September 16, 2004, which we received on September 21, 2004, requesting for advice and guidance whether your agency can legally pursue on a negotiated basis, the project entitled "Enhancement of Meteorological Delivery System to the Countryside (EMDSC), Phase III" designed to further strengthen the weather analysis and forecasting capability of the Philippine Atmospheric, Geophysical and Astronomical Services Administration (PAGASA).

As represented, the estimated amount of US\$1.3 Million for the EMDSC Phase III Project will be financed by a French loan. In this regard, we will discuss hereinafter the applicability of the provisions of Republic Act 9184 (R.A. 9184) and its Implementing Rules and Regulations Part A (IRR-A) on procurement activities funded out of loan agreements.

Applicable Rules and Regulations for Foreign-Funded Procurement Activities

A number of Philippine laws and executive issuances¹ have established the consistent policy upholding international agreements entered into by the Philippine Government with other states and international organizations to faithfully comply with its commitment in its international dealings.

¹ See Section 4 of Republic Act No. 4860 (Foreign Borrowings Act); Section 1 Executive Order No. 40 and its Implementing Rules and Regulations; Department of Justice (DOJ) Opinion No. 46, Series of 1987.



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 ensure the fulfillment of the obligations undertaken.² For this reason, R.A. 9184 provides under Section 4 thereof, as follows:

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 departments, offices and agencies, including government owned and/or -controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. **Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed.**³

Based on the afore-quoted provision, although R.A. 9184 covers all types of government procurement, regardless of source of funds, it recognizes the Government's international commitments and obligations in requiring that any treaty or international or executive agreement be observed. For this reason, R.A. 9184 will have two (2) IRRs, namely, IRR-A and IRR Part B (IRR-B). Pursuant to Section 1 of the IRR-A of R.A. 9184, procurement activities that are fully domestically-funded shall be governed by IRR-A, while procurement activities that are foreign-funded shall be governed by IRR-B. Section 1 of the IRR-A specifically provides, to wit:

This Implementing Rules and Regulations (IRR) Part A, hereinafter called "IRR-A," is promulgated pursuant to Section 75 of Republic Act No. 9184 (R.A. 9184), otherwise known as the "Government Procurement Reform Act" (GPRA), for the purpose of prescribing the necessary rules and regulations for the modernization, standardization, and regulation of the procurement activities of the government. **The IRR-A shall cover all fully domestically-funded procurement activities from procurement planning up to contract implementation and termination, except for the following:**

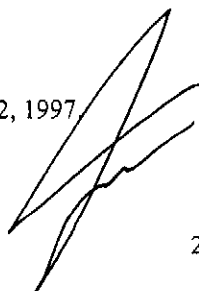
- a) Acquisition of real property which shall be governed by Republic Act No. 8974 (R.A. 8974), entitled "An Act to Facilitate the Acquisition of Right-of-Way Site or Location for National Government Infrastructure Projects and for Other Purposes," and other applicable laws; and
- b) Private sector infrastructure or development projects and other procurement covered by Republic Act No. 7718 (R.A. 7718), entitled "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes," as amended: *Provided, however,* That for the portions financed by the Government, the provisions of this IRR-A shall apply.

The IRR-B for foreign-funded procurement activities shall be the subject of a subsequent issuance.⁴

² Tañada vs. Angara, GRN 118295, May 2, 1997

³ Emphasis supplied.

⁴ Emphasis supplied.



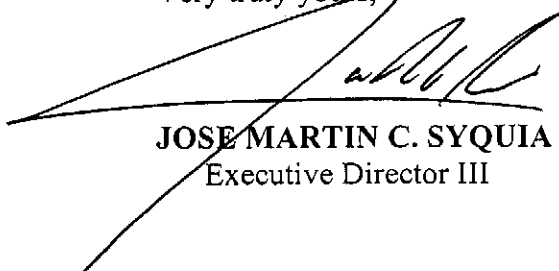
Considering that foreign-funded procurement activities are governed by R.A. 9184 through its IRR-B, and considering further that the said IRR-B has not yet been promulgated, foreign-funded procurement activities may be conducted following the guidelines set by the lending institution concerned. Hence, the procurement of the EMDSC Phase III Project shall be conducted following the specific guidelines provided under the French loan agreement.

In view of the foregoing, we are of the opinion that the propriety or validity of pursuing a negotiation with the supplier in the first two phases of the said project rests on the determination by the lending institution concerned. However, emphasis should be made that if the French loan agreement does not specify a particular procurement procedure to be used, the procurement project shall be conducted following the provisions of R.A. 9184 and its IRR-A; in which case, the more appropriate procedure is to conduct a public bidding therefor.

Please bear in mind that this opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not be necessarily applicable upon a different set of facts or circumstances.

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director III

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September 22, 2004

MR. PRISCO D. NILO


Officer-in-Charge
Philippine Atmospheric, Geophysical and
Astronomical Services Administration
PAGASA Central Office Building,
Science Garden Complex,
Agham Road, Diliman, Quezon City

Dear Deputy Director Nilo:

This refers to your letter dated September 16, 2004, which we received on September 21, 2004, addressed to the Government Procurement Policy Board (GPPB), requesting for guidance on whether or not negotiation may be conducted for the project entitled "Enhancement of Meteorological Delivery System to the Countryside (EMDSC), Phase III" under Republic Act 9184 and its Implementing Rules and Regulations Part A.

We wish to inform you that we shall respond to your concerns either through phone or in writing at the earliest possible opportunity, or raise the same to the GPPB for appropriate resolution should referral thereto becomes necessary.

Very truly yours,



ATTY. SALVADOR C. MALANA III
Head, Legal and Policy Group