

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

**NPM No. 129-2012**

16 October 2012

**HON. MARY ANN LUCILLE L. SERING**  
*Vice Chairperson and Executive Director*  
**CLIMATE CHANGE COMMISSION (CCC)**  
Room 238, Mabini Hall, Malacañang Compound,  
San Miguel, Manila

**Re: Engagement of Energy Service Companies (ESCOs)**

Dear Secretary Sering:

We write in response to your letter dated 8 October 2012, requesting our opinion and recommendations on the proper procurement method and financing scheme for the implementation of the Sustainable Energy Efficiency Program (Program).

As represented, the Program aims to promote and expand energy efficiency and conservation among government buildings in line with CCC's National Climate Change Action Plan and the Department of Energy's Energy Management Program. This project will entail no initial cost to the government since it will be implemented in partnership with ESCOs, which shall provide the project expenses.

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

The rules and procedures for the procurement of goods, infrastructure projects and consulting services are provided under Republic Act (RA) 9184<sup>1</sup> and its revised Implementing Rules and Regulations (IRR). However, we wish to point out that the procurement rules and procedures embodied in RA 9184 and its associated revised IRR are only one of several other means of government contracting. There are other laws and regulations establishing other means of government contracting, such as RA 6957<sup>2</sup>, as amended by RA 7718, (otherwise known as the BOT Law) and Executive Order (EO) 423, Series of 2005<sup>3</sup>.

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.

<sup>1</sup> Otherwise known as the Government Procurement Reform Act.

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

<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 Republic Act No. 9184, otherwise known as "The Government Procurement Reform Act"

Such acquisition entails use of funds, regardless of source, in accordance with the methods and procedures (e.g., Competitive Bidding and any of the Alternative Modalities of procurement) laid down in RA 9184 and its IRR.

Simply put, RA 9184 provides the rules that should be followed in acquisition of goods, infrastructure projects, and consulting services in relation to an identified appropriation. We can deduce from the foregoing that if an acquisition does not involve expenditure of funds in relation to an identified appropriation, RA 9184 and its revised IRR do not apply. In line with this, Section 4.4 of the revised IRR states that it shall not apply to activities involving public-private sector infrastructure or development projects and other procurement covered by RA 6957, as amended by RA 7718, except those portions financed by the government.

### **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 the BOT Law or EO 423 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 Agreement. JV is defined under Section 5.4 of the JV Guidelines as a contractual 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, to jointly undertake an investment activity for the accomplishment of a specific, limited, or special goal, with the end view of facilitating private sector initiative in a particular industry or sector.

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, partners with a private entity which either assumes the costs of the project or infuses capital for its operation in pursuit of a common objective or goal.

In view of all the foregoing, and considering that the project expenses for the Program will be provided by the ESCOs, or through some banking facilitations, instead of the government entity concerned, we are of the view that the implementation of the Program, including the selection of partners and financing scheme therefor, may be most appropriately

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<sup>4</sup> Issued by NEDA pursuant to Section 8 of EO 423.

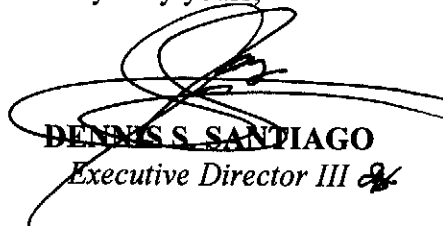
<sup>5</sup> Section 1.2 of the Revised IRR of RA 6957, as amended by RA 7718.

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

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

We hope our advice provided sufficient guidance on the matter. Note that this opinion is being issued on the basis of facts and particular circumstances 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*