

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

Rcd by: Roger Zuniga

NPM No. 138-2004

October 26, 2004

MR. JOSE U. ALBERTO II
Mayor
Municipality of Virac
Catanduanes

Dear Mayor Alberto:

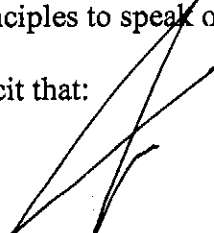
This refers to the letters dated September 9, October 11 and October 18, 2004, of your Municipality, which we received on September 21, October 11 and October 18, 2004, respectively. A reading of these letters would reveal the same issues to be resolved, to which we have already responded through a phone conversation with Mr. Virgilio Candelaria on October 12, 2004, to wit:

1. Whether or not the Municipality of Virac may participate in the auction of reconditioned heavy equipment such as a bulldozer; or otherwise stated, whether the said Municipality may procure a second hand bulldozer to be used in excavating pits and covering garbage, in implementing the Ecological Solid Waste Management Act of 2000 ;
2. Whether the requirements stated in Section 54.2 (b) of the Implementing Rules and Regulations Part A (IRR-A) of Republic Act No. 9184 (R.A. 9184) should be strictly followed, or the procuring entity has the leeway to directly negotiate a contract with a technically, legally and financially capable supplier;
3. Whether or not the procedures established under Commission on Audit (COA) Circular NO. 92-386 may still be practiced under R.A. 9184 and its IRR-A.

Procurement of Second-Hand Equipment

On this issue of procurement of second-hand equipment, R.A. 9184 and its IRR-A have for their letter and intent, the following provisions and principles to speak of:

1. Section 10 of R.A. 9184 and its IRR-A is explicit that:



“All procurement shall be done through competitive bidding, except as provided in Article XVI of this Act / Rule XVI of this IRR-A.”

It has always been emphasized that under the new procurement law which governs procurement contracts of all government agencies including local government units (LGUs), the general rule is competitive bidding; and, resort to alternative methods of procurement may only be done in highly exceptional cases.

The practice of purchasing second-hand equipment from an auction, when analyzed, partakes the nature of Direct Contracting, where the procuring agency directly contracts with one selected and preferred supplier or contractor. However, such purchase from an auction, cannot still be allowed considering that procurement through *Direct Contracting* may only be resorted to in the presence of the specific conditions mentioned under Sections 48 (b) and 50, of R.A. 9184 and its IRR-A, respectively; which conditions do not exist in the aforesaid situation where the need to procure a bulldozer suddenly arises.

2. The rule that the award of contract shall be made to the bidder with the Lowest Calculated and Responsive Bid¹ for procurement of goods, proves and supports the principle in government procurement that the most advantageous price and the *best quality* should be obtained for the government.

Clearly, purchase of second-hand equipment is not contemplated by the very letter and spirit of the law. We suggest, however, that the municipality may hire or procure for the aforesaid services needed in the implementation of the Ecological Solid Waste Management Act of 2000, instead of buying for their Municipality, a second-hand bulldozer.

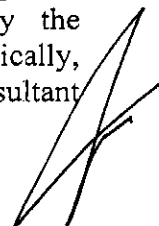
Section 54.2 (b) of the IRR-A

We wish to inform you that the same issue on whether the requirements under Section 54.2 (b) of the IRR-A for paragraphs (a) and (b) of Section 53 on Negotiated Procurement conflict with the concept of said method of procurement has been raised to us by the Philippine Air Force (PAF), which we have resolved in Non-Policy Opinion (NPM) No. 097-2004 dated July 19, 2004. We quote in verbatim the pertinent portions of the said opinion, to wit:

Strict Interpretation of Section 54.2 (b) of the IRR-A of R.A. 9184 vis-à-vis the Common Definition of the term “Negotiate”

Section 53 of R.A. 9184 and its IRR-A, pertinent portions of which are quoted hereunder, clearly defines *Negotiated Procurement* as:

Negotiated Procurement is a method of procurement of goods, infrastructure projects and consulting services, whereby the procuring entity directly negotiates a contract with a technically, legally and financially capable supplier, contractor or consultant only in the following cases:



¹ See Sec. 37.1 of the IRR-A

- a) Where there has been a failure of public bidding for the second time as provided in Section 35 of the Act and this IRR-A;
- b) In case of imminent danger to life or property during a state of calamity, or when time is of the essence arising from natural or man-made calamities or other causes where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities. In the case of infrastructure projects, the procuring entity has the option to undertake the project through negotiated procurement or by administration or, in high security areas, through the AFP

x x x x

In connection with this, Section 54.2 (b) of the same IRR-A further provides for the terms and conditions in undertaking Negotiated Procurement for cases falling under the aforequoted provisions, to wit:

For items (a) and (b) of Section 53, in the case of goods and infrastructure projects, the procuring entity shall draw up a list of at least three (3) suppliers or contractors which will be invited to submit bids. The procedures for the conduct of public bidding shall be observed, and the lowest calculated and responsive bid shall be considered for award. Moreover, the provisions of Section 21.2.4 of this IRR-A shall be observed.

As can be gleaned from the aforecited provisions, the legal definition of Negotiated Procurement, the specific circumstances when the said alternative method may be resorted to, as well as the terms, conditions and limitations in applying Negotiated Procurement are emphatically and categorically provided in R.A. 9184 and its IRR-A. Moreover, a reading of the aforementioned provisions would certainly express the mandatory and obligatory force of the procurement reforms contained therein. As such, we cannot agree with the idea that the terms and conditions specified under Section 54.2 (b) of the IRR-A of R.A. 9184 may be dispensed with and the procuring entity has the leeway to directly negotiate a contract with any technically, legally and financially capable supplier they prefer.

Likewise, we do not share the observation of the PAF that the commonly-accepted definition of "negotiate" appears to be contradictory with the requirement of the conduct of public bidding procedures under Section 54.2 (b) for cases of Negotiated Procurement falling under Sections 53 (a) and (b) of the IRR-A of R.A. 9184. Under the Rules on Statutory Construction, "the natural and ordinary meaning of words will however be disregarded in favor of a statutory meaning or a well-established technical meaning, or when it is plain and clear from the statute or from the context of the words within the statute that a different meaning was intended, or when to observe the commonly accepted meaning will defeat the manifest intention of the legislature or result in absurdity."² Indeed, it

² 82 C.J.S. Sec. 329, pp. 644, 645.

is an old and well-established maxim that words ought to be more subservient to the intent, and not the intent to the words.³

Procedures under COA Circular No. 92-386

Similarly, in addressing the same issue raised by the Municipal Treasurers League of Camarines Sur (MUNTREALCAS), we had the occasion to opine on whether COA Circular No. 92-386, having been issued in pursuance to Section 383 of R.A. 7160, has been superseded by R.A. 9184. Pertinent portions of NPM NO. 48-2004 dated April 14, 2004 are quoted hereunder to wit:

Section 358 of R.A. 7160 and COA Circular 92-386 are superseded by R.A. 9184 and its IRR-A

Section 358 of Republic Act No. 7160 ("R.A. 7160") is quoted hereunder, to wit:

Requirement of Requisition. – Any order for supplies shall be filled by the provincial or city general services officer or the municipal or barangay treasurer, as the case may be, for any office or department of a local government unit only upon written requisition as hereinafter provided.

In this connection, we quote Section 76 of Republic Act No. 9184 ("R.A. 9184"), as well as Section 75 of its Implementing Rules and Regulations, Part A ("IRR-A"):

" x x x This law amends **Title Six, Book Two of Republic Act No. 7160**, otherwise known as the "Local Government Code of 1991" x x x." (Emphasis Supplied)

Considering that Title Six, Book Two of Republic Act No. 7160 ("R.A. 7160") covers **Sections 355 – 383** of the said law, pertaining to "Property and Supply Management in the LGUs," there is no question that Section 358 thereof has been expressly superseded by R.A. 9184.

With regard to COA Circular No. 92-386 dated October 20, 1992, which prescribes rules and regulations on Supply and Property Management in LGUs, pursuant to Section 383 of R.A. 7160, which has also been declared non-existent based on the aforementioned, we are of the opinion that the same has been repealed by R.A. 9184 and its IRR-A following the above citation. This is supported further by an eloquent, although silent statement under Sections 76 and 75 of R.A. 9184 and its IRR-A, respectively, quoted hereunder, to wit:

"x x x Any other law, presidential decree or issuance, executive order, letter of instruction, administrative order, proclamation, charter, **rule or regulation and/or parts thereof contrary to or**

³ Alcantara, *Statutes*, 1997 Ed. p. 58 citing *Bailey vs. Abington*, 201 Ark. 1072. 148 SW (2nd) 176.

**inconsistent with the provisions of this Act is hereby repealed,
modified or amended accordingly.”**
(Emphasis Supplied)

Conclusion

In view of the foregoing, we conclude as follows:

1. The purchase of second-hand equipment is not allowed under R.A. 9184 and its IRR-A;
2. The requirements specified under Section 54.2 (b) in connection with Section 53 paragraphs (a) and (b) of the IRR-A on negotiated procurement should be strictly followed;
3. The procedures established under COA Circular No. 92-386, pursuant to Section 383 of R.A. 7160 are deemed superseded by the procurement rules and procedures embodied under the new law, R.A. 9184 and its IRR-A.

With the foregoing elucidations, we trust that your issues have been clarified. Please bear in mind that this opinion is 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.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director

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*

September 22, 2004

MR. FERNAN A. GIANAN

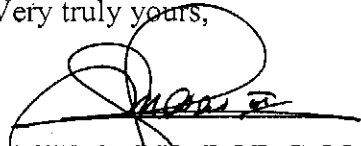
Chairman, Bids and Awards Committee
Municipality of Virac
Province of Catanduanes

Dear Mr. Gianan:

This refers to your letter dated September 9, 2004, which we received on September 21, 2004, addressed to the Government Procurement Policy Board (GPPB) through Executive Director Jose Martin C. Syquia, requesting for clarification on 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

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
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October 11, 2004

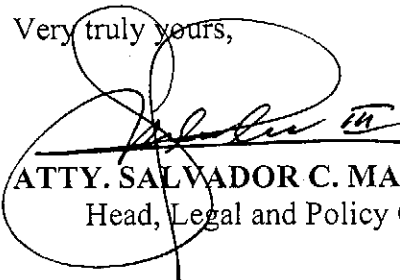
MR. VIRGILIO A. CANDELARIA
Municipal Administrator
Office of the Mayor
Municipality of Virac, Catanduanes

Dear Mr. Candelaria:

This refers to your letter dated October 11, 2004, which we received by facsimile on even date, addressed to the Government Procurement Policy Board thru its Technical Support Office's Executive Director, requesting for clarification on Republic Act 9184 and its Implementing Rules and Regulations Part A relative to a bidding you earlier undertook.

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 Government Procurement Policy Board for appropriate resolution should referral thereto becomes necessary.

Very truly yours,



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