

REPUBLIC OF THE PHILIPPINES  
**GOVERNMENT PROCUREMENT POLICY BOARD**  
Technical Support Office

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**NPM No. 139-2004**

November 3, 2004

**HON. RAUL M. GONZALEZ**

Acting Secretary  
Department of Justice  
Manila

**Re : Opinion on Philippine Ports Authority's Request for Exemption from the Conduct of Public Bidding for its Proposed Extension of Berth and Berthing Facilities at the Batangas Port Development Project, Phase 2**

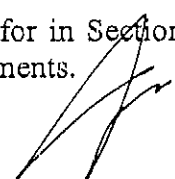
Dear Acting Secretary Gonzalez:

This refers to your letter dated September 7, 2004, which we officially received on October 18, 2004, addressed to the Honorable Secretary Emilia T. Boncodin of the Department of Budget and Management as Chairperson of the Government Procurement Policy Board (GPPB) through the undersigned, requesting opinion on the request for exemption from the conduct of public bidding submitted by the Philippine Ports Authority (PPA) in connection with its proposed extension of berth and berthing facilities at the Batangas Port Development Project, Phase 2, Package 1 (BPDP2).

This request is being raised in view of the letters of PPA, dated August 16 and May 20, 2004, to then Secretary of Justice Merceditas N. Gutierrez in compliance with the requirement under Section 4 of Executive Order 109-A, Series of 2003 (E.O. 109-A). In its first letter to the Department of Justice (DOJ), PPA mentioned that the implementation of the proposed extension through negotiated procurement will be funded out of the balance of the BPDP2 loan from the Japan Bank for International Cooperation (JBIC).

The issues to be resolved are as follows:

1. Whether or not the proposed extension of berth and berthing facilities at the BPDP2 may be exempted from the conduct of public bidding as required under Republic Act 9184 (R.A. 9184); and
2. Whether or not compliance with the requirements provided for in Section 4 of E.O. 109-A is necessary for projects funded out of loan agreements.



## Applicable Rules and Regulations for Foreign-Funded Procurement Activities

The Government's policy is to uphold and faithfully comply with the commitments in its international agreements with other states and international organizations. 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.<sup>1</sup> 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.**<sup>2</sup>

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. Concomitantly, the Implementing Rules and Regulations (IRR) for R.A. 9184 shall be divided in two (2) parts, namely, IRR Part A (IRR-A) and IRR Part B (IRR-B). 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.

<sup>1</sup> Tañada vs. Angara, GR 118295, May 2, 1997.

<sup>2</sup> Emphasis supplied.

The IRR-B for foreign-funded procurement activities shall be the subject of a subsequent issuance.<sup>3</sup>

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 in the loan agreement. It should be emphasized, however, that in case such loan agreement is silent as to the governing guidelines, the provisions of the IRR-A of R.A. 9184 shall apply.

### Applicability of E.O. 109-A to Foreign Funded Projects

E.O. 109-A entitled "AMENDING EXECUTIVE ORDER NO. 109 DATED MAY 27, 2002 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," was issued to streamline procedures for the review and approval of government contracts and facilitate expeditious implementation of development projects and the speedy delivery of basic services while promoting transparency, impartiality, and accountability in government transactions.<sup>4</sup>

As differentiated from the rules and procedures for modes of acquiring government contracts, E.O. 109-A provides for the rules and procedures in the review and approval of all government contracts. It is expressed on general terms; and notwithstanding the lack of a provision pertaining to its scope and application, it is apparent that it does not make any distinction with respect to its applicability to government contracts. Apparently, its title is categorical on this note.

It has been repeatedly declared by the courts that where the law speaks in clear and categorical language, there is no room for interpretation or construction; there is only room for application.<sup>5</sup> As such, considering that E.O. 109-A is categorical on its application, the rules and procedures provided therein shall apply to all government contracts regardless of the funding source or mode of its acquisition.

### Conclusion

Based on the discussions above, our opinion on each of the issues may be summarized as follows:

1. The propriety or validity of implementing the proposed extension of berth and berthing facilities at the BPDP2 through a supplemental agreement/negotiated contract rests on the determination by and concurrence of JBIC as the lending institution for the project.
2. Notwithstanding the fact that the proposed extension of berth and berthing facilities at the BPDP2 will be funded out of the balance from the original loan agreement

<sup>3</sup> Emphasis supplied.

<sup>4</sup> 1<sup>st</sup> WHEREAS clause, Executive Order 109-A, Series of 2003.

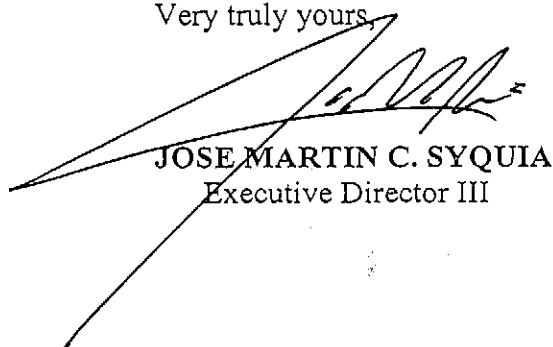
<sup>5</sup> Alcantara, Samson, *Statutes*, 1997 Edition, p. 32.

with JBIC, the rules and procedures on the review and approval process provided for in E.O. 109-A should still be followed.

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

Copy furnished:

HON. EMILIA T. BONCODIN  
Secretary, DBM  
Chairperson, GPPB