

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*

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**NPM No. 141-2004**

November 5, 2004

**ENGR. ARTEMIO A. MARTIN**  
Municipal Engineer  
Office of the Municipal Engineer  
Municipality of Sablan  
Province of Benguet

**Re : Queries on Republic Act 9184 (R.A. 9184) and its Implementing Rules and Regulations-Part A (IRR-A)**

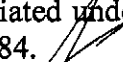
Dear Engineer Martin:

This refers to your letter dated September 20, 2004 which we received on October 12, 2004, requesting for clarification on Republic Act No. 9184 (R.A. 9184) and its Implementing Rules and Regulations-Part A (IRR-A), specifically on the use of Negotiated Procurement on Infrastructure Projects funded under the Calamity Fund of the Municipal Government of Sablan.

This query stems from the issuance by the Municipal Government of Sablan Administrative Order No. 10 and Resolution No. 04-124. Both issuances concern the use of the Municipality's calamity fund for Negotiated Procurement on certain infrastructure projects. Hence, the principal issue for our comment and/or resolution is as follows:

Whether or not all projects and programs under the 5% calamity fund will no longer pass through the BAC, since the Sangguniang Bayan Resolution has already identified the mode of procurement.

Inevitable in the resolution of the said issue are sub-issues which we endeavor to tackle jointly in the succeeding discussion. These sub-issues are reproduced herein as they were raised in your letter, as follows:

1. Whether or not the 5% calamity funds are subject to the provisions of the procurement law.
  2. Whether or not the Administrative Order instructing the BAC to make use of Negotiated Procurement on projects appropriated under the 5% calamity fund is in accordance with the provisions of R.A. 9184.
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**Procurement activities are subject to the provisions of R.A. 9184 regardless of source of funds**

What is sought to be clarified in the first sub-issue is the application of R.A. 9184 over the Calamity Fund of the Municipal Government of Sablan. Precisely on this regard, the law does not deal with funds or their source; but with the procurement activities for which it is allotted or those which it is contemplated to finance. Section 4 of R.A. 9184 provides the basis for this view. The provision provides, thus:

*Sec. 4. Scope and Application* -- 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 department, 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.

A cursory reading of the foregoing provision of law yields the necessary inference that the procurement activity for which the 5% Calamity Fund is allotted – not the fund itself – is subject to the provisions of R.A. 9184. In other words, an appropriation for procurement, regardless of its character or source, intended for calamity or otherwise, is within the reach of the law for purposes of regulation. For as long as the same is utilized or is contemplated to be spent for any procurement activity, it shall, by force, fall within the ambit of the present procurement law; although, what remains to be at the middle of the statutory measure is the procurement activity itself.

On the question of whether the Municipal Mayor may instruct the BAC to make use of Negotiated Procurement on projects appropriated under calamity funds, the prescription of the IRR-A in Sections 48.1 and 53 (b) proves helpful. Section 48.1 states, to wit:

Subject to the prior approval of the head of the procuring entity or his duly authorized representative, and whenever justified by the conditions provided in this Act, the procuring entity may, in order to promote economy and efficiency, resort to any of the alternative methods of procurement provided in this Rule. In all instances, the procuring entity shall ensure that the most advantageous price for the Government is obtained.

Section 53 amplifies the conditions under which negotiated procurement may be resorted to. Paragraph (b) thereof states:

- b) In case of imminent danger to life or property during a state 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 projects, the procuring entity has the option to undertake the project through negotiated procurement or by administration or, in high security risk areas, through the AFP;

It is submitted that although the head of the procuring entity is empowered to identify the alternative mode of procurement which may be used by the procuring entity, the same cannot however, *ipso facto*, adopt a pre-identified alternative mode of procurement in as much as the law requires the attendance of certain exceptional conditions under which alternative mode of procurement may be resorted to. In other words, only under justified circumstances may competitive public bidding may be dispensed with and alternative mode of procurement be availed of. Necessarily, the resort to alternative mode of procurement may arise depending on the exigencies of the situation, and may be determined on a "case-to-case basis," so to speak.

Hence, the Administrative Order subject of this query should, at most, be construed as an instruction for the use of the 5% Calamity Fund for the specific project contemplated. It should not in any way be a blanket authority for the resort to alternative mode of procurement; nor offer to be a basis for the pre-identification of the mode of procurement for all cases funded by the 5 % Calamity Fund. Interestingly, the conditions under R.A. 9184 providing for the basis for the resort to alternative methods of procurement may differ in significant terms to those conditions that justify the use of the calamity fund.

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 and circumstances.

We trust that this clarifies the matters.

Very truly yours,



**JOSE MARTIN C. SYQUIA**  
Executive Director III

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October 14, 2004

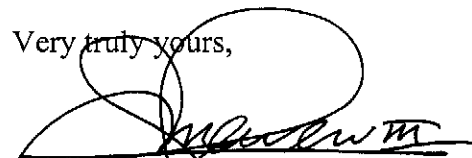
**ENGR. ARTEMIO A. MARTIN**  
Municipal Engineer  
Office of the Municipal Engineer  
Municipality of Sablan  
Province of Benguet

Dear Engr. Martin:

This refers to your letter dated September 20, 2004, which we received on October 12, 2004, addressed to Executive Director Jose Martin C. Syquia, requesting for clarification on Republic Act 9184 and its Implementing Rules and Regulations Part A, specifically the use of Negotiated Procurement on infrastructure projects funded under the calamity fund.

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