



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

NPM No. 155-2012

21 December 2012

MR. LEO TERESO A. MAGNO
Administrator
PHIVIDEC INDUSTRIAL AUTHORITY (PIA)
PHIVIDEC Industrial Estate – Special Economic Zone
Tagoloan, Misamis Oriental

**Re: Applicability of the Provisions of Republic Act (RA) No. 9184
and its Revised Implementing Rules and Regulations (IRR)**

Dear Administrator Magno:

This is in response to your letter dated 6 September 2012, seeking clarification on the applicability of the provisions of RA 9184, particularly, on whether competitive bidding may be undertaken in PHIVIDEC's expansion of the Mindanao Container Terminal (MCT).

As represented, the MCT is an international seaport facility owned by PIA, the management and operation of which was awarded to International Container Terminal Services, Inc. (ICTSI) after public bidding. Said management and operation of MCT is covered by a Concession Contract between PIA and ICTSI. Under the Concession Contract, ICTSI has the obligation to pay PIA concession fees composed of a fixed fee and a variable fee from a percentage of annual gross revenues generated from MCT operations. However, ICTSI subsequently assigned its rights and privileges as operator of MCT to its wholly owned subsidiary, Mindanao International Container Terminal Services, Inc. (MICTSI), with the consent of PIA. In October 2011, MICTSI informed PIA that due to the increasing cargo volume and ship traffic, there is a need to expand the MCT to accommodate more clients, thereby increasing profitability of the port. For this purpose, MICTSI proposed to undertake the design and construction of the port expansion with the costs to be charged on future fees and charges owed by MICTSI to PIA. Salient provisions of the Concession Contract cited in your letter appear to show that the Operator and PIA may agree on additional areas to be covered by the contract.

Based on the above-cited representation, PIA seeks guidance on the applicability of RA 9184 and its revised IRR for the proposed port expansion, specifically requesting consideration of the following aspects:

1. There is an existing contractual relationship between PIA and MICTSI, which was established through competitive bidding; and, B

2. Government funds will not be used for the implementation of the project. However, the private entity will be allowed reimbursement of construction costs charged against the concession fees in the existing contract.

Applicability of RA 9184 and its Revised IRR

We wish to inform you that RA 9184 and its associated rules would apply in all cases where public funds are to be allocated and utilized for government procurement activities. In other words, for as long as public funds 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.¹ 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 of public funds.² Conversely, if the government transaction or activity does not involve use of public funds, such transaction or activity will not be covered by RA 9184 and its IRR.

We note that despite the representation that no government funds will be used for the port expansion project because MICTSI has offered to advance all costs therefor, we take due notice and observation that such offer is qualified by the condition that the expenses to be advanced will be deducted or charged from future concession fees and charges owed by MICTSI to PIA until the costs advanced are recovered from the operation of the port.

A careful scrutiny of MICTSI's proposal will show that during the construction for the expansion of the port, and even thereafter, MICTSI will offset and charge the costs of the port expansion against the receivable concession fees due to PIA. Upon a cursory review, it is manifest that at the end of the transaction, the funds that would have been purportedly advanced by MICTSI for the undertaking are the very funds that PIA should have regularly received from MICTSI in the form of fees and charges under the original Concession Contract, which are, in reality, PIA's own money expected from the latter's accounts receivables from MICTSI, and therefore considered collectible public funds due to PIA.

Viewed on another perspective, a situation exists here where public funds that would have accrued and received by government, are instead forfeited through an established and agreed offsetting facility. Although the funds to be collected through the Concession Contract are not "taxes" in the strictest sense of the term, it may be viewed analogously because these funds are necessary for the operation and conduct of business of PIA in the light of the "lifblood principle"; thus, understood alongside taxation principles, the Supreme Court in the case of *Francia vs. Intermediate Appellate Court*³ ruled that funds derived from this class of transaction are not subject to legal compensation or offsetting.

Considering that the transaction ultimately involve the use of public funds, it is our considered view that the acquisition of the contract for the construction of port expansion should be governed by RA 9184 and its IRR, and procured by way of competitive bidding, unless circumstances exist justifying resort to alternative methods of procurement provided under the procurement law and rules. Directly engaging MICTSI for the port expansion project despite the existence of the circumstances presented above may ultimately result in a

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¹ NPM 141-2004 dated 5 November 2004.

² NPM 129-2012 dated 16 October 2012.

³ G.R. No. L-67649, June 28, 1988.

circumvention of the rules on the use of public funds, and a violation of the provisions of RA 9184 and its IRR on the selection process relative to procurement contracts.

Applicability of RA 6957, as amended by RA 7718, and its Revised IRR


Assuming, for the sake of discussion, that the transaction does not involve public funds, we note that in the case of projects where the government is set to earn or profit rather than spend public funds, and the transaction involves partnership with private sector, generally termed as public-private partnership, we look to the application of RA 6957⁴, as amended by RA 7718, otherwise known as the Build Operate and Transfer (BOT) Law.

The BOT Law and its revised IRR provides that it shall cover private sector infrastructure or development projects, which is defined under Section 1.3(v) of the revised BOT Law as those projects normally financed and operated by the public sector but *which will now be wholly or partly implemented by the private sector.*⁵

It should also be noted that the BOT Law recognizes transactions, other than the BOT scheme itself, *e.g., Build-Own-and-Operate*⁶ and *Build-Transfer-and-Operate*⁷, which may include contractual arrangements entered into between the public and private sector, whereby the project proponent undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof.⁸

Emphasis should also be made that Section 2.2 of the revised BOT Law, particularly Item (m) thereof, identifies industrial and tourism estates or townships, including ecotourism projects, such as terrestrial and coastal/marine nature parks, among others, and related infrastructure facilities and utilities as among the projects eligible to be put up for construction, rehabilitation, improvement, betterment, expansion, modernization, operation, financing and maintenance in accordance with the BOT Law.

In conclusion, we reiterate that in case of projects wherein the government entity partners with the private sector in which the latter shoulders the cost or where the former is set to earn or profit rather than spend public funds, commonly termed as PPP, it is advisable to look into the applicability of the BOT Law.⁹

Based on the foregoing, with the assumption that the port expansion project will be financed, constructed, maintained and operated fully by MICTSI, said project may be properly undertaken and addressed through an observance of PPP-related laws, rules, and regulations, such as the BOT Law.¹⁰ In this regard, we additionally suggest that coordination with the PPP Center should be established for proper guidance. 

⁴ An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes.

⁵ *Id.*

⁶ Section 2(d), RA 7718.

⁷ Section 2(f), RA 7718.

⁸ Section 2(b), RA 7718.

⁹ *Supra* note 2.

¹⁰ *Id.*

Summary

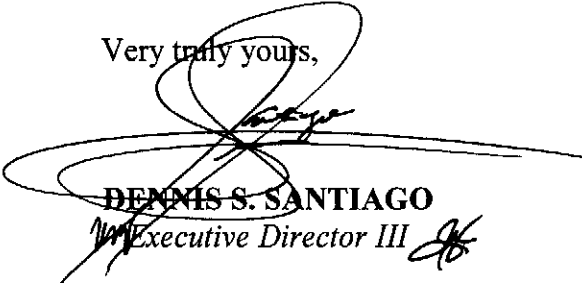
We reiterate that since the above-described transaction between PIA and MICTSI will be ultimately funded using public funds, such transaction should be entered into in accordance with the provisions of RA 9184 and its IRR. However, assuming that public funds will not be involved in the transaction, and instead will be fully financed by MICTSI, the rules and regulations under RA 6957, as amended by RA 7718, and its revised IRR should be considered.

Lastly, in considering the existing contractual relationship between PIA and MICTSI, we wish to point out that the salient provisions mentioned in your letter that seemingly support the engagement of MICTSI for the development of additional concession areas and port expansion are not mandatory in character, and are merely options that both parties may agree to exercise. At the end of the day, it will be prudent and still in the best interest of PIA to define and determine the parameters, extent, scope and technical coverage, design, cost and other related endeavors underlying the expansion of the ports it maintains.

In this regard, without any intention of encroaching upon its prerogative and judicious discretion, rather with a view to ensuring the most advantageous terms for the government, we respectfully suggest that PIA re-evaluate the proposal of MICTSI and the provisions of the Concession Contract, as well as the resulting contractual arrangement, *vis-à-vis* the applicability of the provisions of RA 9184 or RA 6957, as amended by RA 7718, and its respective revised IRRs.

We hope that our advice provided sufficient guidance on the matter. Note that this opinion is being issued on the basis of the facts and particular situation presented, and may not be applicable given a different set of facts and circumstances. Should you have further questions, please do not hesitate to contact us.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director III