



**NPM No. 18-2009**

09 March 2009

**MR. RENATO T. CRUZ**

*Chairman, Bids and Awards Committee*

**ENVIRONMENTAL MANAGEMENT BUREAU**

**DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

**DENR Compound, Visayas Ave,**

**Diliman, Quezon City**

**Re: Public/Competitive Bidding for GOCC Requirements**

Dear Mr. Cruz,

This is in response to your letter dated February 11, 2009 seeking clarification on whether or not the National Power Corporation (NPC), the National Transmission Corporation (TRANSCO), and the Power Sector Assets and Liabilities Corporation (PSALM) would have to undergo the usual bidding procedures (i.e. public/competitive bidding) for the engagement of the services of Philippine National Oil Company-Alternative Fuel Corporation.

Relative to the above query, you presented the following factual considerations:

1. The Department of Environment and Natural Resources-Environmental Management Bureau (DENR-EMB), in collaboration with the United Nations Industrial Development Organization (UNIDO) and Global Environmental Facility (GEF) is currently implementing the "Global Programme to Demonstrate the Viability and Removal of Barriers that Impede Adoption and Successful Implementation of Available Non-Combustion Technologies for Destroying Persistent Organic Pollutants (POPs) in the Philippines (hereinafter referred to as the Project);"
2. The operating entity of the destruction facility to be established is the Philippine National Oil Company-Alternative Fuel Corporation (PNOC-AFC);
3. For the demonstration phase of the Project, DENR entered into a memorandum of agreement with NPC, TRANSCO, and PSALM whereby the latter committed to supply around 1,500 tons of PCB oil and PCB contaminated equipment to the non-combustion facility of the Project;

4. NPC, TRANSCO and PSALM will avail of the services of PNOG-AFC as the operating entity of the destruction facility provided that the destruction cost is lower than the current export and destruction costs; and
5. PNOG-AFC, NPC, TRANSCO and PSALM are all government-owned and controlled corporations.

Pertinent to the resolution of the issue is Section 4 (*Scope and Application*) of Republic Act No. 9184 (RA 9184), the Government Procurement Reform Act (GPRA) and its Implementing Rules and Regulations Part A (IRR-A) which provides, viz:

"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. (*Emphasis provided*)."

It is clear from the aforecited provision that the procurement of the services of PNOG-AFC, by TRANSCO, NPC and PSALM, being government-owned and controlled corporations, are covered by R.A. 9184 and its IRR-A.

Corollary thereto is the fact that the default mode of procurement under R.A. 9184 and its IRR-A is competitive bidding. It is only in highly exceptional cases when resort to alternative modes of procurement may be allowed, subject, however to prior approval of the head of the procuring entity.<sup>1</sup> Thus, as a general rule, NPC, TRANSCO and PSALM must undergo public, competitive bidding for the engagement of the services of PNOG-AFC.

Furthermore, although resort to alternative modes may be allowed, the subject procurement of services does not fall under the agency-to-agency arrangement provision of Sec. 53 (e), Rule XVI of the IRR-A on negotiated procurement, viz:

**"Section 53. *Negotiated Procurement***

*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:

x x x

- a) Procurement of infrastructure, consulting services and goods from another agency of the Government, such as the PS-DBM, which is tasked with a centralized procurement of commonly used Goods for the government in accordance with Letters of Instruction No. 755 and Executive Order No. 359, series of 1989. For purposes of this paragraph, the term agency shall exclude GOCCs incorporated

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<sup>1</sup> Section 10, Article IV, R.A. 9184

under Batas Pambansa Blg. 168, otherwise known as the Corporation Code of the Philippines. x x x”

Based on the foregoing, NPC, TRANSCO and PSALM cannot directly engage the services of PNOC-AFC through the agency-to-agency arrangement since the latter is a GOCC incorporated under the Corporation Code.

Nevertheless, if it could be established, pursuant to the international law principle of *pacta sunt servanda* embodied in Section 4 of R.A. 9184, that the agreement between DENR-EMB, UNIDO and GEF partakes of the nature of a treaty or executive or international agreement, and, the procedure for the procurement of the services of the operator of the destruction facility is specifically provided therein, then such procurement procedure would have to be observed by DENR, NPC, TRANSCO and PSALM in engaging the services of PNOC-AFC, albeit subject to mutually agreeable terms and conditions.

This opinion is being rendered on the basis of the facts as represented.

We hope to have provided sufficient guidance on the matter. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,

  
**RUBY U. ALVAREZ**  
*Executive Director III*