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Postmaster/Teller

**NPM No. 19-2008**

04 September 2008

**HON. LYNN DANA0-MORENO**

*Assistant Executive Secretary*  
*Chairman, Bids and Awards Committee*  
**OFFICE OF THE PRESIDENT**  
Malacañang, Manila

Dear AES Moreno:

This pertains to your letter dated 2 September 2008 requesting for a definition of an "exclusive dealer" in the context of Section 50 (c), Rule XVI of the Implementing Rules and Regulations Part A (IRR-A) of Republic Act No. 9184 (R.A.9184) on Direct Contracting as an alternative mode of procurement.

We wish to inform you that neither Republic Act No. 9184 (R.A. 9184) and its Implementing Rules and Regulations Part A (IRR-A) nor the Generic Procurement Manuals (GPM) provides for a categorical definition of the term "exclusive dealer." Likewise, the Government Procurement Policy Board (GPPB) has not issued any resolution, circular or guideline defining such.

Notwithstanding the foregoing, please be advised that Section 50 (c) of the R.A. 9184 and its IRR-A expressly qualifies an "exclusive dealer" as one which does not have sub-dealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the government.


In addition, Volume II of the GPM – *Manual of Procedures for the Procurement of Goods*, provides guidance in determining the exclusivity of a dealer. It states that the procurement unit or office should first study the supply market by conducting an extensive survey of the industry in order to confirm the exclusivity of the source, prior to engaging in Direct Contracting. The GPM also emphasizes that exclusive dealership does not per se give rise to the use of Direct Contracting. The supplier/contractor/manufacturer must prove, through proper documentation, that it is the sole source of said goods, equipment or services required.

Furthermore, we wish to note that, under the *Guidelines in the Determination of Eligibility of Foreign Suppliers, Contractors and Consultants to Participate in Government Procurement Projects*, in cases where the procuring entity intends to procure goods from an exclusive local manufacturer, supplier, distributor or dealer through Direct Contracting under Section 50 (c) of the IRR-A of R.A. 9184, the procuring entity shall (in order to prevent situations that defeat competition or restrain

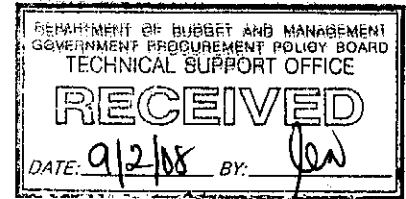
trade), before commencing negotiations with a local supplier, post through the website of the procuring entity, if any, and in the Philippine Government Electronic Procurement System (PhilGEPS), an invitation to foreign manufacturers to submit a manifestation of its intention to participate. Should any foreign manufacturer submit such manifestation within the period prescribed in the invitation, the procuring entity shall commence the conduct of public bidding. If no foreign manufacturer submits such manifestation within the said period, the procuring entity will now be certain that said item indeed will be coming from an exclusive dealer and the procuring entity concerned may proceed with the intended procurement through Direct Contracting under Section 50 (c).

We trust that this clarifies matters. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,

  
**EMILUISA C. PEÑANO**  
*Officer-in-Charge*

**Office of the President  
of the Philippines  
Malacañang**



**OP-Bids and Awards Committee**

September 2, 2008

**Atty. Ruby U. Alvarez**  
Executive Director  
Government Procurement Policy Board  
Emerald Avenue, Rasols  
Ortigas Center, Pasig City

Attention : **Atty. Emiluisa C. Peñano**

Madam:

May we request a definition of "exclusive dealer" as mentioned in Section 50 (c), Rule XVI of the IRR-A of R.A. No. 9184 (Direct Contracting as an Alternative Mode of Procurement).

We shall highly appreciate your kind and expeditious action to this request.

Thank you and warm personal regards.

Very truly yours,

**LYNN DANAO MORENO**  
Assistant Executive Secretary &  
OP-BAC Chairman



## TECHNICAL SUPPORT OFFICE

Unit 2506 Raffles Corporate Center,  
F. Ortigas Jr. Avenue, Ortigas Center,  
Pasig City, Philippines 1605

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### CERTIFICATE OF APPEARANCE

This is to certify that the following personnel from the General Services Office of City Government of Lipa, Batangas, appeared before this office on 1 September 2008 to inquire on Republic Act 9184 and its IRR-A (with GPPB Updates).

1. Mr. Gerardo Carandang
2. Ms. Marilyn Molino
3. Ms. Myra Acusa
4. Ms. Judy Del Rio
5. Mr. Nazario Matias

**MR. ANDY G. MATULA**

PMO II, Legal and Policy Group

*[Handwritten signature]*



REPUBLIC OF THE PHILIPPINES  
DEPARTMENT OF JUSTICE  
OFFICE OF THE GOVERNMENT CORPORATE COUNSEL  
3rd Floor MWSS Administration Building, Katipunan Road  
Bakara, Quezon City

OPINION NO. 213  
Series of 2007

26 September 2007

MR. CLARITO L. MAGSINO  
President & CEO  
DBP DATA CENTER, INC.  
22/F Pacific Star Building  
Sen. Gil Puyat Avenue  
Makati City

*[Handwritten signature]*  
Oct 1, 2007  
2:22  
REC'D

Re : Legal opinion on the amendments to Section 53 of the  
Implementing Rules and Regulations Part A of  
Republic Act No. 9184

Gentlemen:

This refers to your request for legal opinion as regards the Government Procurement Policy Board (GPPB) Resolution No. 03-2007 ("Resolution"), otherwise known as "Amending Section 53 (e) of IRR-A of R.A. 9184 to include Infrastructure Projects and Consulting Services", the relevant portion of which is quoted hereunder:

"e) 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

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Series of 2007



26 September 2007  
Page 3 of 5

"SEC. 63. Organization and Functions. - A Government Procurement Policy Board (GPPB) is hereby established to: (a) protect national interest in all matters affecting public Procurement, having due regard to the country's regional and international obligations; (b) formulate and amend, whenever necessary, the IRR and the corresponding standard forms for Procurement; (c) ensure that Procuring Entities regularly conduct Procurement training programs and prepare a Procurement operations manual for all offices and agencies of government; and (d) conduct an annual review of the effectiveness of this Act and recommend any amendments thereto, as may be necessary." (emphasis supplied)

By express provision of R. A. 9184, the GPPB has the power to make rules and regulations to protect national interest in all matters affecting public procurement. However, it may make only such rules and regulations as are within the limits of the power granted to it. In addition, such rules and regulations should be uniform in operation, reasonable, and not unfair or discriminatory. The Supreme Court, in the case of *JMM Promotion and Management, Inc., and Kary International, Inc., vs. Court of Appeals*,<sup>2</sup> recognized and upheld the right to classify, thus -

" x x x the Constitution does not forbid classification for so long as such classification is based on real and substantial differences having a reasonable relation to the subject of the particular legislation. If classification is germane to the purpose of the law, concerns all members of the class, and applies equally to present and future conditions, the classification does not violate the equal protection guarantee."

The 1987 Constitution of the Philippines recognizes the difference between a GOCC with original charters from a GOCC created through the general corporation law (Section 2 [1], Article IX and Section 16, Article XII, 1987 Constitution). The civil service system applies to GOCCs with original charters while the Labor Code of the Philippines applies to GOCCs incorporated under the Corporation Code of the Philippines.<sup>3</sup> The 1987 Constitution further provides that GOCCs may be

<sup>2</sup> G.R. No. 120095, August 5, 1996.

<sup>3</sup> Section 2 [1], Article IX, 1987 Constitution in relation with Section 6, Labor Code.

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further shows that there exist a parent-subsiary relationship between DBP and DCI. In fact, DCI's Board of Directors and stockholders are senior officials of DBP.

Under the Implementing Rules and Regulations of the Securities Regulations Code, the term "control" is the power to govern the financial and operating policies of an enterprise so as to obtain benefits from its activities. Control is presumed to exist when the parent owns, directly or indirectly through subsidiaries, more than half of the voting power of an enterprise unless, in exceptional circumstances, it can be clearly demonstrated that such ownership does not constitute control.

Based on the foregoing, since DBP has the power of control over its subsidiary, i.e., the power to direct or cause the direction of the management and policies of its subsidiary either through the ownership of the shares or by existence of a contract, DBP may negotiate directly with DCI to render IT services. Section 33 of the Corporation Code recognizes as valid a contract between two (2) or more corporations which have interlocking directors (i.e., one some or all of the directors in one corporation is/are also director/s in another corporation) as long as there is no fraud and the contract is fair and reasonable under the circumstances. However, we suggest that this matter be confirmed before the GPPB as the policy-making body on public procurement as an exception to Resolution No. 03-2007.

Please be guided accordingly.

Very truly yours,

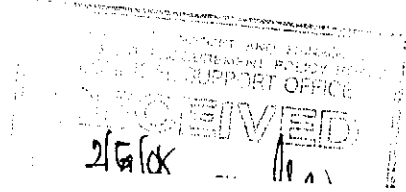
ALBERTO C. AGRA

Government Corporate Counsel



February 4, 2008

MS. EMILUISA PEÑANO  
Executive Director II  
GOVERNMENT PROCUREMENT POLICY BOARD  
Technical Support Office  
Unit 2506 Raffles Corporate Center  
F. Ortigas Jr. Road  
Ortigas Center, Pasig City



*Agals,*  
*Let's include this in*  
*agenda of TWG of GPPB*  
*this march under other*  
*matters.*  
*cc: Atty. Enmy 2/10/08*

Dear Ms. Peñano:

In your letter dated November 26, 2007, you informed us that the GPPB Technical Support Office shall conduct further research and/or study before any opinion can be rendered by your Office on our request for clarification of the term "Agency", as specified under Section 53(e) of the IRR, Part A of the Republic Act No. 9184 and as amended by GPPB Board Resolution No. 03-2007.

We believe that it is the Government's role to provide the environment of free enterprise where private sector business will thrive. The inconsistent application of the term "Agency" in Sections 4 and 53(e) of the IRR has placed DCI on unequal footing with its private sector counterparts in providing services to the same Government that created DCI. This inconsistency is clearly disadvantageous to Government.

In the spirit of fair play, we reiterate our request for clarification and permission to dissolve our BAC. We will greatly appreciate your valuable help in bringing the issue to light not only for DCI but for all other GOCCs incorporated under the Corporate Code of the Philippines.

Thank you.

Very truly yours,

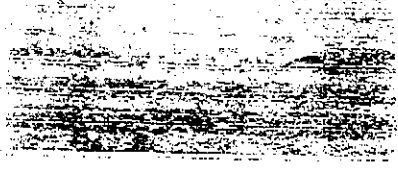
  
CLARITO L. MAGASINO  
President & CEO

Encl : GPPB TSO response dated November 26, 2007  
DCI letter to GPPB TSO dated November 16, 2007  
GPPB Resolution No. 03-2007

Cc : Atty. Ruby Alvarez, Executive Director III

*points to RA 1086*  
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*PD 64 - 1973*  
*GOCCs*  
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*Duke*

26 November 2007

**MR. CLARITO L. MAGSINO**  
*President and CEO*  
**DRP DATA CENTER, INC.**  
22 Floor Pacific Star Building,  
Sen. Gil Puyat Avenue, Makati City

Dear Mr. Magsino:

This is to acknowledge receipt by this office, on 20 November 2007, of your letter-  
query requesting for clarification of the term "Agency" as specified under Section 53 (e) of  
the Implementing Rules and Regulations Part A of Republic Act No. 9184, as amended by  
Government Procurement Policy Board Resolution No. 03-2007.

We wish to inform you that, after initial review of the issues raised, we find that  
before we can render any opinion on the matter further research and/or study is necessary.  
Moreover, and as may be determined by this office, said issues may be raised to the GPPB  
Technical Working Group and/or to the GPPB itself for their consideration and resolution.

Thank you.

Very truly yours,

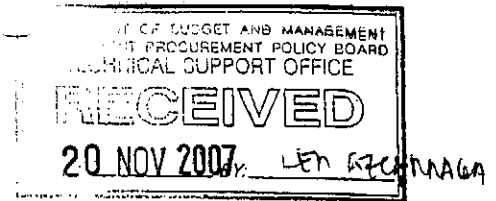
*EMILUISA PEÑANO*  
**EMILUISA PEÑANO**  
*Executive Director II*

**Received By:**

*Karen*  
Karen Decipeda  
(Signature above printed name)

11/26/07 - 3:50 pm  
(Date and Time of receipt)

\*Kindly fax to sender to acknowledge receipt



November 16, 2007

ATTY. RUBY U. ALVAREZ  
Executive Director III  
GOVERNMENT PROCUREMENT POLICY BOARD  
Technical Support Office  
Unit 2506 Raffles Corporate Center  
F. Ortigas Jr. Road  
Ortigas Center, Pasig City

Subject: Clarification on the application of the term agency as specified by GPPB Resolution 03-2007

Dear Atty Alvarez:

In its Resolution 03-2007, the GPPB has excluded government owned and controlled corporations (GOCCs) incorporated under the Corporate Code of the Philippines from the meaning of the term agency in Republic Act 9184 (RA9184), otherwise known as the Government Procurement Reform Act.

Applying the rule of statutory construction that the Supreme Court has stated:

*It is a rule in statutory construction that every part of the statute must be interpreted with reference to the context, i.e., that every part of the statute must be considered together with the other parts, and kept subservient to the general intent of the whole enactment (Paras v. Commission on Elections, 264 SCRA 54),*

we have come to conclude that Resolution 03-2007 has actually removed the same GOCCs from the coverage of the Implementing Rules and Regulations Part A (IRR-A) of RA9184, meaning that the exclusion of said GOCCs from the term agency is likewise applied to Section 4 (Scope and Application) as well as the entire IRR-A.

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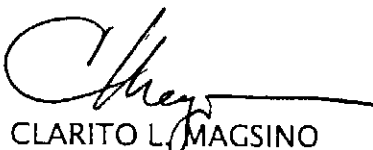
Since the only logical reason for GPPB to exclude the said GOCCs from the meaning of the term agency is to force the same GOCCs to deal with government within a public bidding environment, it does make sense for the GPPB to allow the same operational flexibility to these GOCCs, as with their private sector counterparts, by having them conduct their respective businesses outside the restrictions of RA9184. Clearly, competing with the private sector for government contracts necessitates that these GOCCs operate under the same free marketplace rules as any private sector entity. Doing so otherwise puts the GOCCs at a disadvantage and negates the whole purpose of having the GOCCs bid for government contracts in the first place.

Removing the said GOCCs from the coverage of the IRR-A of RA9184 therefore means that these same GOCCs need not have a Bids and Awards Committee charged to conduct public biddings for their own procurement requirements and need not follow the prescribed procurement processes and procedures.

We seek clarification since we are preparing to dissolve our Bids and Awards Committee.

Thank you and we look forward to your prompt response.

Sincerely,



CLARITO L. MAGSINO

President and CEO



RESOLUTION NO. 03-2007

AMENDING SECTION 53 (e) OF IRR-A OF R.A. 9184 TO INCLUDE  
INFRASTRUCTURE PROJECTS AND CONSULTING SERVICES

WHEREAS, Section 63.1 of the IRR-A of R.A. 9184 authorizes the Government Procurement Policy Board (GPPB) to formulate public procurement policies, rules and regulations, and amend, whenever necessary, the IRR-A;

WHEREAS, Section 53 of Republic Act No. 9184 (R.A. 9184) on Negotiated Procurement covers the procurement of goods, infrastructure projects and consulting services;

WHEREAS, Section 53 (e) of the Implementing Rules and Regulations of R.A. 9184 limits agency-to-agency agreements, one of the instances under Negotiated Procurement, to purchases of goods;

WHEREAS, there is a need to reconcile Section 53 with Section 53 (e) of the IRR-A of R.A. 9184;

NOW, THEREFORE, for and in consideration of the foregoing, WE, the Members of the **Government Procurement Policy Board**, by virtue of the powers vested on Us by law, hereby **RESOLVE** to amend, as WE hereby amend, Section 53(e) of IRR-A of R.A. 9184, as follows:

- e) **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 under Batas Pambansa Blg. 168, otherwise known as the Corporation Code of the Philippines.**

In order to hasten project implementation, agencies which may not have the proficiency or capability to undertake a particular procurement, as determined by the head of the procuring entity concerned, may request other agencies to undertake such procurement for them, or at their option.



**RESOLUTION NO. 03-2007**

recruit and hire consultants or procurement agents to assist them directly and/or train their staff in the management of the procurement function;

The GPPB shall issue guidelines to implement this provision.

This resolution shall take effect immediately.

APPROVED this 30<sup>th</sup> day of March 2007 at Pasig City, Philippines

(Sgd.)

\_\_\_\_\_  
**ROLANDO G. ANDAYA JR.**  
Secretary  
Department of Budget and Management

\_\_\_\_\_  
**ROMULO L. NERI**

Secretary  
National Economic and Development  
Authority

\_\_\_\_\_  
**NATIONAL ECONOMIC AND  
DEVELOPMENT AUTHORITY**

\_\_\_\_\_  
**DEPARTMENT OF NATIONAL  
DEFENSE**

(Sgd.)

\_\_\_\_\_  
**DEPARTMENT OF EDUCATION**

(Sgd.)

\_\_\_\_\_  
**DEPARTMENT OF HEALTH**

(Sgd.)

\_\_\_\_\_  
**DEPARTMENT OF THE INTERIOR  
AND LOCAL GOVERNMENT**

(Sgd.)

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**DEPARTMENT OF ENERGY**

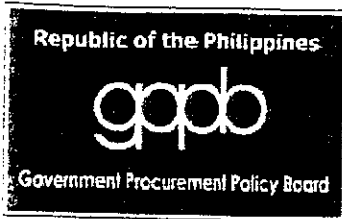
(Sgd.)

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**DEPARTMENT OF PUBLIC WORKS  
AND HIGHWAYS**

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**DEPARTMENT OF FINANCE**

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**DEPARTMENT OF TRADE AND  
INDUSTRY**

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**DEPARTMENT OF SCIENCE AND  
TECHNOLOGY**



RESOLUTION NO. 03-2007

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(Sgd.)

DEPARTMENT OF TRANSPORTATION  
AND COMMUNICATIONS

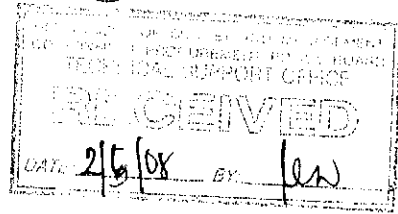
(Sgd.)

PRIVATE SECTOR REPRESENTATIVE

Attested by:

(Sgd.)

RUBY. U. ALVAREZ  
Board Secretary, GPPB  
Executive Director, GPPB-TSO



February 4, 2008

HON. ROLANDO G. ANDAYA, JR.  
Chairman  
GOVERNMENT PROCUREMENT POLICY BOARD  
Unit 2506 Raffles Corporate Center  
F. Ortigas Jr. Road  
Ortigas Center, Pasig City

Dear Secretary Andaya:

We refer to our letter of November 27, 2007, seeking assistance from the Office of the Chairman of the GPPB in suspending the effectivity of GPPB Resolution No. 03-2007 which amended Section 53(e) of IRR-A of R.A. 9184, pending further study of the GPPB Technical Support Office (TSO) on the issues brought about by the said resolution.

It is the desire of the DBP Data Center, Inc. (DCI), being wholly-owned by the Development Bank of the Philippines, to extend its expertise to the Government in implementing its Information & Communication Technology agenda. However, the inconsistent provision in GPPB Res No. 03-2007, that excluded DCI from the term "agency" in Section 53(e) of IRR-A of R.A. 9184 while Section 4 includes it in its definition, has placed DCI at a disadvantage with its private sector counterparts, which by implication, GPPB wants us to compete with head on.

In this regard, we would like to reiterate our request for the suspension of GPPB Resolution No. 03-2007 while GPPB TSO is looking into this matter.

Thank you and we look forward to your favorable action on this request.

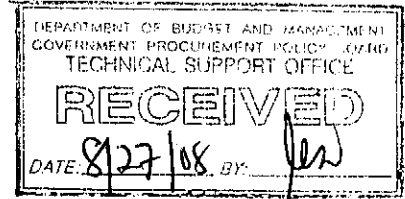
Very truly yours,

CLARITO L. MAGSINO  
President & CEO

Encl: DCI letter to GPPB Chairman dated November 27, 2007  
GPPB TSO response dated November 26, 2007  
DCI letter to GPPB TSO dated November 16, 2007  
GPPB Resolution No. 03-2007

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August 21, 2008

SECRETARY ROLANDO G. ANDAYA, JR.  
Chairman  
GOVERNMENT PROCUREMENT POLICY BOARD  
Unit 2506, Raffles Corporate Center  
F. Ortigas Jr. Road, Ortigas Center  
Pasig City 1106

**Subject: Request for Legal Opinion on Government  
Procurement Policy Board (GPPB) Res. No. 03-2007**

On 30 March 2007, the GPPB approved Resolution No. 03-2007, "Amending Section 53 (e) of IRR-A of R.A. 9184 to Include Infrastructure Projects and Consulting Services" ("Resolution No. 3"). Essentially, Resolution No. 3 amended Sec. 53(e) of the Implementing Rules and Regulations - Part A ("IRR-A") of Republic Act No. 9184, "An Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes" ("R.A. 9184") to add "procurement of infrastructure and consulting services" to "procurement of goods" made by a government agency *from another government agency* in the coverage of instances where negotiated procurement is permissible *but* excluded government-owned or controlled corporations ("GOCCs") incorporated under the Corporation Code of the Philippines ("Corporation Code") from the definition of the term "agency" or "government agency".

Such amendment has the effect of making a distinction between GOCCs incorporated under the Corporation Code and GOCCs created under a special charter with regard to the applicability of Sec. 53(e) of IRR-A when no such distinction is provided under R.A. 9184 and IRR-A, as originally issued.

As applied in the case of DBP Data Center, Inc. ("DCI") in connection with its transactions with its parent company, the Development Bank of the Philippines ("DBP"), such amendment gives rise to the absurd, if not adverse consequence of prohibiting DCI's negotiation of information technology ("IT") contracts with DBP which is detrimental to the performance of the principal mandate of DCI to service the IT requirements of DBP. Moreover, the amendment runs counter to all intents and purposes the subsidiary was created to carry out the principles and objectives of the GOCC (Parent Company) like DBP, as spelled out in its governing law, in support of the government's thrust towards sustainable development.

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With respect to negotiated procurement, Section 53(e) of R.A. 9184 enumerates the instances when it may be allowed including the purchase of goods by a government agency from another government agency, such as the Procurement Service of the DBM, subject to the guidelines specified in the implementing rules and regulations ("IRR").

Under Sec. 75 of R.A. 9184, the GPPB, jointly with the members of the Joint Congressional Oversight Committee, is mandated to formulate the IRR of R.A. 9184 for approval of the President of the Philippines. Pursuant to the foregoing mandate, the GPPB issued IRR-A dated 11 July 2003 and endorsed it for approval to the President. On 18 September 2003, IRR-A was approved by the President through Memorandum Order No. 119.

Notably, in both R.A. 9184 and IRR-A negotiated procurement is permissible in case of procurement of goods by a government agency from another government agency without distinction or qualification. The pertinent provisions of R.A. 9184 and IRR-A provide:

*Section 53. Negotiated Procurement - Negotiated Procurement shall be allowed only in the following instances:*

*Xxx*

- e. Subject to the guidelines specified in the IRR, purchases of Goods from another agency of the government, such as the Procurement Service of the 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.*

*Xxx*

*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:*

*Xxx*

- e. Purchases of 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. Further, in order to hasten project implementation,*

Clearly, the foregoing definition of a "government agency" covers all GOCCs regardless of whether they are incorporated under the Corporation Code or created by virtue of a special charter.

Following the ruling of the SC, since the term "agency" or "government agency" in Sec. 53(e) of R.A. 9184 is not explicitly defined, its definition of as provided in the Administrative Code should apply. Hence, the term "agency" as used in Section 53(e) of R.A. 9184 should be taken to mean as covering all GOCCs without distinction or qualification. This conclusion is bolstered by the fact that there is no explicit distinction made in Sec. 53(e) of R.A. 9184 between GOCCs incorporated under the Corporation Code and those created under a special law.

Similarly, since the term "government agency" is not specifically defined under Sec. 53(e) of IRR-A, the Administrative Code definition of the term "government agency" may be applied. The term "agency" as used in Section 53(e) of IRR-A should therefore be considered as embracing all GOCCs without any distinction as to the manner of their incorporation or creation.

However, the GPPB subsequently issued Resolution No. 3 amending Sec. 53(e) of IRR-A by excluding GOCCs created under the Corporation Code from the term "government agency" thereby creating a distinction between GOCCs incorporated under the Corporation Code and those created by virtue of a special law. Evidently, this is inconsistent with or contrary to what is provided under R.A. 9184 and IRR-A as discussed above.

While it is conceded that under Sec. 63(b) of R.A. 9184, the GPPB has the power to formulate and amend whenever necessary the IRR of R.A. 9184, it must be underscored that the formulation and amendment of the IRR must be consistent with the law and the whole intent of the law. In the case of *Romulo, Mabanta, Buenaventura, Sayoc & De Los Angeles vs. Home Development Mutual Fund*,<sup>2</sup> the SC ruled that:

*It is without doubt that the HDMF Board has rule-making power as provided in Section 5 of R.A. No. 7742 and Section 13 of P.D. No. 1752. However, it is well-settled that rules and regulations, which are the product of a delegated power to create new and additional legal provisions that have the effect of law, should be within the scope of the statutory authority granted by the legislature to the administrative agency. It is required that the regulation be germane to the objects and purposes of the law, and be not in contradiction to, but in conformity with, the standards prescribed by law.*

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<sup>2</sup> G.R. No. 131082, 19 June 2000.

*voluntary and involuntary conveyances. There should also be no distinction in the application of the law where none is indicated. Lo Cham vs. Ocampo, 77 Phil. 636, 638 (1946). Where the law does not distinguish, courts should not distinguish. Ubi lex non distinguit nec nos distinguere debemos. Commissioner of Internal Revenue vs. COA, 218 SCRA 203, 214-215 (1993). (Emphasis supplied; Footnotes omitted.)*

Applying the foregoing ruling of the SC in this case, since Section 53(e) of R.A. 9184 did not make a distinction between GOCCs incorporated under the Corporation Code and GOCCs created under a special law, the GPPB should also not make such distinction.

**2. *The distinction between GOCCs incorporated under the Corporation Code and those created by virtue of a special law is not germane to the purpose or rationale of R.A. 9184***

Under Sec. 10 of R.A. 9184, all procurement by the government shall be done through competitive bidding subject to certain exceptions explicitly mentioned therein. Evidently, the rationale for requiring public bidding for the procurement of goods and services by government agencies is to ensure that the government will not be financially prejudiced in its contractual dealings in relation to procurement. Specifically, the requirement of competitive bidding for government procurement was made in line with the Government's commitment to good governance and its effort to adhere to the principle of transparency, accountability, equity, efficiency and economy in procurement process as provided for in Section 2 of IRR-A of R.A. 9184.

It must be pointed out that the provisions of R.A. 9184 and its IRR must give effect to the foregoing purpose or rationale of R.A. 9184. Simply put, the provisions of R.A. 9184 and its IRR must be germane to such purpose. However, the classification of GOCCs into (a) GOCCs incorporated under the Corporation Code and (b) those created under a special law, by the GPPB through the issuance of Resolution No. 3, does not appear to promote nor is it relevant to the foregoing purpose. R.A. 9184 included the procurement by a government agency from another government agency, without distinction or qualification, among the instances when competitive bidding may not be conducted precisely because it recognizes that no financial prejudice would be incurred by the government in such case. Thus, since such distinction is not in any way germane to the rationale or purpose of R.A. 9184, (notably, equity, efficiency and economy), such distinction must be deleted.

Moreover, a subsidiary of a GOCC (like DCI) created under the Corporation Code should not be treated as "another agency of the Government" or as a totally separate government entity since for all intents and purposes, the subsidiary was created to carry out the purposes and objectives of the GOCC (Parent Company) like DBP, as

*For if it were the intention of Congress to prevent sham marriages or those entered in contemplation of imminent death, then it should have prescribed a definite "duration-of-relationship" x x x. as one of the requirements for entitlement to survivor's pension. X x x.*

*X x x.*

*Further, the classification of dependent spouses on the basis of whether their respective marriages to the SSS member were contracted prior to or after the latter's retirement for the purpose of entitlement to survivor's pension does not rest on real and substantial distinctions. It is arbitrary and discriminatory. It is too sweeping because the proviso "as of the date of his retirement," which effectively disqualifies the dependent spouses whose respective marriages to the retired SSS member were contracted after the latter's retirement as primary beneficiaries, unfairly lumps all these marriages as sham relationships or were contracted solely for the purpose of acquiring benefits accruing upon the death of the other spouse. The proviso thus unduly prejudices the rights of the legal surviving spouse, like the petitioner, and defeats the avowed policy of the law "to provide meaningful protection to members and their beneficiaries against the hazards of disability, sickness, maternity, old age, death, and other contingencies resulting in loss of income or financial burden." (Emphasis supplied; Footnotes omitted.)*

It appears that the classification made by the GPPB, which created a distinction in the treatment of GOCCs with original charter from those organized under the Corporation Code, would fail the foregoing tests for validity of classifications made laid down by the Supreme Court.

3. *If non government institutions (NGOs) are included in the enumeration of Section 53 of the IRR-A [as 53 (j)] among the cases which qualify for negotiated procurement, then with more reason that GOCCs created under the Corporation Code should qualify for the negotiated procurement method.*

We note that GOCCs created under the Corporation Code are most often than not, subsidiaries of GOCCs with special charters or those crafted or established to perform specific Government services and/or carry out the Government's socio-economic programs. Please note, in this connection, that the rationale for allowing NGOs to qualify for either a public bidding or negotiated procurement method under GPPB Res. No. 12-2007 is basically due to the fact that NGOs are community-based or sectoral organizations established for the promotion of the welfare of the nation (Section 1, Policy Statement of GPPB Res. No. 12-2007) and that they are committed to the task of socio-economic development (Sec. 42, General Guidelines). If we go by this line of

Under R.A. 9184, all procurement by the government shall be done through competitive bidding subject to certain exceptions explicitly mentioned therein. Among such exceptions is negotiated procurement which may be resorted to only in specific cases such as in procurement of infrastructure, consultancy services and goods by a government agency from another government agency.

However, with the issuance of Resolution No. 3, negotiated procurement may no longer be applied in cases of procurement of goods, consultancy services and infrastructure by a government agency from another government agency where the latter pertains to a GOCC incorporated under the Corporation Code. In such case, a GOCC incorporated under the Corporation Code may only deal with another government agency through competitive or public bidding.

Applying the foregoing, DCI is forced to deal with DBP and/or other government agencies only through competitive bidding even if no financial prejudice would be incurred by them in their transactions with DCI considering that DCI is one hundred percent (100%) owned by DBP. Simply put, since DCI is wholly-owned by DBP, any income that would accrue to DCI from its contracts with DBP will ultimately redound to the benefit of the latter and ultimately to the national government.

Moreover, forcing DCI to participate in a bidding process against other IT Service Providers from the private sector would defeat the very purpose of RA 9184 to promote "competitiveness by extending equal opportunity to enable private contracting parties who are eligible and qualified to participate in public bidding" (cf. Par. b), Section 3 of RA 9184). DCI as a GOCC, already has the innate advantage of being owned and managed by the very institution that is calling for the bid.

Foregoing considered, we reiterate our request that the distinction between GOCCs incorporated under the Corporation Code and GOCCs created by virtue of a special law, be deleted from Resolution No. 03-2007.

Very truly yours,



CLARITO L. MAGSINO  
President & CEO

Encls: As stated

# DCI

November 27, 2007

Office of the Secretary - 7777

RECEIVED  
NOV 27 2007

By: Elena CTRL No. \_\_\_\_\_

HON. ROLANDO G. ANDAYA JR.  
Chairman  
GOVERNMENT PROCUREMENT POLICY BOARD

Subject: Request to suspend the effectivity of GPPB Resolution 03-2007.

Dear Secretary Andaya:

We respectfully request the assistance of the Office of the Chairman of the Government Procurement Policy Board in suspending the effectivity of GPPB Resolution 03-2007 titled "Amending Section 53 (e) of IRR-A of R.A. 9184 to include infrastructure projects and consulting services" pending further study of the GPPB Technical Services Office (TSO) on the issues brought about by the said resolution.

One particular issue of Resolution 03-2007 affecting the operations of DBP Data Center, Inc. (DCI), a corporation wholly-owned by the Development Bank of the Philippines, is the inconsistent provision excluding government owned and controlled corporations incorporated under the Corporate Code of the Philippines from the term "agency" in Section 53 (e) of IRR-A of R.A. 9184. We have written the GPPB TSO regarding this matter and have been informed that "further research and/or study is necessary" before the TSO can render an opinion. It therefore only makes sense to suspend the effectivity of Resolution 03-2007 pending the outcome of the TSO's further study.

Since it is the Board, and not the TSO, that approves the implementation of the IRR-A of R.A. 9184 and revisions thereof, we have coursed this request through your office in the hope that your office may provide the proper guidance to the TSO regarding this matter.

Thank you and we look forward to your favorable response.

Sincerely,



CLARITO L. MAGSINO  
President and CEO

Enclosed:

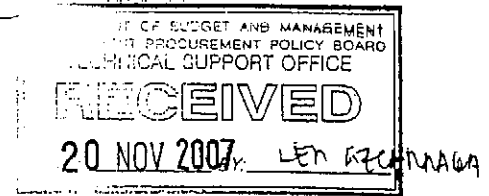
DCI letter to GPPB TSO dated 16 November 2007

GPPB TSO response dated 26 November 2007

GPPB Resolution 03-2007

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November 16, 2007

ATTY. RUBY U. ALVAREZ  
Executive Director III  
GOVERNMENT PROCUREMENT POLICY BOARD  
Technical Support Office  
Unit 2506 Raffles Corporate Center  
F. Ortigas Jr. Road  
Ortigas Center, Pasig City

Subject: Clarification on the application of the term agency as specified by GPPB Resolution 03-2007

Dear Atty Alvarez:

In its Resolution 03-2007, the GPPB has excluded government owned and controlled corporations (GOCCs) incorporated under the Corporate Code of the Philippines from the meaning of the term agency in Republic Act 9184 (RA9184), otherwise known as the Government Procurement Reform Act.

Applying the rule of statutory construction that the Supreme Court has stated:

*It is a rule in statutory construction that every part of the statute must be interpreted with reference to the context, i.e., that every part of the statute must be considered together with the other parts, and kept subservient to the general intent of the whole enactment (Paras v. Commission on Elections, 264 SCRA 54),*

we have come to conclude that Resolution 03-2007 has actually removed the same GOCCs from the coverage of the Implementing Rules and Regulations Part A (IRR-A) of RA9184, meaning that the exclusion of said GOCCs from the term agency is likewise applied to Section 4 (Scope and Application) as well as the entire IRR-A.

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AMENDING SECTION 53 (e) OF IRR-A OF R.A. 9184 TO INCLUDE  
INFRASTRUCTURE PROJECTS AND CONSULTING SERVICES

WHEREAS, Section 63.1 of the IRR-A of R.A. 9184 authorizes the Government Procurement Policy Board (GPPB) to formulate public procurement policies, rules and regulations, and amend, whenever necessary, the IRR-A;

WHEREAS, Section 53 of Republic Act No. 9184 (R.A. 9184) on Negotiated Procurement covers the procurement of goods, infrastructure projects and consulting services;

WHEREAS, Section 53 (e) of the Implementing Rules and Regulations of R.A. 9184 limits agency-to-agency agreements, one of the instances under Negotiated Procurement, to purchases of goods;

WHEREAS, there is a need to reconcile Section 53 with Section 53 (e) of the IRR-A of R.A. 9184;

NOW, THEREFORE, for and in consideration of the foregoing, WE, the Members of the Government Procurement Policy Board, by virtue of the powers vested on US by law, hereby RESOLVE to amend, as WE hereby amend, Section 53(e) of IRR-A of R.A. 9184, as follows:

- e) **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 under Batas Pambansa Blg. 168, otherwise known as the Corporation Code of the Philippines.**

In order to hasten project implementation, agencies which may not have the proficiency or capability to undertake a particular procurement, as determined by the head of the procuring entity concerned, may request other agencies to undertake such procurement for them, or at their option.





RESOLUTION NO. 03-2007

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(Sgd.)

DEPARTMENT OF TRANSPORTATION  
AND COMMUNICATIONS

(Sgd.)

PRIVATE SECTOR REPRESENTATIVE

Attested by:

(Sgd.)

RUBY. U. ALVAREZ  
Board Secretary, GPPB  
Executive Director, GPPB-TSO