



TECHNICAL SUPPORT OFFICE

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

NPM No. 21-2008

16 September, 2008

MR. CLARITO L. MAGSINO

President and CEO

DBP DATA CENTER, INC.

22/F Pacific Star Building

Sen. Gil J. Puyat Avenue

Makati City

Re : Definition of Agency under GPPB Resolution No. 03-2007

Dear Mr. Magsino:

We refer to the following:

- (a) Letters dated 21 August 2008, 4 February 2008, and 27 November 2007 addressed to Sec. Rolando G. Andaya, Jr., as Chairman of the Government Procurement Policy Board (GPPB); and
- (b) Letter dated 16 November 2007 addressed to the Technical Support Office of the GPPB.

In sum, DBP Data Center, Inc. (DCI) questions the validity of GPPB Resolution No. 03-2007, which excludes government owned and/or controlled corporations (GOCCs) from the definition of "agency", for the following reasons:

- (a) The legal maxim that "where the law does not distinguish, neither should we distinguish" applies to this case;
- (b) 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 Republic Act (R.A.) No. 9184; and
- (c) As applied in transactions between DCI and its parent company, the Development Bank of the Philippines (DBP), such amendment has the absurd effect of (i) defeating the performance by DCI of its primary mandate to service the information technology requirements of DBP; and (ii) forcing DCI to deal with DBP and other government agencies only through competitive bidding even if no financial prejudice would be incurred by them in its transactions with DCI.

Consequently, DCI requests for the deletion of the distinction between GOCCs incorporated under the Corporation Code and those created by special law under GPPB Resolution No. 03-2007, or in the alternative, that said resolution be suspended pending further study. It further warns of its resolve to dissolve its Bids and Awards Committee since said distinction, if not deleted, has the alleged effect of removing GOCCs incorporated under the Corporation Code from the coverage of R.A. No. 9184.

Please be advised that your concerns were raised to the Inter-Agency Technical Working Group (IATWG) of the GPPB for resolution. After deliberations, and bearing in mind the policy rationale behind GPPB Resolution No. 03-2007 and the opinion of the Office of the Government Corporate Counsel (OGCC) dated 26 September 2007,¹ we regret to inform you that the IATWG is of the considered view that the foregoing reasons cited are not sufficient to warrant the amendment of the definition of "agency" under GPPB Resolution No. 03-2007.

With respect to your first and second contentions, the IATWG takes note of the legal opinion of the OGCC that the GPPB, by express provision of R.A. No. 9184, has the quasi-legislative power to formulate and amend the implementing rules and regulations of R.A. No. 9184. Such power includes the right to classify as long as the distinction is germane to the purpose of the law, concerns all members of the class, and applies equally to present and future conditions.

Consequently, applying said conditions to this particular case, the OGCC ruled that the distinction between GOCCs formed under the Corporation Code and those with special charters is grounded on the 1987 Constitution and is germane to the declared principle of competitiveness in government procurement under R.A. No. 9184.

The 1987 Constitution of the Philippines recognizes the difference between a GOCC with original charter from a GOCC created through the general corporation law (Section 2 [1], Article IX and Section 16, Article XII, 1987 Constitution). . .

It can be surmised that the rationale of the GPBB in excluding GOCCs incorporated under the Corporation Code under Section 53 (e) of the IRR-A is for these corporations to bid and compete with the private sector in all government procurement activity. It is the declared principle of Government to make contracting parties who are eligible to participate in public bidding. These GOCCs cannot be given greater rights, powers or privileges than any other corporation which might be organized under the Corporation Code.

Moreover the remaining queries laid down by the Supreme Court in the above-mentioned case have been sufficiently met. The subject resolution is not limited to existing conditions only and that same is not being made to apply to DCI alone, but to all entities of the same class. **Considering the foregoing premises, the distinction made by the GPPB as regards GOCCs organized**

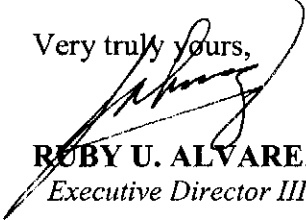
¹ OGCC Opinion No. 213, s. 2007, addressed to Mr. Clarito L. Magsino, as President and CEO of DBP Data Center, Inc.

under the Corporation Code in Resolution No. 03-2007 is well-founded.
[Emphasis supplied]

Anent your last contention, the IATWG likewise notes that the OGCC has already opined that GOCCs formed under the Corporation Code may enter into agency-to-agency agreements with another GOCC as long as a parent-subsidary relationship exists between the two. Thus, contrary to the allegations of DCI, GPPB Resolution No. 03-2007 does not render nugatory the primary mandate of DCI, which is to service the information technology requirements of DBP, its parent company.

In ending, it bears stressing that the general mode for government procurement under R.A. No. 9184 is public bidding. Thus, there is no need to justify why GOCCs formed under the Corporation Code are required to bid and compete with the private sector in their dealings with government. Rather, it is for DCI to explain why GOCCs formed under the Corporation Code should be exempt from the requirement of public bidding, and thus, preferred from all other bidders in government transactions.

Very truly yours,


RUBY U. ALVAREZ
Executive Director III