

**NPM No. 37-2008**

7 October 2008

**HON. JOSE MA. R. ZUBIRI, JR.**

*Provincial Governor*

**PROVINCE OF BUKIDNON**

Provincial Capitol 8700

Re : Cooperative Undertakings among Local Governments

Dear Sir:

In letter dated 10 June 2008, your good office seeks exemption from the threshold provided under Item 5 (a) (ii) of the Guidelines on Agency-to-Agency Agreements (hereinafter, the "Guidelines"), which reads:

Total amount of all goods, consulting, and infrastructure projects undertaken or to be undertaken through Agency-to-Agency Agreements shall not exceed twenty-five percent (25%) of the Procuring Entity's total procurement budget for each category (*i.e.*, goods, infrastructure, or consulting) as reflected in its approved APP.

It bears stressing that the Guidelines were issued by the Government Procurement Policy Board (GPPB)<sup>1</sup> last May 31, 2007 to implement Section 53 (e) of the Implementing Rules and Regulations Part A (IRR-A) of Republic Act (R.A.) 9184.

Based on your representation, said request is premised on the following grounds:

- (a) Since 2002, the Provincial Government of Bukidnon (PGB) has been contracting Provincial Road Maintenance to the Local Government Units (LGUs) of Bukidnon with the end in view of having the construction properly executed by the actual beneficiaries;
- (b) The contractual agreement between PGB and LGUs is embodied in a Memorandum of Agreement which is legally based on Section 33 of R.A. 7160 or the Local Government Code; and

<sup>1</sup> GPPB Resolution No. 018-2006 dated 31 May 2007.

- (c) PGB was able to generate substantial savings through the foregoing contracting arrangement.

PGB, however, fears that said scheme may be later questioned by the Commission on Audit for being inconsistent with the guidelines issued by the GPPB, especially Item 5 (a) (ii) of the Guidelines.

### **Policy Rationale**

It is the general policy of government to purchase its requirements from the private sector. However, the GPPB acknowledges that, in some exceptional cases, procurement from or contracting with another agency of the government is more efficient and economical for the government. Thus, it is only in these highly exceptional cases, and when justified by the conditions prescribed under the Guidelines, may the procuring entity procure from or contract with another government agency under the 1<sup>st</sup> paragraph of Section 53(e) of the IRR-A of R.A. 9184.

Bearing this in mind, the GPPB opted to place a twenty five percent (25%) cap in the respective budgets for each procurement category of government agencies under Item 5 (a) (ii) of the Guidelines. Said condition is intended to discourage government agencies from adopting Agency-to-Agency agreements as the general rule in procurement transactions.

### **Cooperative Undertakings as Joint Ventures**

We wish to point out, however, that the contractual arrangement between the PGB and other LGUs in Bukidnon appears to be a joint venture agreement. Although joint ventures have no precise category as a legal entity under Philippine legal parlance, it has been generally understood to mean an organization formed for some temporary purpose.<sup>2</sup>

In *Kilosbayan, Inc., et. al. v. Guingona, et. al.*,<sup>3</sup> the Supreme Court adopted Black's definition of joint venture when it held, as follows:

A careful analysis and evaluation of the provisions of the contract and a consideration of the contemporaneous acts of the PCSO and PGMC indubitably disclose that the contract is not in reality a contract of lease under which PGMC is merely an independent contractor for a piece of work, but one where the statutorily prescribed collaboration or association, in the least, or joint venture, at the most, exists between the contracting parties. Collaboration is defined as the act of working together in a joint project. Association means the act of a number of persons in uniting together for some special purpose or business. **Joint venture is defined as an association of persons or companies jointly undertaking some commercial enterprise; generally all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy connected therewith, and a duty, which may be altered by agreement to share both in profit and losses.**<sup>4</sup> [Emphasis supplied]

<sup>2</sup> Gates v. Megarggel, 266 Fed. 811 [1920].

<sup>3</sup> 232 SCRA 110 (5 May 1994)

<sup>4</sup> *Id.*, at 143-144.

Culled from the above, a joint venture is said to exist when the following elements are present:

- (a) An association of persons or companies is established to undertake jointly some commercial enterprise or to achieve a common purpose or objective;
- (b) These persons or companies contribute money, property, industry, knowledge, skill or some identifiable asset; and
- (c) These parties have: (i) a community of interest in the performance of the subject matter; (ii) a right to direct and govern management; and (iii) an agreement, express or implied, to share in the profits, risks, and losses.

We believe that cooperative arrangements formed among LGUs under Section 33 of R.A. 7160 are akin to joint venture agreements. Section 33 reads:

Sec. 33. Cooperative Undertakings Among Local Government Units. – Local government units may, through appropriate ordinances, group themselves, consolidate, or coordinate their efforts, services, and resources for purposes commonly beneficial to them. In support of such undertakings, the local government units involved may, upon approval by the sanggunian concerned after public hearing conducted for the purpose, contribute funds, real estate, equipment, and other kinds of property and appoint or assign personnel under such terms and conditions as may be agreed upon by the participating local units through Memoranda of Agreement.

We, thus, urge PGB to closely examine whether the Memorandum of Agreement it entered into with LGUs falls under the definition of a joint venture agreement. If it does, then PGB does not have to comply with the threshold prescribed under Item 5 (a) (ii), which properly applies to an agreement where a government agency procures from or contracts with another government agency.

This opinion is being rendered on the basis of the facts and particular circumstances as represented. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,

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