



TECHNICAL SUPPORT OFFICE

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Pasig City, Philippines 1605

NPM No. 38-2005

September 12, 2004

HON. GABRIEL R. SINGSON, JR.
Undersecretary, Department of Finance
Roxas Boulevard Cor. Pablo Ocampo, Sr. St
Manila

**Re : Legality of success-based arrangement for the procurement
of financial advisory/consultancy services for the
Government's privatization projects**

Dear Undersecretary Singson:

This pertains to your letter, dated 18 July 2005,¹ requesting that this office render an opinion on the legality of a success-based arrangement for the procurement of financial advisory/consultancy services for the Government's Privatization projects.

The letter states that a great majority of the big-ticket items now undergoing privatization have proved to be the most problematic, from economic, financial and legal standpoints. These, allegedly, require a substantial amount of research and planning for a privatization plan to be arrived at; and, unfortunately, the drain on government coffers which the acquisition of services for said research and planning presents provide a virtual disincentive for the successful sale of government assets that cost millions of pesos every year to maintain. It is for this reason that a success-based arrangement for funding the financial advisor's/consultant's fees, i.e., fee is paid out of the proceeds derived from a successful privatization, is recommended to defray the costs of financial advice and as an answer to the problem of lacking government funds.

Hence, this query as to the legality of the aforementioned arrangement.

Republic Act No. 9184, otherwise known as the Government Procurement Reform Act, mandates, generally, that all government procurement activities shall be governed by the principles of transparency, accountability, and competitiveness; and shall be undertaken in accordance with the prescribed procedures set therein and in its implementing rules and regulations. It specifically provides for the allowable methods of procurement, and the conditions for their use, through which government acquisition may be prosecuted.

¹ Letter was received by GPPB-TSO on July 26, 2005.



Interestingly, the law does not deal with the other incidents of contracts, such as payment and those matters relating to the enforcement of contract terms and conditions. The law merely lays down the policies, principles, and the rules for the efficient undertaking of procurement activities and, for emphasis, is bereft of authority or jurisdiction over matters involving payment.

The proposed success-based arrangement in the hiring of consultants/advisors of DOF is not a mode of procurement within the contemplation of Republic Act No. 9184; rather, it is a payment scheme purported to provide a remedy to avoid or temporarily skip an outlay of money by the government. It does not in any way directly involve the acquisition of services nor the selection of a service provider or contractor.

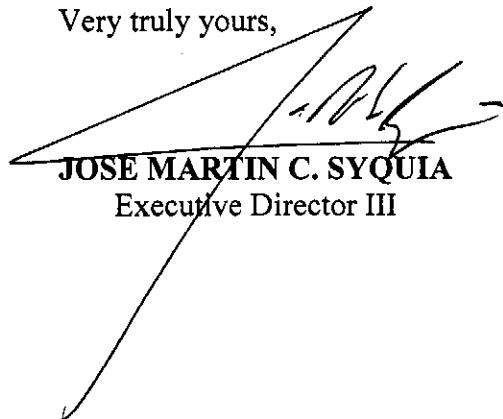
As payment scheme, the agency and process by which it is to be accomplished should be addressed and set out in the terms and conditions of the contract, in accordance with the Philippine Bidding Documents. Under this proposed arrangement, the payment of the financial consultant/advisor will be made to depend on the eventual success of the principal undertaking which is the sale of government assets. In this case, payment becomes conditional to the happening of an uncertain event which concern is not within the intention of RA 9184.

The foregoing having been stated, it is our considered view that while the proposed scheme addresses payment or other incidents of the prospective contract, the procedures involved in the acquisition of the consulting services shall be governed by the provisions of RA 9184. This is without prejudice to whatever legal sanction that may be available to justify the adoption of a success-based payment arrangement in government contracts. Be that as it may, the legality of the same is beyond the jurisdiction of this office to determine.

This opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not necessarily be applicable upon a different set of facts or circumstances.

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director III