

REPUBLIC OF THE PHILIPPINES  
**GOVERNMENT PROCUREMENT POLICY BOARD**  
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**NPM No. 043-2004**

March 30, 2004

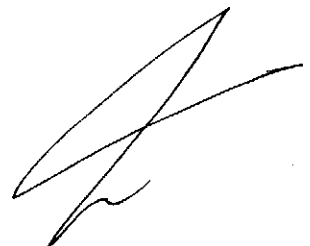
**MR. FRANCISCO S. CRUZ**  
Assistant Secretary for Internal Affairs  
Department of Labor and Employment  
Intramuros, Manila

**Re : Request for Clarification on the Concession of a Service Provider for the Operation of the Department of Labor and Employment ("DOLE") – Central Office Canteen for Calendar Year 2004**

Dear Mr. Cruz :

This refers to your letter dated November 4, 2003, which we received on November 17, 2003, requesting for guidance on the issues confronted by the Department of Labor and Employment ("DOLE") in the award of concession for the operation of its canteen for CY 2004, to wit:

- 1) Whether the existing Bids and Awards Committee ("BAC") is mandated to secure an authorization from the Department Secretary for the concession of canteen services considering that this is not a usual procurement conducted by the Agency;
- 2) Whether the provisions of the Implementing Rules and Regulations Part A ("IRR-A") of Republic Act No. 9184 ("R.A. 9184"), otherwise known as the "Government Procurement Reform Act" ("GPRA") should be observed in the conduct of the public bidding for the concessionaire of DOLE canteen services;
- 3) Whether public bidding is needed for this type of contract; and
- 4) Whether other government agencies are observing a different set of guidelines on this type of contract.



Evidently, the foregoing queries hinge on a central issue, which is whether the concession of a service provider for the operation of the DOLE – Central Office' Canteen for Calendar Year 2004 is covered by R.A. 9184 and its IRR-A.

### **Nature of Government's Concession of Canteen Operations and Applicability of R.A. 9184**

Based on your letter and the attached approved Purchase Request and Terms of Reference, we are of the opinion that the concession of a service provider for the operation of the DOLE canteen is more of a contract of lease, rather than a plain concession, taking into consideration the fact that the concessionaire for the canteen shall be paying a monthly rental of P300.00 per square meter for the 83 square meter area of the DOLE Building or a monthly rental of P24,900.00.

As such, this type of transaction is classified as leasing out of a government-owned building for private use, which is definitely beyond the ambit of R.A. 9184 and its IRR-A. While it may be true that the GPRA and its IRR-A now introduces a broader concept of "Procurement"<sup>1</sup> which encompasses even the lease of goods and real estate, it is apparent that the law has no intention to include therein the leasing out of government buildings and spaces, wherein the concerned government agency does not acquire ownership or temporary use of a thing, but generates income by such transaction.

Verily, leasing out of government-owned properties does not involve the acquisition of any particular equipment, material, or personal property or a contractual service such as janitorial, security and related services. Moreover, this kind of transaction does not involve any construction, improvement, rehabilitation or other activity which would fall under the definition of the term "civil works," nor a contract for the performance of services such as advisory, review, design, management, or other service which would fall under the concept of "consulting services."

Accordingly, by the nature and peculiarity of this government contract, leasing out of government building remains to be governed by Executive Order No. 301<sup>2</sup> ("E.O. 301") particularly Section 7 thereof, which provides:

*Jurisdiction Over Lease Contracts* – The heads of agency intending to rent privately-owned buildings or spaces for their use, or to **lease out government-owned buildings or spaces for private use**, shall have authority to determine the reasonableness of the terms of the lease and the rental rates thereof, and to enter into such lease contracts without need of prior approval by higher authorities, subject to compliance with the uniform standards or guidelines established pursuant to Section 6<sup>3</sup> hereof by the [Department of Pulic Works and

<sup>1</sup> Section 5 of R.A. 9184 and its IRR-A defines procurement as "(T)he acquisition of Goods, Consulting Services, and the contracting for Infrastructure Projects by the Procuring Entity. Procurement shall also include the lease of goods and real estate...."

<sup>2</sup> Dated July 26, 1987

<sup>3</sup> Section 6. *Guidelines for Lease Contracts*. – Any provisions of law, decree, executive order or other issuance to the contrary notwithstanding, the Department of Public Works and Highways (DPWH), with respect to the leasing of privately-owned buildings or spaces for government use or of government-owned buildings or space for private use, shall formulate uniform standards or guidelines for determining the reasonableness of the terms of lease contracts and of the rental rates involved.

Highway] DPWH and to the audit jurisdiction of COA or its duly authorized representative in accordance with existing rules and regulations. (Emphasis supplied)

Pursuant to this provision, the DPWH has come out with an issuance embodying the guidelines for lease contracts applicable to all government agencies, which provides for a uniform set of rules for the determination of reasonableness of rental rates and the standards to determine the terms and conditions in the preparation of lease contracts. Said guidelines provide:

4.2.1.1 Lessor – The lessor is the absolute owner of the building/space to be leased. The lessor may be a private individual, a corporation, or a government agency. If a private individual, he may personally enter into contract or authorize somebody, thru a special power of attorney, to represent him. If a corporation, the representative should be duly authorized by a resolution of the governing board. **If a government agency, it shall be represented by the official having custody and administration of the building/space, who is duly authorized by law to enter into contract, and the lease contract shall be subject to approval of the official concerned.** (Emphasis supplied)

Based on the foregoing discussions, it is clear that lease contracts do not undergo competitive bidding which has to pass through the BAC. As such, the DPWH guidelines provide that it is the official duly authorized by law to enter into contracts, having custody and administration of the building/space to be rented out that enters into contract as lessor thereof, subject to the approval of the head of agency concerned. Moreover, this transaction is in the category of lease of things and hence, suppletorily governed by the provisions on lease found in the Civil Code.

For your guidance, we have attached herewith the pertinent provisions of the guidelines promulgated by the DPWH for government lease contracts. For further clarification regarding the same, you may contact the Bureau of Maintenance of the DPWH at Telephone Nos. (02) 304-3000; (02) 304-3618.

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

We trust that this clarifies matters.

Very truly yours,



**JOSE MARTIN C. SYQUIA**

Executive Director