



TECHNICAL SUPPORT OFFICE

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NPM No. 51-2007

14 September 2007

GEN. NARCISO L. ABAYA (RET)
President and Chief Executive Officer
BASES CONVERSION DEVELOPMENT AUTHORITY
BCDA Corporate Center
2/F Bonifacio Technology Center
31st Street, Bonifacio Global City
Taguig City 1634

Re : Subic-Clark-Tarlac Expressway Project

Dear Gen. Abaya:

We refer to your letter dated 15 August 2007 requesting for a confirmatory opinion on the legal position taken by the Office of the Government Corporate Counsel (OGCC) that -

1. The Bases Conversion Development Authority (BCDA) may hire an interim Operations and Management (O & M) Operator for the Subic-Clark-Tarlac Expressway Project (SCTEx Project) through negotiated procurement under Section 53 (a) and (b) of Republic Act No. 9184 (R. A. 9184) and its Implementing Rules and Regulations Part A (IRR-A);
2. BCDA is not required to follow the same Terms of Reference used in the two (2) previous failed biddings in the conduct of the negotiated procurement.
3. The interim O & M Operator is not disqualified from participating in the public bidding for the permanent O & M Operator.

As we understand in your letter, the relevant facts are as follows:

1. SCTEx Project, consisting of Packages I and II, is envisioned to be the longest toll road in the Philippines that will provide the much needed infrastructure and

access necessary for the development of Central Luzon. Package I is targeted for completion in March 2008. Package II is expected to be operational in October 2007.

2. The procurement of an O & M Operator for both packages has undergone two (2) biddings on 21 December 2006 and 10 April 2007. Both biddings failed on account of non-responsive bids.

3. With Packages I and II due for completion in about 210 and 60 days, respectively, the hiring of an interim O & M Operator is of extreme urgency. The non-operation of SCTEx is expected to cost the Government approximately P1.3 billion per annum in revenues and P3.1 billion per annum in cash outflows. Moreover, the non-operation of a vital infrastructure facility would cause a major disruption in the delivery of public services.

Negotiated Procurement

We confirm that under Section 53 of R.A. 9184 and its IRR-A, the alternative mode of negotiated procurement may be resorted to when there has been a failure of public bidding for the second time (Section 53 [a] in relation with Section 35 of the IRR-A). Negotiated procurement is also justified and resorted to in case of imminent danger to life or property during a state of calamity, or when time is of the essence arising from natural or man-made calamities or other causes where immediate action is necessary in order to:

1. prevent damage to or loss of life or property;
2. restore vital public services, infrastructure facilities and other public utilities (Section 53 [b] of the IRR-A; GPPB Circular No. 03-2006 dated 06 December 2006).

It bears stressing, however, that the ~~determination~~ and ~~accountability~~ for use of any of the alternative methods of procurement rest with the head of the procuring entity, upon the recommendation of the Bids and Awards Committee (Section 12, R. A. 9184; Section 48, IRR-A). In the instant case, if BCDA is convinced, after taking into account the purpose of the project, the possible losses to the Government, the time schedule available, and other relevant circumstances, that the procurement of the services of an interim O & M Operator through negotiated procurement is justified under Section 53 (a) or (b) of the IRR-A of R. A. 9184, then it may resort to negotiated procurement.

Terms of Reference

A change in the Terms of Reference may be in any of the following:

- a. scope of work or to adjust the procuring entity's cost estimates or specifications;
- b. approved budget for the contract (ABC).

Under Government Procurement Policy Board (GPPB) Resolution No. 07-2005), the ABC may be adjusted upwards only under the following conditions:

- a. There has been failure of bidding for the second time due to all bids submitted exceeding the ABC or no bids have been submitted, or failure of negotiated procurement after two (2) failed biddings; and
- b. There has been a previous modification of the terms, conditions and specifications of the project based on Section 35 of the IRR-A except when the project is indivisible.

Upon adjustment of the ABC, the procuring entity must conduct re-bidding with re-advertisement and posting (GPPB Resolution No. 07-2005).

Based on the foregoing, if BCDA resorts to negotiated procurement under Section 53 (a), it may only change the scope of work or the cost estimates or specifications as prescribed in the Terms of Reference used in the two (2) previous failed biddings. However, if BCDA adjusts the ABC, it must conduct a re-bidding.

On the other hand, if BCDA resorts to negotiated procurement under Section 53 (b), negotiations will be governed by a totally new set of terms and conditions considering that this alternative mode of procurement is resorted to only in emergency situations.

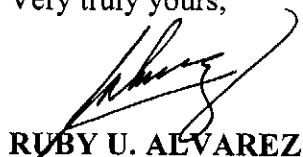
Participation of the Interim O & M Operator

We confirm the opinion of the OGCC that there is no prohibition under R.A. 9184 and its IRR-A for the interim O & M Operator to participate in the public bidding for the permanent O & M Operator.

Before ending, please allow us to note that, while we respect BCDA's right to avail of its legal options under R.A. 9184 in the engagement of its interim O & M Operator, we believe that public bidding for the hiring of a permanent O & M Operator remains to be the most commendable course of action.

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

Very truly yours,



RUBY U. ALVAREZ
Executive Director III