

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office
Mezzanine 125, Mabini Hall, Malacañang, Manila
Telefax Nos. (02) 735-4962; (02) 736-5758

NPM No. 091-2004

July 5, 2004

MR. ARNEL R. MANRESA

Chairman, Technical Working Group ("TWG")
Department of Transportation and Communications ("DOTC")
The Columbia Tower, Ortigas Avenue
Pasig City

Re : Applicability of Republic Act No. 9184 ("R.A. 9184") On Foreign Assisted Projects

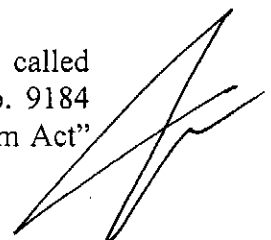
Dear Mr. Manresa:

This refers to your letter dated June 7, 2004, which we received on June 9, 2004, requesting for a legal opinion on a single issue, to which we have already responded through telephone on even date. As raised in your letter, your query refers to the procurement rules and procedures that your agency should adopt in your procurement of smoke testing equipment, funded by a Loan Agreement with the Asian Development Bank ("ADB") under Loan No. 1655-PHI for Metro Manila Air Quality Improvement Sector Development Project ("MMAQISDP").

Scope of the Implementing Rules and Regulations Part A ("IRR-A") of R.A. 9184

The enactment of R.A. 9184, otherwise known as the Government Procurement Reform Act ("GPRA"), and its Implementing Rules and Regulations Part A ("IRR-A") paved the way for the institutionalization of procurement reforms in the country, particularly through the issuance of a streamlined and standardized set of rules and regulations governing procurement of goods, civil works and consulting services. However, notwithstanding the concept of a uniform set of procedures applicable to various procurement activities of the government, it must be noted that the IRR-A limits its application to fully domestically-funded projects. Witness Section 1 of the IRR-A, to wit:

This Implementing Rules and Regulations (IRR) Part A, hereinafter called "IRR-A", is promulgated pursuant to Section 75 of Republic Act No. 9184 (R.A. 9184), otherwise known as the "Government Procurement Reform Act"



(GPRA), for the purpose of prescribing the necessary rules and regulations for the modernization, standardization, and regulation of the procurement activities of the government. **This IRR-A shall cover all fully domestically-funded procurement activities from procurement planning up to contract implementation and termination x x x** (Emphasis supplied.)

Based on the above-cited provision, it can be clearly inferred that the IRR-A of R.A. 9184 does not apply to projects funded by International Financing Institutions ("IFIs"). This being the case, procurement activities funded by the IFIs are governed by their respective procurement guidelines, rules and regulations.

However, we have observed that the aforesaid Loan Agreement with ADB, specifically under Schedule 4 Paragraph 7 thereof¹, allows the use of local competitive bidding in accordance with the Borrower's standard procurement procedures acceptable to the Bank. Apparently, pursuant to this provision in the Loan Agreement, the DOTC applied the provisions under R.A. 9184 and adopted the procedures in Presidential Decree No. 1594 ("P.D. 1594") entitled "Prescribing Policies, Guidelines, Rules and Regulations For Government Infrastructure Contracts."

To our mind, this may not conform with such provision in the Loan Agreement considering that this is not the applicable standard local bidding procedures when the project was bidded out. It must be noted that since the IRR-A of R.A. 9184 was already effective at the time when such procurement activity was advertised, the DOTC should have applied the IRR-A of R.A. 9184 pursuant to the Loan Agreement. Hence, we suggest that this observation be directly addressed and discussed with ADB for proper evaluation and appropriate action.

Please bear in mind that 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

¹ quoted by the State Auditor V of the Commission on Audit in her letter dated May 17, 2004 addressed to the Technical Working Group of DOTC

RESPONSE SHEET FOR ONE OPINIONS

PHO No. 013-2004

Date Received: 06.15.04

Date Called: 6/22/04

Requesting Entity: DOTC

Contact Person / Number: Atty. Ferdinand Laboy (F) 727-7941
Atty. Luis Manuel Virtucio 725-0013

Issue(s) / Request(s): Execution of Variation Orders and Supplemental Agreements in light of the effectivity of RA 9184 & its IRR-A.

① Applicability of PD 1594 in contracts perfected prior to the effectivity of RA 9184 and its IRR-A but are now necessary to be subjected to Variation Orders.

② ~~Is~~ Are supplemental agreements still allowed considering that the basic elements of a supplemental agreement is reproduced in Sec. 53(d) of IRR-A?

③ How do we treat cumulative Variation Orders beyond 10% which the head of the procuring entity may authorize to grant under item 4 of Annex 'E' of IRR-A?

Response: ① Notwithstanding the passage of RA 9184 & its IRR-A prior procurement laws, rules and regulations still govern the procurement and implementation of certain government contract contracts, if the advertisement or invitation for bids were issued prior to the effectivity of the ~~GRA~~ RA 9184 & its IRR-A. (Sec. 77, IRR-A)

② Variation Orders are limited only to Change Order and Extra Work Order. The deletion of any reference to supplemental agreement infers that such type it is no longer allowed. ~~If it is as~~ Regardless of the claim that the basic elements of a supplemental agreement were reproduced in Sec. 53(d) of IRR-A, such type of variation order it cannot be imp interpreted as it does not imply that supplemental agreements are still allowed. Sec. 53(d) of IRR-A being an should be strictly interpreted to ~~be~~ limited to ~~infer~~ apply only to apply only when the subject contract is adjacent or contiguous to an on-going infrastructure project. But it cannot be interpreted in light of the supplemental agreement under PD 1594, which may be executed for change orders or ~~vs~~ extra work orders.

Formerly, Supplemental Agreements as Variation Order (CO/EWO), that exceeds 25% of the established original contract price. It appears that CA & EWO beyond 10% are still limited as such

Remarks: WRITTEN RESPONSE REQUESTED. (NPM 092-2004, 06/02/04)

Assigned to: PEY

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Technical Support Office

Mezzanine 125, Mabini Hall, Malacañang, Manila
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June 15, 2004

ATTY. LUIS MANUEL L. VIRTUCIO

Director
Legal Service Department
Officer-in-Charge
Office of the Assistant Secretary for Legal Affairs
Department of Transportation and Communications
The Columbia Tower, Brgy. Wack-Wack,
Mandaluyong City

Dear Dir. Virtucio:

This refers to your letter dated June 14, 2004, which we received on June 15, 2004, addressed to Executive Director Jose Martin C. Syquia, requesting for clarification on the application of variation order and supplemental agreements for existing contracts perfected before the effectivity of Republic Act 9184 and its Implementing Rules and Regulations Part A.

We wish to inform you that we shall respond to your concerns either through phone or in writing at the earliest possible opportunity, or raise the same to the Government Procurement Policy Board for appropriate resolution should referral thereto becomes necessary.

Very truly yours,



ATTY. REYNALDO H. BICOL JR.
Procurement Management Officer V