

NPM No. 021-2019

18 October 2019

HON. MARK A. VILLAR
Secretary
Department of Public Works and Highways
Bonifacio Drive, Port Area
Manila City

Re: Procurement Project funded by Loan Agreement

Dear Secretary Villar:

This refers to the Honorable Secretary's letter,¹ forwarded by the Department of Budget and Management, requesting for guidance and opinion relative to the bidding of the Panguil Bay Bridge Project in Region X, Northern Mindanao. Particularly, clarification is being sought on the following:

- a.) Are the guidelines contained in KEXIM Bank's Letter dated 07 August 2019 acceptable pursuant to the Loan Agreement and the Guidelines for Procurement attached thereto?
- b.) Will the authority of the Negotiating Team to be constituted to carry on the Project procurement process be limited to negotiating with the higher ranked bidder or may it be given authority to negotiate AND to undertake the succeeding procurement process until the issuance of the Resolution of Award to the winning bidder?
- c.) Is the draft Special Order creating the Negotiating Team and authorizing it to proceed with the Project procurement process in conformity with KEXIM Bank's Letter dated 07 August 2019 and the First DOJ Opinion?

As represented, the DPWH is implementing the Panguil Bay Bridge Project under the Korean Economic Development Cooperation Fund (EDCF) Loan Agreement,² with the Export-Import Bank of Korea (KEXIM Bank). However, the project has been stalled due to conflicting interpretations of the DPWH Bids and Awards Committee for Civil Works and the KEXIM Bank on the procurement guidelines.

At the outset, Section 4³ of Republic Act (RA) No. 9184, pursuant to the international legal principle of *pacta sunt servanda*, expressly recognizes the adoption of other procurement rules or methodology embodied in a treaty or international or executive agreement to which the Philippine government is a signatory.

¹ Dated 25 September 2019.

² Dated 28 April 2016, EDCF Loan Agreement No. PHL-18, entitled: "Loan Agreement on the Panguil Bay Bridge Project between the Government of the Republic of the Philippines and the Export-Import Bank of Korea (Government Agency for the EDCF).

³ Section 4 of RA No. 9184 states, "Scope and Application. – This Act shall apply to the Procurement of Infrastructure Projects, Goods, and Consulting Services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or -controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed."

Considering that the EDCF Loan Agreement⁴ has prescribed the use of its own rules⁵ in the implementation of the Panguil Bay Bridge Project, the Government Procurement Policy Board and its Technical Support Office finds no reason to disturb this well-established legal precept by rendering an interpretation of the EDCF loan procurement rules as against the provisions of RA No. 9184.

Moreover, under Section 4.3⁶ of the 2009 IRR of RA No. 9184, the applicable rules as the Loan Agreement was executed prior to the effectivity of the 2016 revised IRR on October 28, 2016, the negotiating panel that agreed on the procurement rule or methodology to be used is in a better position to comment thereon. In fine, the selection of the winning bidder for the implementation of the Panguil Bay Bridge Project is not covered by the provisions of RA No. 9184 and its 2016 revised IRR.

Finally, the foregoing opinion was made based on the particular facts presented and circumstances prevailing and may not be applicable given a different set of facts and circumstances.

We hope to have sufficiently addressed the Honorable Secretary's concern.

Sincerely yours,
(sgd.)

Rowena Candice Ruiz
Executive Director V

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⁴ Section 4.01, Article IV of the EDCF Loan Agreement No. PHL-18.

⁵ Schedule 4, EDCF Loan Agreement No. PHL-18.

⁶ Sec.4.3 of 2009 IRR of RA No. 9184 states, "Unless the Treaty or International or Executive Agreement expressly provides use of foreign government/foreign or international financing institution procurement procedures and guidelines, this IRR shall apply to Foreign-funded Procurement for goods, infrastructure projects, and consulting services by the GOP.

Consistent with the policies and principles set forth in Sections 2 and 3 of this IRR, the GOP negotiating panels shall adopt, as its default position, use of this IRR, or at the very least, selection through competitive bidding, in all Foreign-funded Procurement. If the Treaty or International or Executive Agreement states otherwise, then the negotiating panels shall explain in writing the reasons therefor."