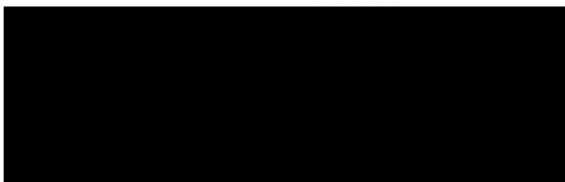


NPM No. 130-2016

29 December 2016



Re: Mode of Procurement; Joint Ventures

Dear

This refers to your letter requesting our opinion on the appropriate mode of procurement (Goods, Infrastructure Projects or Consulting Services) to be used for the preparation of Bidding Documents considering the uniqueness of your project.

As represented, CPA is planning to bid the procurement of Solid Waste/Garbage, Oil/Oily Waste, Noxious Liquid Substances (NLS) and Sewage Water Services at the CPA Bases, Subports, Outports and Private Ports within its territorial jurisdiction. For the project, CPA requires the bidder to provide the needed manpower, equipment and facilities at no cost to CPA and to remit a fixed annual fee and percentage variable fee of the gross receipts of all transactions of services rendered to port stakeholders. This means that the contract will be awarded to the waste contractor offering to pay CPA, apart from the fixed annual privilege fee, the highest percentage share from its gross receipts, instead of the bidder with the Lowest Calculated Responsive Bid (LCRB).

Hence, this request for our opinion.

At the outset, we wish to clarify that in determining the classification of a procurement project, it is our considered view that it is the Procuring Entity (PE) that is in the best position to determine the correct classification of its procurement based on its identified needs, guided by the parameters and conditions in the relevant provisions of Republic Act (RA) No. 9184 and its 2016 Revised Implementing Rules and Regulations (IRR) on what should be considered as goods, infrastructure project, and consulting services.¹ We note, however, the peculiarity of the project being proposed by the CPA whereby private entities will be engaged at no cost on the part of CPA but instead, will be required to remit certain fees to the CPA. Hence, we deemed it necessary to discuss the concept of procurement and its related activities.

Procurement is defined under Section 5(aa) of the 2016 Revised IRR of RA 9184 as acquisition of goods, consulting services, and the contracting for infrastructure projects by the

¹ NPM No. 138-2013 dated 27 December 2013.

procuring entity. In a previous opinion², we expressed our view that if the government transaction or activity does not involve use of public funds, such transaction or activity is not within the purview and coverage of RA 9184 and its IRR.

At this juncture, we note that government entities³ may also opt to enter into partnership with private entities, in which case, the processes and procedures under RA 9184 and its associated issuances are no longer applicable. Pointedly, under Section 4.5(e) of the 2016 Revised IRR of RA 9184, a joint venture between Government Owned and Controlled Corporations (GOCCs) and private entities are not considered as procurement activity, and therefore not covered by RA 9184 and its IRR but by the *Revised Guidelines and Procedures for Entering into Joint Venture Agreements between Government and Private Entities*⁴ (Revised JV Guidelines for brevity).

Under Section 5.7 of the Revised JV Guidelines, JV refers to an arrangement whereby a private sector entity or a group of private sector entities on one hand, and a government entity or a group of government entities on the other hand, contribute money/capital, services, assets (including equipment, land, intellectual property or anything of value), or a combination of any or all of the foregoing to undertake an investment activity. The investment activity shall be for the purpose of accomplishing a specific goal with the end view of facilitating private sector initiative in a particular industry or sector, and eventually transfer the activity to either the private sector under competitive market conditions or to the government.

Based on your representation, for the specific project subject of this request, CPA requires the bidder to provide the project requirements at no cost to CPA and to remit a fixed annual fee and percentage variable fee of the gross receipts of all transactions of services rendered to port stakeholders. In this regard, it is our considered view that if the project of CPA contemplates a JV as defined above, the rules, guidelines and procedures laid down in the Revised JV Guidelines shall be observed, and not the provisions of RA 9184 and its associated issuances.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is issued on the basis of particular facts and situations presented, and may not be applicable given a different set of facts and circumstances. Should there be other concerns, please do not hesitate to contact us.

Very truly yours,

(sgd.)

DENNIS S. SANTIAGO
Executive Director V

Wrd3

² NPM No. 60-2013, dated 26 June 2013.

³ Include Government Owned and/or Controlled Corporations (GOCCs), Government Corporate Entities (GCEs), Government Instrumentalities with Corporate Powers (GICPs), Government Financial Institutions (GFIs), and State Universities and Colleges (SUCs).

⁴ Approved on 3 May 2013.