

**NPM No. 132-2016**

29 December 2016



**Re: Applicability of Republic Act (RA) No. 9184  
in Privatization of Government Assets**

Dear :

This refers to the letter of Chief State Counsel Ricardo V. Paras III endorsing to our office your electronic mail (e-mail), dated 22 September 2016, regarding the privatization of the Mt. Apo Geothermal Power Plant in Mindanao. It was alleged that the absence of public bidding on the lowest service rate per kilowatt hour (kWh) is in violation of the provisions of RA 9184, otherwise known as the Government Procurement Reform Act, rendering the concession contract for geothermal power distribution illegal.

We wish to clarify that RA 9184 and its 2016 Revised Implementing Rules and Regulations (IRR) 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 (GOCCs) and Local Government Units (LGUs).<sup>1</sup>

Procurement is defined as the acquisition of goods, consulting services, and the contracting for infrastructure projects by the procuring entity.<sup>2</sup> For as long as public funds are utilized or is contemplated to be spent for any procurement activity, it shall, by force, fall within the ambit of the present procurement law.<sup>3</sup> In a recent opinion<sup>4</sup>, we clarified that there are two important elements to be considered in determining whether an activity is procurement that is covered by RA 9184 and its IRR, thus:

1. the activity involves the acquisition of goods, consulting services, and the contracting for infrastructure projects; and
2. public funds are utilized or is contemplated to be spent.

In the same opinion, we expressed our view that an activity, *i.e.*, divestment of equity process, that does not involve an acquisition of goods, consulting services, and the contracting

<sup>1</sup> Section 4 of RA 9184 and its IRR.

<sup>2</sup> Section 5(n) of RA 9184.

<sup>3</sup> NPM No. 141-2004 dated 5 November 2004.

<sup>4</sup> NPM No. 23-2016 dated 23 March 2016

for infrastructure projects, neither the utilization of public funds, is not considered as procurement and is, accordingly, beyond the ambit of RA 9184 and its IRR.

We note that the privatization of assets and liabilities of the National Power Corporation, *e.g.*, Mt. Apo Geothermal Power Plant., is covered by RA 9136 or the Electric Power Industry Reform Act of 2001<sup>5</sup>. Section 4(pp) thereof defines privatization as the sale, disposition, change and transfer of ownership and control of assets and Independent Power Producer (IPP) contracts from the Government or a government corporation to a private person or entity.


By its definition under Section 4(pp) of RA 9136, it can be inferred that the term “privatization” contemplates sale or disposition of government property to a private entity, which is totally opposed to the concept of procurement under RA 9184 where it is the government acquiring goods and consulting services from, or contracting infrastructure projects with a private entity. Relatedly, Section 4.5 (f) of the 2016 Revised IRR of RA 9184 specifically provides that disposal of property and other assets of the government are not considered procurement activities covered by RA 9184 and its 2016 Revised IRR.

In this regard, we are of the view that considering that privatization of assets and liabilities covered by RA 9136 does not involve an acquisition of goods, consulting services, and the contracting for infrastructure projects, it is not considered as procurement and therefore, beyond the ambit of RA 9184 and its 2016 Revised IRR.

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*

Copy furnished:

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<sup>5</sup> Approved on 8 June 2001.