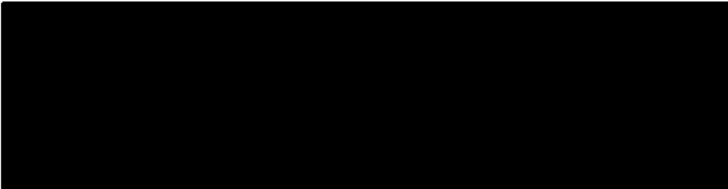


**NPM No. 141-2016**

29 December 2016



**Re: Exemption from Public Bidding**

Dear [REDACTED]:

This refers to your letter seeking exemption from the public bidding process as mandated under Republic Act (RA) No. 9184 and its revised Implementing Rules and Regulations (IRR).

As represented, a Medium-Term Project is to be implemented in relation to the Tacloban North Yolanda National Housing Resettlement Project Sites. About 7,000 families are scheduled to be relocated to the completed housing units in the different resettlement sites north of Tacloban City. In view of the imperative need to immediately provide safe and potable water for the relocatees, six (6) 10 cubic meter water delivery trucks are scheduled to be procured. In addition, laying of 10.9 kms of pipes, construction of 600 CUM reservoir and provision of pumps, valves and generator sets are included in the Program of Work as part of the Medium-Term Project. To date, you are awaiting approval of your request and authority to procure the water tankers from Department of Budget of Management and Department of Public Works and Highways.

To expedite the provision and delivery of water, an emergency procurement process is being considered to achieve your objective at the earliest possible time in connection with the recent instruction of the President to fast track the implementation of the Project by December. In this regard, you would like to request for an exemption from the regular procurement process under RA 9184 for your Medium-Term Project, which includes the procurement of the water delivery trucks.

**Jurisdiction of the GPPB**

Please note that it is beyond the authority of the Government Procurement Policy Board (GPPB) to grant exemptions from the application of RA 9184, its revised IRR, and associated issuances, as it does not have the mandate to provide exemption, legislate or limit the coverage of the law. This office has been consistent with its position that the GPPB cannot waive any of the provisions of RA 9184 and its IRR or allow any exemption from the application of the procurement law, rules and regulations in favor of procuring entities,

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suppliers, manufacturers, consultants and contractors.<sup>1</sup> The GPPB, however, may render contemporaneous construction of the provisions of the law pursuant to its quasi-legislative fiat, and issue rules and regulations on the basis of its rule-making power.

In the case of *Commissioner of Internal Revenue v. The Insular Life Assurance Co. Ltd.*<sup>2</sup>, the Supreme Court held:

While administrative agencies, such as the Bureau of Internal Revenue, may issue regulations to implement statutes, **they are without authority to limit the scope of the statute to less than what it provides, or extend or expand the statute beyond its terms, or in any way modify explicit provisions of the law.** Indeed, **a quasi-judicial body or an administrative agency for that matter cannot amend an act of Congress.** (Emphasis supplied)

Thus, the request of LWUA for an exemption from regular procurement procedure under RA 9184 cannot be granted since the GPPB has no authority to grant the same.

### **Negotiated Procurement (Emergency Cases)**

We wish to stress that it is an established public policy,<sup>3</sup> as well as a statutory mandate<sup>4</sup> that government procurement shall be done through competitive public bidding and alternative methods of procurement shall be resorted to only in highly exceptional cases. Section 48.2 of the IRR of RA 9184 is instructive, thus:

48.2. In accordance with Section 10 of this IRR, as a general rule, the Procuring Entities shall adopt public bidding as the general mode of procurement and shall see to it that the procurement program allows sufficient lead time for such public bidding. Alternative methods shall be resorted to only in the highly exceptional cases provided for in this Rule.

However, as an exception, in order to promote efficiency and economy, Article XVI of RA 9184 sanctions resort to alternative methods of procurement, among others, *via* Negotiated Procurement through Emergency Cases.

The responsibility and accountability in determining and justifying the existence of conditions or circumstances warranting the use of any of the alternative methods of procurement provided in RA 9184 and its revised IRR rest primarily with the procuring entity. Thus, we would like to clarify that prior approval of the GPPB to resort to any of the alternative methods of procurement is not necessary, except where the Approved Budget for the Contract amounts to at least Five Hundred Million Pesos (PhP500,000,000.00), as required under Executive Order No. 423, Series of 2005,<sup>5</sup> as amended.

<sup>1</sup> NPM No. 041-2005 dated 20 September 2005

<sup>2</sup> G.R. No. 197192, June 4, 2014.

<sup>3</sup> *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines, Inc.*, G.R. No. 183789, August 24, 2011, 656 SCRA 214, 241.

<sup>4</sup> Section 10, Article IV of RA 9184 provides that “[a]ll Procurement shall be done through Competitive Bidding, except as provided for in Article XVI of this Act.”(RA 9184)

<sup>5</sup> As amended by Executive Order No. 645, Series of 2007.

Section 53(b) of RA 9184 and Section 53.2 of the associated IRR identifies Negotiated Procurement (Emergency Cases) as an alternative modality that procuring entities may utilize in case there is “imminent danger to life or property during a state of calamity, or when time is of the essence arising from man-made calamities or other causes where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities.”

The adoption of Negotiated Procurement under any of the Emergency Cases situations should seriously consider the imminence of danger to life or property; element of time; immediacy of action to prevent damage to or loss of life or property; and, restoration of vital public services, infrastructure facilities and other public utilities, such that under any of these extra-ordinary circumstances procurement through competitive bidding cannot be performed, or is impracticable, to timely, immediately and actually address the needs of the procuring entity.

Annex “H” Section (D)(2) of the revised IRR of RA 9184 provides for the procedure for Emergency Cases modality, thus:

The End-User unit or the duly authorized official or personnel shall submit a request to the BAC or the HOPE, as the case may be, accompanied by appropriate supporting documents identifying the emergency sought to be addressed, and the necessary goods, civil works or consulting services (*e.g.*, Technical Specifications, Scope of Work or Terms of Reference) that have to be procured to address the emergency.

Upon preparation of the appropriate procurement documents, the BAC may directly negotiate with a supplier, contractor or consultant with technical, legal and financial capability to deliver the goods, execute the works and perform the services to address the emergency. Upon confirmation and ascertainment of such capability to address the emergency, the HOPE, upon recommendation of the BAC, shall immediately award the contract to the Supplier, Contractor or Consultant.

Accordingly, LWUA may utilize Negotiated Procurement (Emergency Cases) for the procurement of six (6) 10-cubic meter water delivery trucks, including the laying of pipes, construction of 600 CUM reservoir and provisions of pumps, valves and generator sets included in the Program of Work as part of the Medium-Term Project upon determination by the Honorable Administrator, based on the recommendation of the BAC, of the existence of any of the circumstances mentioned in Section 53.2 of the IRR of RA 9184.

In sum, we wish to emphasize the following:

1. The GPPB cannot waive any of the provisions of RA 9184 and its revised IRR or allow any exemption from the application of procurement laws, rules and regulations in favor of procuring entities, suppliers, manufacturers, consultants and contractors; and
2. Upon determination by the Honorable Administrator, based on the recommendation of the BAC, LWUA may resort to Negotiated Procurement under Emergency Cases taking into serious consideration the

extra-ordinary circumstances provided for under Section 53(b) of RA 9184 and Section 53.2 of its associated IRR, and when procurement through competitive bidding cannot be performed, or is impracticable, to timely, immediately and actually address the needs of the procuring entity.

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*

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