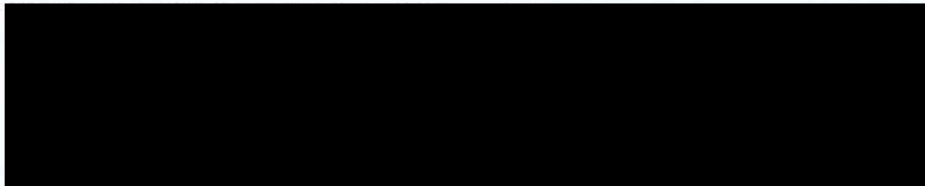




Department of Budget and Management
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE

NPM No. 21-2015

7 October 2105



Re: Negotiated Procurement (Adjacent or Contiguous)

Dear 

This refers to your letter seeking our opinion on DOTC's proposed engagement of ALMEC Corporation for the Metro Manila Urban Transportation Integration Study Update and Capacity Enhancement II Project (MUCEP II).

As represented, MUCEP involves the preparation of Origin-Destination (OD) matrices for Metro Manila and selected areas in Regions 3 and 4a, and the establishment of travel demand forecasts. The project is undertaken by DOTC in partnership with the Japan International Cooperation Agency (JICA) under a grant agreement. As Metro Manila and Regions 3 and 4a currently exhibit the highest traffic congestion and growth rates in the Philippines, DOTC sees the need to study the travel behavior of commuters in the area to be able to craft the appropriate public transport policies. Thus, DOTC proposes to engage ALMEC Corporation, through Negotiated Procurement, to implement MUCEP II that entails the preparation of OD matrices and travel demand forecasts for the previously uncovered areas of Regions 3 and 4a, considering among others that the proposed engagement is contiguous to their original scope of work. However, since the original Procuring Entity (PE) was JICA, DOTC seeks the opinion of this office as to the propriety of the proposed Negotiated Procurement modality.

Applicability of RA 9184; Official Development Assistance (ODA)

At the outset, we would like to clarify that the procurement of goods, infrastructure projects and consulting services funded through Foreign Grants and governed by Republic Act No. (RA) 8182, otherwise known as the *Official Development Assistance Act of 1996*, as amended by RA 8555, are not covered by RA 9184 and its associated revised Implementing Rules and Regulations (IRR), unless the Government of the Philippines and the foreign grantor/foreign or international financing institution agree otherwise.¹ On the other hand, Section 4 of RA 9184 and its IRR recognize observance of Treaty, or International or Executive Agreement provisions, specifically when the procurement processes and

¹ Section 4.4(a) of the IRR of RA 9184.

procedures are specified in the Loan or Grant Agreement. In which case, we apply the procurement guidelines, rules and regulations identified in the agreement, that is, the Loan or Grant Agreement. The Supreme Court in *DBM-PS v. Kolonwel Trading*² and *Abaya v. Ebdane*³, had the occasion to rule on the matter, thus:

"The question as to whether or not foreign loan agreements with international financial institutions, such as Loan No. 7118-PH, partake of an executive or international agreement within the purview of Section 4 of RA 9184, has been answered by the Court in the affirmative."


Negotiated Procurement (Adjacent or Contiguous)

Assuming *arguendo* that Negotiated Procurement under Section 53.4 (Adjacent or Contiguous) of the revised Implementing Rules and Regulations (IRR) of Republic Act No. (RA) 9184 is applicable because the Loan or Grant Agreement is silent as to the processes and procedures to be adopted, the mandated conditions under the rules must be complied with.

Adjacent or Contiguous modality of Negotiated Procurement may be resorted to whenever the subject contract is adjacent or contiguous to an on-going infrastructure project, or consulting service where the consultants have unique experience and expertise to deliver the required service, provided that the following conditions are complied with:

1. the original contract is the result of a Competitive Bidding;
2. the subject contract to be negotiated has similar or related scopes of work;
3. it is within the contracting capacity of the contractor/consultant;
4. the contractor/consultant uses the same prices or lower unit prices as in the original contract less mobilization cost;
5. the amount involved does not exceed the amount of the ongoing project;
6. the contractor/consultant has no negative slippage/delay; and
7. the negotiations for the procurement are commenced before the expiry of the original contract.

Article 1311 of the New Civil Code of the Philippines mandates that contracts take effect only between the parties, their assigns and heirs, a rule of law commonly referred to as the *principle of relativity of contracts*. Under this principle, contracts can only bind the parties who entered into it, and it cannot favor or prejudice third persons.⁴ Accordingly, when an existing procurement contract between a PE and a private contractor becomes the subject of negotiated contract between the same private contractor and another PE, it gives an unwarranted favor to such different PE which is not privy to, or a party to the original contract, and an undue prejudice to other private contractors who are also eligible and qualified to undertake the execution of the contract given the right opportunity.

In this regard, it is our considered view that the PE can only resort to Negotiated Procurement under Section 53.4 (Adjacent or Contiguous) of the IRR of RA 9184 if it is a 

² G.R. No. 175608 promulgated on 08 June 2007.

³ G.R. No. 167919 promulgated on 14 February 2007.

⁴ *Starbright Sales Enterprises, Inc. v. Philippine Realty Corporation, et.al.*, G.R. No. 177936, January 18, 2012 citing *Ramos v. Court of Appeals*, 362 Phil. 205, 215 (1999).

party to the original contract subject of negotiation, and provided that all other conditions for the use of this alternative method of procurement are strictly complied with.

Summary

All told, we wish to clarify the following matters:

1. RA 9184 and its IRR shall not apply to procurement projects that are covered by an Official Development Assistance (ODA), through Loan or Grant Agreement, which requires the use of specific procurement processes and procedures other than those laid down in RA 9184 and its IRR; and
2. PE can only resort to Negotiated Procurement under Section 53.4 (Adjacent or Contiguous) of the IRR of RA 9184 if it is a party to the original contract subject of negotiation, and provided that all other conditions for the use of this alternative method of procurement are strictly complied with.

We hope 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.

(sgd.)

Executive Director V

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