

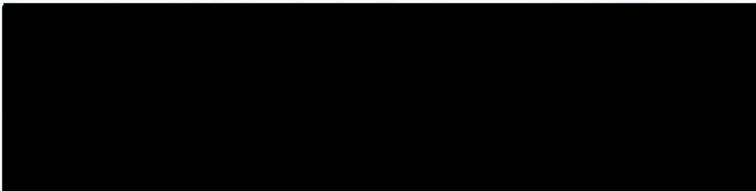


Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 48-2015

9 October 2015



Re: Applicability of Republic Act (RA) No. 9184

Dear 

This refers to your letter pertaining to the establishment of a Direct Communication Link (DCL) Project with and in between ASEAN Member States, which was agreed upon during the 8th Meeting of the ASEAN defense Ministers' Meeting held on 20 May 2014.

As represented, the DCL Project is aimed towards reducing and managing risks of potential conflict in the ASEAN Region by enabling two (2) ASEAN Defense Ministers to communicate with each other and arrive at a mutual decision while handling emergency situations. Being an ASEAN member, the Philippines participated in the discussion and planning for the realization of the DCL Project that was projected to be established this year. To date, the concept paper for the project has already been approved by the ASEAN members and the project is ready to take its course pending members' confirmation.

Before giving its confirmation, the DND is seeking the opinion of our office given that the project involves the utilization of public funds in a relatively complex manner. As further represented, the arrangement for the procurement of the said project would be that the total cost of the acquisition of the equipment would initially be shouldered by Brunei and later be reimbursed by the ASEAN Member States. It is in this light that you are seeking clarification on the following matters:

1. Whether said project would fall under the ambit of procurement law?
2. Whether Section 4.2 of the revised Implementing Rules and Regulations (IRR) of RA 9184 may apply, given that the agreement which stipulated the mode of payment/procurement for the project was between States under the "ASEAN Declaration"?
3. What other options can DND consider in order to satisfy the agreement and the participation of the Philippines in the said ASEAN Project?



Applicability of RA 9184 and its IRR; Exceptions


As a general rule, RA 9184 and its 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), Government Financial Institutions (GFIs), State Universities and Colleges (SUCs) and Local Government Units.¹ 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.²

An exception to this rule is our faithful compliance with our international obligations under the fundamental principle of international law, *pacta sunt servanda*, which is, in fact, embodied in Section 4 of RA 9184 as it provides that any treaty or international or executive agreement affecting the subject matter of the Act to which the Philippine government is a signatory shall be observed.³ Section 4.2 of the IRR of RA 9184 further provides that in case of conflict between the terms of the Treaty or International or Executive Agreement and the IRR, the former shall prevail.

International or Executive Agreement; Clear Procurement Procedures

The question of whether Section 4 of RA 9184 and its IRR will apply, that is, the procurement aspect of the DCL Project of DND will not be subjected to the rules and procedures laid down in RA 9184 and its IRR, depends on the nature of the agreement made under the ASEAN Declaration. If the agreement which stipulated the mode of procurement/payment for the project is considered as an international/executive agreement, said agreement, to which the Philippines is a signatory, shall be observed to the effect that the procurement activity shall follow the procedures specifically indicated in such agreement. However, if the agreement is silent or unclear as regards the procurement rules to be applied, the procurement processes and procedures under RA 9184 and its IRR shall be followed.

The Supreme Court, in the case of *Land Bank of the Philippines v. Atlanta Industries, Inc.*⁴ defined an international agreement as one concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation, and further expounded that it may be in the form of either (a) treaties that require legislative concurrence after executive ratification; or (b) executive agreements that are similar to treaties, except that they do not require legislative concurrence and are usually less formal and deal with a narrower range of subject matters than treaties. A similar definition of international agreement can be found in Section 5(v) of the IRR of RA 9184.

Relatedly, the Government Procurement Policy Board (GPPB) issued Policy Matter Opinion No. 01-2013, dated 1 March 2013, in relation to the application of Section 4 of RA 9184, particularly to Treaty or International or Executive Agreement, thus: 

¹ Section 4 of RA 9184 and its IRR.

² NPM No. 141-2004 dated 5 November 2004.

³ *Abaya vs. Ebdane*, G.R. No. 167919, 14 February 2007.

⁴ G.R. No. 193796, 2 July 2014 citing *Bayan Muna v. Romulo*, G.R. No. 159618, 1 February 2011.

“Executive Order 459, Series of 1997⁵ lays down the policy and rules concerning the negotiation of Treaties, International Agreements, and Executive Agreements, and vests upon the Department of Foreign Affairs the authority to determine whether an agreement is a Treaty or International or Executive Agreement. Hence, in resorting to Section 4 of RA 9184 and its IRR, it is imperative for the procuring entity to establish, through DFA confirmation, that the procurement activity is covered by an agreement that is a Treaty or International or Executive Agreement, and the same agreement expressly provides the use of procurement rules other than RA 9184 and its IRR.”

Summary

In this regard, it is our considered view that any government procurement activity where public funds are utilized or is contemplated to be spent shall, perforce, fall within the ambit of RA 9184 and its associated rules and guidelines, unless the procuring entity is able to establish, through DFA confirmation, that the procurement activity is covered by an agreement that is a Treaty or International or Executive Agreement, and the same agreement expressly provides the use of procurement rules other than RA 9184 and its 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.

(sgd.)

~~DEJUAN S. SANTIAGO~~
Executive Director ✓

⁵ Providing the Guidelines in the Negotiation of International Agreements and its Ratification issued on 25 November 1997.