

THE REPORT

The Philippines 2017

ECONOMY ENERGY INDUSTRY
BANKING TOURISM CAPITAL MARKETS
BPO REGIONS INFRASTRUCTURE
REAL ESTATE TRANSPORT INTERVIEWS

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V&A LAW

Villaraza & Angangco



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The Firm is involved in **commercial, civil, tax** and **criminal** representation and **trial advocacy** in every forum. V&A Law provides efficient and effective strategies capitalizing on **alternative methods of dispute resolution**. The litigators have successfully handled cases in all **appellate levels** of the judicial system and routinely handle appeals from **quasi-judicial agencies**. The Firm represents a wide array of **banks and financial institutions**, both local and foreign. V&A Law has been involved in almost all **major corporate recovery projects** in the country, both litigated and non-litigated. The lawyers of V&A Law have extensive exposure and high level of competence in handling matters involving **labor standards** and **labor relations law**. Moreover, the Firm handles **labor litigation** before the regular courts and quasi-judicial bodies, such as the National Labor Relations Commission (NLRC).

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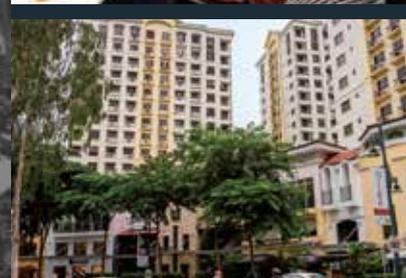
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V&A Law



Procurement in the Philippines is conducted by competitive bidding

Rules of supply

The Procurement Act has been updated

On October 24, 2002 Senator Edgardo Angara delivered a speech before the Philippine Senate pushing for change in the country's public procurement system. With the Philippines ranked the 11th most corrupt nation in the world at the time, Angara proposed the passing of Senate Bill No. 2248. "Fighting official corruption should mean snuffing out its roots, plugging the holes and gaps in the obsolete and fraud-prone public procurement," said Angara. "The proposed reforms are aimed at promoting transparency, openness and institutionalising genuine competition. They seek to end the crippling delays in the procurement process."

Angara emphasised the following six objectives of Senate Bill No. 2248 to encourage competition and transparency in the procurement process:

- To adopt a simple eligibility method;
- To eliminate the floor price and the use of the approved budget as the ceiling price;
- To minimise the discretion of the members of the Bids and Awards Committee (BAC);
- To impose a five-year warranty on civil works, as well as the imposition of a cap on price adjustments and change orders; and
- To adopt open and competitive public bidding at all levels of procurement.

Angara was not alone in his clamour for change. Various congressmen in the House of Representatives earlier sponsored the passage of House Bill No. 4809, or "An Act Providing for the Modernisation, Standardisation and Regulation of the Procurement Activities and for Other Purposes", aiming to provide a solution to the graft and corruption then evident in procurement activities in the Philippines. In answer to the growing calls for reform, the Senate and House of Representatives passed Republic Act No. 9184 (the Procurement Act) on January 10, 2003.

THE PROCUREMENT ACT: The drive behind the enactment of the Procurement Act is the general

policy of good governance in all branches of the Philippine government. The Procurement Act covers the procurement of infrastructure projects, goods and consulting services by all branches and instrumentalities of the Philippine government, including all its departments, offices and agencies, even government-owned and/or controlled corporations and local government units.

Further, the Procurement Act provides two methods of procurement: competitive bidding and alternative methods of procurement.

GENERAL RULE: The general rule under the Procurement Act is that procurement shall be conducted through competitive bidding. Under competitive bidding, any interested party is allowed to participate in bidding for government procurement contracts. However, interested parties are required to follow the mandatory stages of competitive bidding under the Procurement Act, which include:

- Advertisement;
- Pre-bid conference;
- Eligibility screening of prospective bidders;
- Receipt and opening of bids;
- Evaluation of bids;
- Post-qualification; and
- Award of contract.

SPECIAL CIRCUMSTANCES: Under special circumstances the act allows the following methods:

- Limited source bidding;
- Direct contracting;
- Repeat order;
- Shopping; and
- Negotiated procurement.

In furtherance of its objectives and policies, the Procurement Act established the Government Procurement Policy Board (GPPB), which was mandated under the law to formulate and amend the implementing rules and regulations (IRR) of the act and the corresponding standard forms of procurement.



The implementing rules and regulations for the Procurement Act were revised in 2003, 2009 and 2016

Pursuant to its mandate, the GPPB issued two IRR prior to 2016, the IRR Part A in 2003 and the Revised IRR of the Procurement Act in 2009. Almost seven years after the latest IRR of the Procurement Act, the GPPB issued the 2016 Revised IRR of the Procurement Act on August 29, 2016.

IRR of the Procurement Act Part A (2003): The IRR Part A of the Procurement Act (IRR-A) issued by the GPPB took effect on October 8, 2003. IRR-A expressly provided that it shall govern all fully domestically funded procurement activities from procurement planning until termination. Further, IRR-A expressly provided that foreign-funded procurement activities shall be governed by a subsequent issuance, which would be known as IRR-B. However, IRR-B was never promulgated by the GPPB.

2009 Revised IRR of the Procurement Act: Despite efforts to formulate IRR-B, the GPPB decided in October 2008 to consolidate an IRR for both locally funded and foreign-assisted projects.

IRR consultation meetings for the consolidated IRR were conducted from January 27 to February 28, 2009, to gather comments and suggestions from various stakeholders. Preparations for the consolidated IRR began on April 2, 2009. On July 22, 2009, the GPPB approved the Revised IRR of the Procurement Act (2009 Revised IRR).

2016 Revised IRR of the Procurement Act: Following discussions on the issues related to the 2009 Revised IRR, the GPPB decided to push for the improvement of the 2009 Revised IRR. On August 29, 2016 the 2016 Revised IRR of the Procurement Act (2016 Revised IRR) was promulgated by the GPPB, and became effective on October 29, 2016.

Salient Changes in the 2016 Revised IRR of the Procurement Act: The 2016 Revised IRR is a mixture of new provisions and amendments to the existing provisions, which exemplifies the government's thrust to further modernise and standardise the

procurement processes of the various branches of the Philippine government.

PROCUREMENT PLANNING: Notable amendments concerning procurement planning in the 2016 Revised IRR acknowledge the challenges involved in the procurement process.

Section five of the 2016 Revised IRR is a recognition of the existence of multi-year contracts, which generally require performance of their terms and conditions after execution. The Approved Budget for the Contract as reflected in the Multi-Year Obligational Authority (MYOA) or equivalent document shall be incorporated in the project cost for multi-year contracts involving the following for which an MYOA or equivalent document is required:

- National government agencies;
- Government-owned and -controlled corporations;
- Government financial institutions;
- State universities and colleges; and
- Local government units.

Moreover, the 2016 Revised IRR recognises that not all procuring entities in the Philippines may have the proficiency or capability to undertake certain procurements, thus, such entities may outsource their procurement by:

- Requesting other agencies of the Philippine government to undertake such procurement for them;
- Engaging private procurement agents; or
- Engaging consultants to assist them directly or by training staff in the management of the procurement function.

All three options must follow existing appropriate guidelines, legal principles and regulations.

The 2016 Revised IRR allows the procuring entity, pending approval of the General Appropriations Act, to undertake procurement activities short of award in order to facilitate the immediate implementation of procurement of goods, infrastructure projects or consulting. However, a contract cannot be awarded until the General Appropriations Act, corporate budget or appropriations ordinance, whichever is applicable, has been approved or enacted.

COMPETITIVE BIDDING: Following the general principle that all procurement of goods, infrastructure projects and consulting services of all branches of the Philippine government must be coursed through competitive bidding, it does not come as a surprise that a substantial portion of the amendments to the 2009 Revised IRR relate to the processes and systems involved in competitive bidding.

The 2009 Revised IRR required the advertisement of the invitation to bid/request for expressions of interest at least once in one newspaper of general nationwide circulation. However, it exempted certain contracts from this requirement if their approved budget fell below certain thresholds.

The 2016 Revised IRR increased these thresholds from P2m (\$42,300) and below to P10m (\$212,000) and below for procurement of goods; from P5m (\$106,000) and below to P15m (\$317,000) and below

for procurement of infrastructure; and from P1m (\$21,200) and below to P5m (\$106,000) and below for procurement of consulting services.

Although the 2009 Revised IRR required all invitations to bid/requests for expressions of interest to be advertised in a newspaper of general nationwide circulation, the 2016 Revised IRR makes a move to modernise the procurement process under the Procurement Act. It provides that, within two years after its effectivity, advertisement of invitations to bid/requests for expressions of interest in a newspaper of general nationwide circulation will no longer be required, unless the procuring entity cannot post its invitations to bid/request for expressions of interest in the Philippine Government Electronic Procurement System (PhilGEPS).

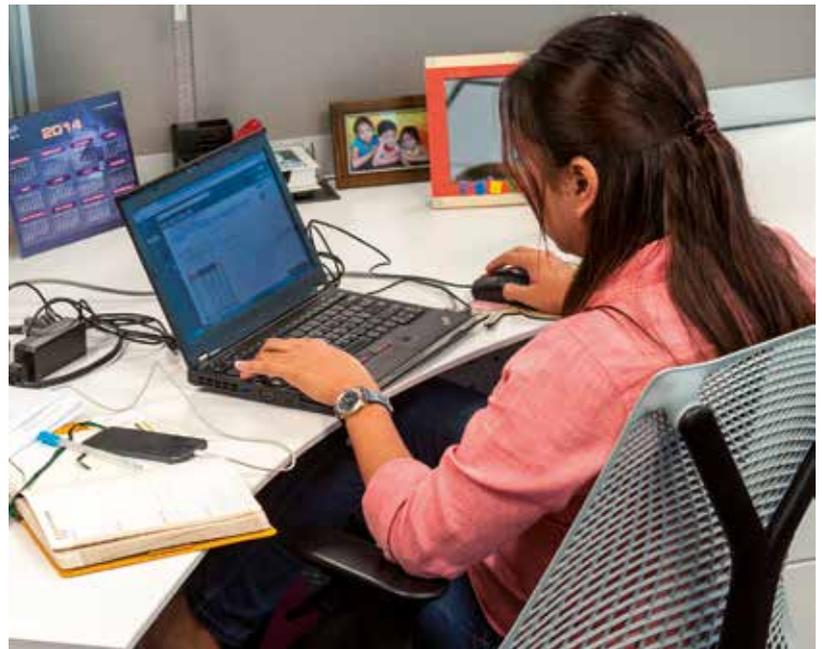
The 2016 Revised IRR makes another move towards modernisation of the procurement process by allowing pre-bid conferences to be held either in person or through modern technology, such as video-conferencing, webcasting or similar technology, or a combination thereof.

The 2016 Revised IRR requires the BAC of the procuring entity to use the contents of the PhilGEPS electronic registry of manufacturers, suppliers, distributors, contractors and consultants in determining the eligibility of bidders. This is in contrast to the 2009 Revised IRR, which only allowed the BAC of the procuring entity to maintain a registry system using the PhilGEPS or to have its own manual or electronic system that allows recording of eligibility requirements simultaneously with registration.

The 2016 Revised IRR provides the specific procedure to be followed by bidders in the event that the head of the procuring entity (HoPE) disapproves the recommendation of the BAC for the award of a contract. Under the 2009 Revised IRR the HoPE was required to inform only the BAC of any disapproval of its recommendation for the award of a contract.

However, the 2016 Revised IRR requires the HoPE to inform the BAC and the bidder in writing of its decision disapproving the award of the contract and the grounds for such decision. The HoPE may only disapprove the award of the contract under the following circumstances:

- If there is *prima facie* evidence of collusion between appropriate public officers or employees of the procuring entity, or between the BAC and any of the bidders, or if the collusion is between or among the bidders themselves, or between a bidder and a third party, including any act which restricts, suppresses or nullifies or tends to restrict, suppress or nullify competition;
- If the BAC is found to have failed in following the prescribed bidding procedures; or
- For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the government of the Philippines, as follows: (i) if the physical and economic conditions have significantly changed so as to render the project no longer economically, financially or



Invitations to bid must be posted on the Philippine Government Electronic Procurement System

technically feasible, as determined by the HoPE; (ii) if the project is no longer necessary as determined by the HoPE; or (iii) if the source of funds for the project has been withheld or reduced through no fault of the procuring entity.

Section 37.1.3 of the 2016 Revised IRR also expressly allows the bidder to file a request for reconsideration with the HoPE three days from receipt of the notice of disapproval. It is expressly provided that no award can be made unless a request for reconsideration has first been resolved, thus:

“37.1.3. In case of approval, the HoPE shall immediately issue the Notice of Award to the bidder with the Lowest Calculated and Responsive Bid, Highest Rated Responsive Bid, Single Calculated and Responsive Bid or Single Rated and Responsive Bid.

In the event of disapproval, which shall be based only on valid, reasonable and justifiable grounds as provided for under Section 41 of this IRR, the HoPE shall notify the BAC and the bidder in writing of such decision and the grounds for it. When applicable, the BAC shall conduct a post-qualification of the bidder with the next Lowest Calculated Bid or Highest Rated Bid, as provided in Section 34.6 of this IRR.

A request for reconsideration may be filed by the bidder with the HoPE within three calendar days from receipt of the notice of disapproval. The HoPE shall resolve the request for reconsideration within seven calendar days from the filing thereof and furnish the bidder a copy of the resolution immediately from its promulgation. In no case shall the request for reconsideration stay or delay the bidding process. However, the request for reconsideration must first be resolved before any award is made.”

ALTERNATIVE METHODS: Despite being the exception rather than the rule, the 2016 Revised IRR provides improvements and amendments to the alternative methods of procurement under the Procurement Act. A repeat order refers to an



Department of Health-certified specialised medical equipment can be contracted to a particular supplier

alternative method of procurement where the procuring entity is allowed to procure goods from the previous winning bidder whenever there is a need to replenish goods procured under a contract previously awarded through competitive bidding.

The 2009 Revised IRR allowed repeat orders if the same is availed of within six months from the contract effectivity date stated in the Notice to Proceed arising from the original contract.

However, the 2016 Revised IRR amended the 2009 Revised IRR by including the requirement that there should have been partial delivery, inspection and acceptance of the goods within the six-month period from the contract effectivity date stated in the Notice to Proceed arising from the original contract.

Negotiated procurement of goods, infrastructure projects and consulting services under the Procurement Act refers to the method of negotiating a contract with a technically, legally and financially capable supplier, contractor or consultant under certain circumstances. The 2009 Revised IRR provided that negotiated procurement may only be resorted to under any of the following cases:

- Two failed biddings;
- Emergency cases;
- Take-over of contracts;
- Adjacent or contiguous cases;
- Procurement from one agency of the Philippine government to another agency;
- Circumstances requiring the appointment of a procurement agent;
- Circumstances requiring highly technical consultants;
- Pursuant to defence cooperation agreements;
- Small-value procurement;
- Lease of real property;
- Non-governmental organisation participation;
- Community participation; and
- Procurement from UN agencies.

The 2016 Revised IRR provides that goods, infrastructure projects and consulting services can be contracted to a particular supplier, contractor or consultant if they involve:

- Works of art;
- Scientific, academic or scholarly work or research, or legal services;
- Department of Health-certified highly specialised life-saving medical equipment;
- Scientific, technical, economic, business, trade or legal journals, magazines, papers, subscriptions, or other exclusive statistical publications and references; or
- Media documentation, advertisements, or announcements through television, radio, newspaper, internet and other communication media.

The 2016 Revised IRR allows negotiated procurement for goods, infrastructure projects and consulting services, involving advanced technologies, techniques and innovations that are not locally available, as certified by the HoPE and when it is most advantageous to the government, from UN agencies, international organisations or international financing institutions.

NEW PROVISIONS: One highlight of the 2016 Revised IRR provides clarity in determining what activities are not considered procurement activities under the Procurement Act. Effective 29 October, 2016, the following have been expressly declared as procurement activities outside of the scope of the Procurement Act and the 2016 Revised IRR:

- Direct financial or material assistance given to beneficiaries in accordance with the existing laws, rules and regulations, and subject to the guidelines of the concerned agency;
- Participation in local or foreign scholarships, training, continuing education, conferences, seminars or similar activities that shall be governed by applicable Commission on Audit, Civil Service Commission, and Department of Budget and Management rules;
- Lease of government-owned property as lessor for private use;
- Hiring of job order workers;
- Joint ventures under the revised National Economic and Development Agency guidelines, and joint venture agreements by local government units with private entities; and
- Disposal of property and other assets of the Philippine government.

In an attempt to strengthen the credibility of the procurement process, the 2016 Revised IRR prohibits bidders with conflicting interests from simultaneously participating in any procurement. Section 47.2 of the 2016 Revised IRR lists 10 specific instances where a conflict between bidders is deemed to arise, such as having controlling shareholders in common with another bidder, having the same legal representative as another bidder, or having participated as a consultant in the preparation of the design or technical specifications of the subject of the bid.

EMERGENCY POWERS: Upon assuming the presidency, President Rodrigo Duterte asked the Philippine Congress to grant him emergency powers to hasten the building and repair of infrastructure, in order to ease the traffic situation in Metro Manila. In response, senator Franklin Drilon filed Senate Bill No. 11, which if passed would allow Duterte to forego the public bidding process in relation to infrastructure and transportation projects.

The 1987 Philippine Constitution allows the Congress to grant emergency powers to the president. Section 23 (2), Article VI of the Constitution states:

“In times of war or other national emergency, the Congress may, by law, authorise the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof.”

The Supreme Court of the Philippines had occasion to explain the nature of emergency powers under the Constitution in the case of *David vs. Macapagal-Arroyo*, 486 SCRA 160 (2006) (“David”). David revolved around the constitutionality of the declaration of a state of emergency by then-President Gloria Macapagal-Arroyo through her issuance of Presidential Proclamation No. 1017 (PP No. 1017). PP No. 1017 directed the Armed Forces of the Philippines and the Philippine National Police to maintain law and order throughout the Philippines in order to prevent or suppress all forms of lawless violence and any act of insurrection or rebellion, and to enforce obedience to all the laws and to all decrees, orders and regulations promulgated by Macapagal-Arroyo.

Before ruling that PP No. 1017 was unconstitutional, the Supreme Court clarified the scope of the term “emergency” in David as follows:

“Emergency, as a generic term, connotes the existence of conditions suddenly intensifying the degree of existing danger to life or well-being beyond that which is accepted as normal ... Emergencies, as perceived by legislature or executive in the US since 1933, have been ... classifiable under three principal heads: a) economic, b) natural disaster, and c) national security. ‘Emergency’, as contemplated in our Constitution, is of the same breadth. It may include rebellion, economic crisis, pestilence or epidemic, typhoon, flood or other similar catastrophe of nationwide proportions or effect.”

The Supreme Court also declared in David that Congress may grant emergency powers to the president subject to the following conditions:

- There must be a war or other emergency;
- The delegation must be for a limited period only;
- The delegation must be subject to such restrictions as the Congress may prescribe; and
- The emergency powers must be exercised to carry out a national policy declared by Congress.

The Supreme Court declared that PP No. 1017 was constitutional insofar as the president is allowed to



President Duterte is seeking emergency powers to hasten the building and repair of infrastructure

declare a state of national emergency. However, the provisions directing the Armed Forces of the Philippines and the Philippine National Police to enforce laws unrelated to lawless violence and any decrees made by Macapagal-Arroyo were held unconstitutional. Further, any provisions in PP No. 1017 authorising the state or Macapagal-Arroyo to take over privately owned public utilities or business were also held unconstitutional by the Supreme Court.

It remains to be seen whether Congress will be able to justify the grant of emergency powers to curb the traffic crisis. Some have argued that the traffic situation has resulted in deleterious effects on the economy of Metro Manila and the Philippines.

However, in the event that the Senate passes Bill No. 11 and grants President Duterte emergency powers, which will allow him to award contracts for infrastructure and transportation projects without undergoing the public bidding process, the provisions of the Procurement Act and the 2016 Revised IRR may not be applicable for such projects. Pending any grant of emergency powers by the Congress, the status quo remains and the Procurement Act and the 2016 Revised IRR remain effective.

CONCLUSION: Keeping in mind the fundamental basis of the enactment of the Procurement Act, the GPPB and various stakeholders are consistently moving to improve and enhance the IRR of the Procurement Act. The 2016 Revised IRR are long overdue given the rapid economic, social, legal and technological changes in society. The amendments and improvements provided in the 2016 Revised IRR provide hope that, moving forward, the procurement activities of the Philippine government will be improved, more transparent, and faithful to the aspirations and core values of the Procurement Act.

OBG would like to thank V&A Law for its contribution to
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Sylvette Tankiang

Confidence through reform

Sylvette Tankiang, Senior Partner, V&A Law, on improving the business climate in the Philippines

In what ways can legislative reform improve the business climate in the Philippines, stimulate competition and encourage foreign investment?

TANKIANG: The Philippines can improve its business climate by promulgating laws that liberalise foreign entry into businesses and by rationalising its tax system. Barriers imposed on foreign land ownership and participation in public utilities and telecoms businesses – as well as in activities such as the exploration, development and utilisation of natural resources – must be lifted. This can be done by removing such restrictions from the constitution and authorising the legislature to enact appropriate laws that allow foreign participation. Philippines tax laws must also be amended to align the tax system with other Asian economies. The country's corporate income tax rate is among the highest in the ASEAN bloc, and this deters foreign investors from doing business in the Philippines. In order to attract more capital and increase the global competitiveness of the country, the Tax Code must be amended to reduce the 30% corporate income tax rate.

What legislative reforms can be applied to encourage more companies to undertake infrastructure and energy projects?

TANKIANG: Philippine regulators should allow the entrance of foreign contractors to all critical infrastructure projects in the Philippines. We do not build our competitive edge in the world market by limiting competition but by learning how to be competitive. The relaxation of the rules on entry of foreign contractors will encourage competition, introduce new technologies and innovations, and drive down the costs for constructing infrastructure projects.

Legislative reform can also encourage the development of renewable energy in the country. While there is growing foreign interest in entering the domestic renewable energy market, low feed-in-tariff (FIT) rates have discouraged players from doing so. Paradoxically,

the very limited FIT allocation poses a deterrent for foreign players in deciding to commit to the high investment costs associated with the construction of a renewable energy project. Renewable energy systems that require considerable investment but benefit the environment in the long run must be encouraged by the state through effective fiscal incentives.

How can the new leadership ensure the progress made by the last administration is sustained?

TANKIANG: The country's new leadership must first acknowledge the positive elements that already exist in the Philippines and build on these. Notably, there were a number of legislative and administrative reforms introduced by the last administration, which have led to the Philippines achieving economic milestones and investment grade status. Solid fundamental policies and the steadfast development of our economy may be attributed to the stable and prudent fiscal and monetary policies of the Philippines. It is important for the current administration to continue to support the policies and initiatives that resulted in the growth of the country's economy, despite the deteriorating economies in the rest of the world.

Furthermore, the administration of today must aggressively reduce graft and corruption in society and level the playing field in order to encourage foreign and local investments in businesses. This will expand the domestic market. In line with this, boosting public confidence by respecting the terms of government contracts will catalyse faith in conducting business with the Philippines. The country must continue to open its markets to new players and enhance the participation of private enterprises in areas of public services through public-private partnership programmes. The Philippines should also concentrate on infrastructure projects in information technology and telecoms to enable more industries, such as business process outsourcing and tourism, to develop further.