**MEMORANDUM OF AGREEMENT**

**SO THAT THE PUBLIC MAY KNOW:**

This **MEMORANDUM OF AGREEMENT** is made and entered into this \_\_\_\_\_\_ day of \_\_\_\_\_\_ 2021 in the City of Manila, Philippines, by and between:

The **AGENCY**, a national government agency existing under the laws of the Philippines, with office address at Address, represented by its [**position**], **[Name]**, herein referred to as the **“AGENCY”;**

- and -

The **PROCUREMENT SERVICE,** a government agency duly organized and existing under the laws of the Republic of the Philippines with office address at PS Complex, Cristobal Street, Paco, Manila, represented by its OIC-**Executive Director, ATTY. JASONMER L. UAYAN**, hereinafter referred to as the **“PS-DBM”**.

The **AGENCY** and **PS-DBM** are collectively called “Parties” and individually called “Party” to this Agreement.

**ANTECEDENTS**

The **AGENCY** intends to procure the **Project** with an Approved Budget for the Contract (ABC) of **AMOUNT IN WORDS (Php 00.00)** as reflected in the **AGENCY’s** **[year]** Annual Procurement Plan (APP), and hereinafter referred to as the “**Project**.” The specifics of the projects are duly reflected and fully disclosed in the respective Agency Procurement Request and Terms of Reference or Technical Specifications for each requirement submitted to **PS-DBM**.

The **AGENCY** has offered to engage and PS-DBM has accepted to undertake the procurement activities in relation to the above subject to the execution of herein agreement.

Accordingly, for and in consideration of the foregoing premises and the mutual obligations, stipulations, and agreements in this Agreement, the **AGENCY** and **PS-DBM** agree to contract as follows:

**ARTICLE 1**

**GENERAL**

* 1. The **AGENCY** hereby engages the services of **PS-DBM** as **Procurement Agent** to undertake the **AGENCY**’s procurement activities for the Project in accordance with Section 7.3.3(a) of the 2016 Revised Implementing Rules and Regulations (IRR) of Republic Act No. 9184 (RA 9184). The **AGENCY** is the Procuring Entity defined under Section 5(bb) of the IRR of RA 9184, and shall be solely and directly responsible for the contract implementation of the Project.
	2. By executing this Agreement, the **AGENCY**hereby represents and warrants that the Project/s covered by this Agreement, regardless of the nature thereof, is/are not the subject of any ongoing or previously completed procurement (i.e., bidding) activity nor has any third party acquired any vested right therein or been awarded any aspect or part thereof whatsoever.  In the event **PS-DBM** discovers or is made aware of any circumstance in violation of the above representation/warranty, it may terminate the procurement of the entire Project/s or such part thereof that has been subject of the previous procurement activity.
	3. This Agreement shall be effective upon signing for a period of **ONE YEAR**. The Agreement may be renewed subject to the review and approval of the **Parties.**
	4. **PS-DBM** shall be responsible for conducting the procurement process for the Project, which consists of the following activities: (a) pre-procurement conference; (b) posting and advertisement; (c) selection process – which includes pre-bid conference, receipt and opening of bids, evaluation of bids, and post-qualification; and (d) recommendation of award of contract to the Head of the Procuring Entity (HoPE) of the **AGENCY**. In the event that the procurement will be undertaken under an alternative mode of procurement, the respective procurement steps shall be followed faithfully by **PS-DBM**.
	5. The procurement method that will be used for the Project shall be agreed upon by the **Parties** and indicated in the APP of the **AGENCY**. Any change in the originally identified procurement method shall also be agreed upon by the **Parties** in writing and accordingly reflected in the APP of the **AGENCY** prior to starting any procurement process.
	6. The **AGENCY** shall ensure that approvals required from the HOPE during the procurement process will be acted upon within the timelines mandated under RA 9184 and its IRR.
	7. The procurement activities will commence on a per project basis upon the **AGENCY**’s submission of the following documentary requirements and funding requirements as mentioned in Article 2 of this Agreement:
		1. The **AGENCY’s** Annual Procurement Plan (APP);
		2. Approved Agency Procurement Request (APR) for the Projects;
		3. Technical Specifications, Terms of Reference (TOR), or Project Requirement for the Projects with approved budget for the contract duly certified correct by the authorized end user;
		4. Certificate of Availability of Funds for the Project;
		5. Certificate of Budget Inclusion for the Service Fee;
		6. Agency Price Market Analysis, which served as the basis of the ABC or the project cost estimate submitted to **PS-DBM**;
		7. Nomination of at least two (2) representatives to the Bids and Awards Committee: one member, and one alternate;
		8. Designation of two (2) representatives from the end user of the project subject of procurement as observers;
		9. Nomination of at least two (2) Technical Working Group representatives;
		10. Nomination of at least two (2) inspectors for purposes of project acceptance;
		11. And other documentary requirements, as may be necessary, subject to additional conditions provided for under this Agreement.
	8. The **PS-DBM** reserves the right, with prior consultation with the **AGENCY**, to make changes to the Bidding Documents, which includes the Technical Specifications, TOR, or other Projects Requirements, as it may deem necessary to promote competition and to ensure compliance with RA No. 9184 and its IRR; provided, that this shall not excuse the **AGENCY** from the obligation to submit complete and accurate documentary requirements under this Agreement or under applicable laws, rules and regulations.

**ARTICLE 2**

**FUNDING AND COMMENCEMENT**

* 1. The funding commitment by the **AGENCY** and its submission of the documentary requirements as stated in Section 1.7 shall be sufficient basis for **PS-DBM** to commence procurement activities for the Project, subject to the latter’s evaluation of the completeness and readiness of the procurement information and documentation. The **AGENCY**, for projects that require installation, construction or other similar activities, similarly undertakes that the required sites shall be ready and available at the time the installation or construction shall commence. If **PS-DBM** determines that the site shall not be ready on time, no procurement shall be undertaken and the same shall be a valid cause for the return of the project.
	2. The Project Cost Estimate (PCE) is the amount reflected in the APP and/or other relevant documents. The ABC, which shall not exceed the PCE, shall be the amount to be reflected in the bidding documents for purposes of procurement activities for the Project. The contract award shall not exceed the ABC consistent with the provisions of the 2016 IRR of RA 9184.
	3. The **AGENCY** shall ensure that the ABC submitted in its PPMP/ APP and PR is based on Market Price Analysis. The **PS-DBM** may request the **AGENCY** for such basis to validate its own Price Monitoring. Based on its price monitoring, **PS-DBM** shall determine the ABC in consultation with the **AGENCY.** The ABC shall be net of the **PS-DBM** Service Fee as provided under Article 4 hereof. The submission of the **AGENCY’s** Market Price Analysis shall not preclude **PS-DBM** from conducting its own price monitoring.
	4. The **AGENCY** undertakes to transmit the documentary requirements to **PS-DBM** within thirty (30) days after the signing of this Agreement. Failure to provide the complete documents within thirty (30) days shall be a valid cause for the return of the project and its cancellation.

**ARTICLE 3**

**SERVICE FEE**

* 1. A four percent (4%) Service Fee to be computed on the basis of the contract award price shall be imposed for services rendered by **PS-DBM,** which shall accrue to **PS-DBM** after the contract for the Project is signed by the **AGENCY**. The **AGENCY** shall ensure the availability of funds for the Service Fee. In the event that a bid or proposal, and ultimately the contract award price is zero pesos (PhP 0.00), the Service Fee shall be based on the Approved Budget for the Contract as published.
	2. In case the Project is cancelled by the **AGENCY** pursuant to Article 8 of this Agreement, or by **PS-DBM** due to the in/actions of the **AGENCY** regardless of cause after the procurement process has already commenced, and with no fault on the part of **PS-DBM**, the **AGENCY** commits to compensate **PS-DBM** in accordance with the following schedule:

For projects undertaken through Competitive Bidding:

|  |  |
| --- | --- |
| **Stage** | **Compensation***(Percentage of the Service Fee based on the ABC of the Project indicated in the APP)* |
| Pre-procurement | 15% |
| Posting and Advertisement | 20% plus cost of publication and production of bidding documents |
| Selection Process(*i.e.*, pre-bid conference/opening of bids up to determination of LCB/HRB) | 60% plus cost of publication and production of bidding documents |
| Post-qualification | 80% plus cost of publication and production of bidding documents and travel expenses of the TWG, if any |
| Recommendation for Award | 100% plus cost of publication and production of bidding documents and travel expenses of the TWG, if any |

For projects undertaken through Alternative Modes of Procurement:

|  |  |
| --- | --- |
| **Stage** | **Compensation***(Percentage of the Service Fee based on the ABC of the Project indicated in the APP)* |
| Pre-procurement | 15% |
| Posting, Requesting of Quotations, or Requesting of Proposals | 20% plus cost of publication or production of requests for quotation |
| Selection Process (Evaluation, Post-qualification, Negotiation, or other equivalent procedure) | 80% plus cost of publication and production of bidding documents and travel expenses of the TWG, if any |
| Recommendation for Award | 100% plus cost of publication and production of bidding documents and travel expenses of the TWG, if any |

* 1. In case a Recommendation for Award has been issued by the BAC, and the same is rejected by the Head of the Procuring Entity, the BAC shall continue with the post-qualification of the next bidder until a recommendation is approved.

In case no Recommendation for Award is approved and there are no bidders left to post-qualify, PS-DBM shall remain entitled to the Service Fee, based on the services already rendered which resulted to the original recommendation, unless the disapproval of the recommendation for award by the HoPE is based on the Reservation Clause under Section 41 of RA 9184, particularly paragraph (a) wherein the BAC is involved in the collusion or paragraph (b) where the BAC failed to follow the prescribed bidding procedure.

In the event that the Recommendation for Award is disapproved by the HoPE but the **PS-DBM** is paid the Service Fee in accordance with the preceding paragraph, the **PS** shall no longer be entitled to any additional Service Fee for the subsequent public bidding until the Recommendation for Award is finally approved by the HoPE.

**ARTICLE 4**

**PRE-PROCUREMENT**

* 1. In line with its price monitoring mandate, **PS-DBM** will conduct the Market Price Analysis, in consultation with the **AGENCY,** consistent with Section 2.4 hereof**,** to ensure that it is realistic and competitive.
		1. For this purpose, upon request by the **PS-DBM,** the **AGENCY** shall submit to **PS-DBM** a price analysis supporting the ABC of the Project consistent with the APR and APP. The cost analysis may include, at the minimum, the following information:
1. Project information sent to relevant vendors;
2. Vendors’ response, which should include their contact person’s details; and
3. Cost estimate analysis, which shall include the breakdown of its cost estimate for the Project.
	* 1. The ABC which shall be used for the procurement shall be the net of the Service Fee required under Article 3 hereof, unless a more competitive ABC is recommended based on the Price Analysis.
		2. The **AGENCY** shall certify the correctness of the Price/Cost Estimate Analysis submitted to PS-DBM to support the ABC of the Project. As a result of a diligent market survey conducted by the PE's End-user Unit/PMO, the survey should have been conducted within the budget year prior to the submission of documentary requirements. If applicable, PS-DBM may consider such other factors, i.e., inflation and cost of money, which are directly related to the procurement timetable.
		3. In the event that **PS-DBM** finds the ABC to be unrealistic or uncompetitive, it shall recommend to the **AGENCY** in writing the appropriate ABC as a result of its own market survey for the latter’s approval. The ABC proposed shall be based on the Price Analysis. The **AGENCY** shall accordingly revise its APP and APR to reflect the agreed ABC for the Project and submit the approved revised APP and APR to **PS-DBM**.
		4. The ABC as approved by the **AGENCY** and accepted by **PS-DBM** shall be the amount that will be reflected in the bidding documents for purposes of the procurement activity.
	1. The **AGENCY** shall be responsible for the preparation of the Technical Specifications, TOR, project requirements, and any other document as may be deemed necessary for the conduct of the procurement activities. The **AGENCY** shall ensure that these documents have been meticulously and judiciously prepared, and are in accordance with the format required by **PS-DBM**. **PS-DBM** defers to the expertise of the **AGENCY** in terms of the technical requirements of the project and shall adhere to the technical opinion of the **AGENCY** on the matter.
	2. The **AGENCY** shall post the bid opportunities and notices to its official website, simultaneously with the posts of **PS-DBM.**
	3. Upon a recommendation for award, the **AGENCY** warrants that the same shall be reviewed and approved within the mandatory timelines under RA 9184. The **AGENCY** commits, further, that Certified True Copies of the Contract and all other documents executed by it shall be transmitted to **PS-DBM** for transmittal to the Commission on Audit **strictly within three (3) days** **upon the approval of the Contract**.

**ARTICLE 5**

**BAC AND TWG**

* 1. **PS-DBM**, through its designated Bids and Awards Committee (BAC), shall facilitate and conduct the procurement activities as stated under Article 1 hereof, and shall prepare the necessary documents related to these activities.
	2. The designated BAC for the Project shall be composed of at least five (5) members - Chairperson, Vice-Chairperson, a regular member, a technical member from **PS-DBM**, and one (1) provisional member/end-user designated by the **AGENCY**. Additional provisional members and regular or technical members as well as Technical Work Group members may be added as required by the complexity of the project.
		1. The **AGENCY** shall designate a representative and an alternate to the designated BAC for the Project, each shall be entitled to one (1) voting seat as a provisional member, and shall sign all pertinent BAC issuances consistent with his/her vote.
		2. The **AGENCY** shall ensure the attendance and participation of its designated provisional BAC member, or his/her alternate, in all deliberations and meetings of the BAC.
	3. The BAC shall create a Joint **PS DBM-AGENCY** Technical Working Group (Joint TWG) for the Project. The Joint TWG shall be composed of at least three (3) technical personnel: one (1) representative from **PS –DBM** as Joint TWG Head, and two (2) technical representatives from the **AGENCY**. Additional Technical Work Group members may be added as required by the complexity of the project.
		1. The **AGENCY** shall designate at least two (2) technical personnel to serve as members of the Joint TWG for the Project and sign in all the required reports.
		2. The **AGENCY** shall ensure the attendance and participation of its designated Joint TWG members in all the activities of the Joint TWG.
		3. **PS-DBM** and the **AGENCY** may send additional technical representative/s during bid evaluation and post-qualification.
		4. All officially designated representatives to the Joint TWG shall be accountable and responsible for the preparation of the necessary reports and recommendations.
	4. The decisions and commitments relative to the Project made by the **AGENCY**’s provisional BAC members and designated TWG members shall be binding on the **AGENCY**.
	5. The designated provisional members of the BAC and TWG shall be entitled to honoraria, as authorized under pertinent DBM Circulars for public bidding activities. **PS-DBM** shall be responsible for the payment of honoraria to the members of the BAC and the Joint TWG to be paid from funds duly authorized for the purpose.
	6. In the event that a bid or proposal is deemed responsive, **PS-DBM** shall transmit the BAC resolution recommending award, including all its attachments and annexes, for consideration of the HoPE within three (3) days upon execution of the Resolution.

**ARTICLE 6**

**AWARD OF CONTRACT AND
CONTRACT IMPLEMENTATION**

* 1. The **AGENCY** shall submit to **PS-DBM** a copy of the signed and duly executed Notice of Award, a Contract, and Notice to Proceed for posting in PhilGEPS within three (3) days upon the signing of the HoPE to enable **PS-DBM** to submit its own transmittal to the Commission on Audit. The **AGENCY** shall be responsible for the timely processing of the documents, ensuring that the approvals required are made within the timelines set under RA 9184.
	2. The **AGENCY** shall be responsible for the timely transmittal of documents to its in-house the Commission on Audit Team, within five days upon the issuance of the Notice to Proceed. The **AGENCY** shall furnish **PS-DBM** with copies of the transmittal and the attachments thereto as received by the Commission on Audit. The **AGENCY** shall likewise be responsible for submissions and responses required by its in-house Commission on Audit Team.
	3. The **AGENCY** shall strictly adhere to the Technical Specifications, TOR, Feasibility Study, Detailed Engineering and Design, Delivery Schedule, and such other related procurement documents forming part of the Bidding Documents in connection with the award of contract to the winning bidder.
	4. The contract implementation during the lifetime of the Project shall be the responsibility of the **AGENCY**.
	5. The **AGENCY** undertakes to provide **PS-DBM** with fully documented feedback and/or field reports detailing the performance of the Supplier/Contractor, and the goods/services delivered/rendered.

**ARTICLE 7**

**PROCEEDS OF FINES AND PENALTIES**

* 1. The proceeds of the forfeiture of the bid security, if any, shall be for the account of **PS-DBM.**
	2. The proceeds of the forfeiture of the performance bond, warranty bond, and liquidated damages for delayed deliveries, if any, shall be for the account of the **AGENCY**.

**ARTICLE 8**

**EFFECTIVITY AND TERMINATION**

* 1. This Agreement shall be effective at the time of its signing by both **Parties’** duly authorized representatives. The **Parties** warrant that their respective signatories are duly authorized to represent and bid their respective entities.
		1. The **AGENCY** commits to comply with the following responsibilities within the timelines required. Unwarranted delay or inaction on the following may be a cause for the termination of this Agreement under Article 8.2.4 below:
			1. Submit the funding commitment and documentary requirements specified in Article 2 within the period required;
			2. Review any changes in the procurement method, ABC, Technical Specifications/TOR/SOW and other Projects Requirements proposed by **PS-DBM**;
			3. Communicate acceptance of or comments to the procurement method, proposed revisions to the ABC, Technical Specifications/TOR/SOW and other Projects Requirements; and
			4. Submit any additional or supporting documentary requirements requested by **PS-DBM** necessary for the progress of the procurement activities.
	2. The Parties may terminate this Agreement, in whole or in part, under any of the following causes:
		1. At any time by mutual consent of the Parties, provided that such consent to rescind is in writing and is signed by each of the Parties;
		2. If the implementation of the Project is economically, financially, or technically impractical, as determined and approved by the **AGENCY**’s HoPE;
		3. A Party materially breaches or violates any of the provisions of the Agreement and such breach is not rectified within five (5) days from written notice thereof; and
		4. A Party causes unreasonable delay or inaction in the implementation of the Project that will irretrievably prejudice the other Party. For this purpose, unreasonable delay shall mean a length of fifteen (15) calendar days from the agreed deadline without justifiable reasons.
	3. The right to terminate or rescind this Agreement by a Party not at fault may be made by serving a Notice of Termination at least thirty (30) days before the date of the intended termination.

**ARTICLE 9**

**GOOD FAITH**

* 1. The Parties undertake to act in good faith with respect to each other’s rights under this Agreement and to adopt all reasonable measures to ensure the realization of the objectives of this Agreement.

**ARTICLE 10**

**DISPUTE RESOLUTION**

* 1. All disputes, controversies or claims arising out of or relating to this Agreement shall first be mutually resolved. Unresolved disputes or issues shall be resolved before the Office of the Solicitor General pursuant to the Rules on Alternative Dispute Resolution for Disputes between National Government Agencies.

**ARTICLE 11**

**GOVERNING LAW**

* 1. This Agreement shall be governed by and construed in accordance with the laws of the Republic of the Philippines. In the event alternative modes of dispute resolution fail, any action brought to enforce or interpret this Agreement shall be brought in the courts of the City of Manila to the exclusion of all other courts.

**ARTICLE 12**

**ENTIRE AGREEMENT AND INTERPRETATION**

* 1. This Agreement contains the entire agreement of the Parties with respect to its subject matter, and there are no other promises or conditions in any other agreement/s, whether oral or written. This Agreement supersedes any prior written or oral agreements between the Parties with respect to its subject matter.
	2. The titles to the paragraphs of this Agreement are solely for the convenience of the Parties and shall not be used to explain, modify, simplify, or aid in the interpretation of the provisions of this Agreement.

**ARTICLE 13**

**AMENDMENT**

13.1. This Agreement may be modified or amended. Any amendment or modification must be in writing and signed by both Parties.

**ARTICLE 14**

**SEVERABILITY**

14.1. If any provision of this Agreement shall be declared invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable. If a court finds that any provision of this Agreement is invalid or unenforceable, but by limiting such provision it would become valid or enforceable, such provision shall be deemed to be written, construed, and enforced as so limited.

**ARTICLE 15**

**NON-WAIVER OF RIGHT**

15.1. The failure of either Party to enforce any provision of this Agreement shall not be construed as a waiver or limitation of that Party’s right to subsequently enforce and compel strict compliance with every provision of this Agreement.

**ARTICLE 16**

**CONFIDENTIALITY CLAUSE**

16.1. Each of the Parties agree to use extraordinary diligence to protect any Confidential Information received from or accessed through the other Party/ies or obtained on account of or due to the implementation of this MOA.

16.2. Confidential Information is any information disclosed by one Party and/or its representative/s or affiliates (Disclosing Party) to the other Party/ies and/or its representative/s or affiliates (Receiving Party/ies) and is either: *(a)* conspicuously marked as confidential, proprietary or the like; or *(b)* clearly identified as confidential, proprietary or the like by the Disclosing Party or information concerning Disclosing Party’s products or services, plans or roadmaps, current or future business, network, architecture and systems, and such other information disclosed for the purpose and/or reason for implementing this MOA, that the Receiving Party/ies knows or reasonably ought to know is Disclosing Party’s Confidential Information. Confidential Information covers any information, agreements, data, records and/or opinions relating to this MOA and the subject matter thereof, disclosed or made available by one Party to the other Party/ies including their respective officers, directors, employees and agents.

16.3. Confidential Information shall cover information disclosed during or after the term of this MOA, contractual documentation, designs, photographs, sketches, drawings, specifications, software, programs and samples and any other intellectual or industrial property, as well as sensitive security information and/or information relating to national security and national interest of the Republic of the Philippines.

16.4. The restrictions shall not apply to information *(i)*which becomes available to the public domain as a result of an action not constituting a breach of confidence, *(ii)* which has already been, through lawful means, in the possession or knowledge of the Receiving Party before the Disclosing Party’s disclosure or facilitation thereof, and *(iii)* which is required to be disclosed by law pursuant to any judicial or administrative order, provided that reasonable notice of such intended disclosure be given to the Disclosing Party, allowing it to take appropriate action to ensure continuing confidentiality to the extent legally permitted.

**IN WITNESS WHEREOF**, the Parties to this Agreement have hereto set their hands on the date and place stated above.

|  |  |
| --- | --- |
| **Agency**By:**[Name]**[Position] | **Procurement Service** By:**ATTY. JASONMER L. UAYAN** OIC-Executive Director V |

|  |  |
| --- | --- |
| **SIGNED IN THE PRESENCE OF:****NAME**Position | **ATTY. EARVIN JAY I. ALPARAQUE**OIC-Director, Procurement Group |

**ACKNOWLEDGMENT**

**REPUBLIC OF THE PHILIPPINES)**

**CITY OF MANILA ) S.S.**

 **BEFORE ME**, a Notary Public for and in the City of Manila, this \_\_ day of \_\_\_\_\_ 20\_\_\_ appeared the following persons presenting to me their respective identifications, to wit:

|  |  |  |  |
| --- | --- | --- | --- |
| **Name** | **Competent Evidence of Identity** | **Date & Place of Issue** | **Expiration** |
| **[NAME]**Agency |  |  |  |
| **ATTY. JASONMER L. UAYAN** OIC-Executive Director V, PS-DBM |  |  |  |

known to me and to me known to be the same persons who executed and voluntarily signed the foregoing Memorandum of Agreement which they acknowledged before me as their own free and voluntary act and deed and with full authority to sign in that capacity.

 This instrument refers to the Memorandum of Agreement and consisting of thirteen (13) pages including this page where the Acknowledgment is written, duly signed by the parties and their instrumental witnesses thereof.

 **WITNESS MY HAND AND SEAL** on the date and place above-written.

Doc. \_\_\_\_\_;

Page \_\_\_\_\_;

Book \_\_\_\_\_;

Series of 2021.