

NPM No. 014-2019

31 May 2019

AILEEN ANUNCIACION R. ZOSA
 Chairperson, Special Bids and Awards Committee
Bases Conversion and Development Authority (BCDA)
 2/F Bonifacio Technology Center, 31st St. cor. 2nd Ave.
 Bonifacio Global City, Taguig City

Re: Negotiated Procurement- Adjacent or Contiguous

Dear Chairperson Zosa:

This refers to your letters¹ seeking advice on the following:

1. The award of contract to the Joint Venture of BSP & Co., Inc. and Almeria International Construction Corporation (AICC) for the additional works pursuant to Section 53.4 of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 under the "Adjacent or Contiguous" provisions; and
2. The delegation of the Special Bids and Awards Committee (SBAC) of its authority to conduct the negotiated procurement to the project end-user.

As represented, the BCDA SBAC for New Clark City (NCC) Access Roads, has successfully bid out the contracts for the NCC to SCTEX Access Road² and the Airport to NCC Access Road Phase 1 Project.³ However, additional infrastructure works are being recommended considering that the roads that are already under construction, together with the existing two lanes of the Clark Bamban Capas Access Road, will not be sufficient to service the anticipated traffic flow during the conduct of the 30th Southeast Asian Games in December 2019.⁴ The additional projects that need to be completed within 250 days are:

Project	Estimated Cost
For 2019 SEA Games	
a. Road widening of the existing Clark Bamban Capas (48m ROW)	84,470,000.00
b. Road widening of the existing Clark Bamban Capas (55m ROW)	236,530,000.00
For Filinvest Development	
a. Construction of Roads 2A (55m ROW)	156,000,000.00
b. Construction of Roads 2B (48m ROW)	42,000,000.00
c. Construction of Roads 4A (48m ROW)	140,000,000.00
TOTAL	Php 657,000,000.00

¹ Dated 17 April 2019 and 28 May 2019.

² Awarded on 20 April 2018.

³ Awarded on 02 August 2018 to the Joint Venture of BSP & Co., Inc. and AICC.

⁴ According to the report of the Philippine SEA Games Organizing Committee which was validated by the report of Surbana Jurong, consultant for the Guidelines for NCC Master Development Plan.

As explained in an earlier opinion,⁵ in negotiated procurement using the adjacent and contiguous modality, the infrastructure works being added is not a necessary part or component of the original infrastructure project and that the latter must by itself be usable and structurally sound even without the additional works to be procured. Otherwise, the procurement of said additional works may fall under the prohibition on splitting of contracts under Section 54.1⁶ of the 2016 revised IRR of RA No. 9184.

Moreover, once the BCDA, as the procuring entity, determines that the subject contracts to be negotiated are properly additional works to the original contract and does not fall under splitting of contracts, the following requirements of Adjacent or Contiguous works under Section 53(d) of RA No. 9184 and the corresponding provision of Section 53.4 of its IRR shall be complied with:

- a) the original contract was awarded through Competitive Bidding;
- b) the adjacent or contiguous contract to be negotiated has similar or related scopes of work;
- c) the adjacent or contiguous contract is within the contracting capacity of the contractor considering the legal, technical and financial requirements for eligibility;
- d) the contractor uses the same prices or lower unit prices as in the original contract less mobilization cost;
- e) the Approved Budget of the Contract of the contiguous or adjacent work does not exceed the amount of the ongoing project;
- f) the contractor has no negative slippage or delay; and
- g) the negotiations for the procurement of the contiguous or adjacent contract are commenced before the expiry of the original contract.

Allow us to emphasize as well that, as with any procurement project, the determination of the above requirements is well within the responsibility of the procuring entity, in this case the BCDA. The Government Procurement Policy Board (GPPB) or its Technical Support Office cannot, through a legal opinion supplant this authority validly imposed upon the procuring entity to undertake pursuant to law.⁷

In fine, Negotiated Procurement under the Adjacent or Contiguous modality may only be resorted to upon compliance with all the above-explained requirements. And the determination of the existence of all the legal conditions warranting resort to any of the alternative methods of procurement falls solely within the ambit of the authority and accountability of BCDA as the procuring entity.

Anent your second concern, the conduct of Negotiated Procurement under Adjacent or Contiguous modality is not among those that may be delegated to the end-user unit or any other appropriate bureau, committee, or support unit in the procuring entity under Part IV(J) of Annex H of the 2016 revised IRR of RA No. 9184.⁸

⁵ Non-Policy Matter Opinion No. 084-2016 dated 15 November 2016.

⁶ Splitting of contracts means the division or breaking up of GOP contracts into smaller quantities and amounts, or dividing contract implementation into artificial phases or sub-contracts for the purpose of evading or circumventing the requirements of law and the IRR, especially the necessity of public bidding and the requirements for the alternative methods of procurement.

⁷ Section 48 of RA No. 9184 in relation to and Sections 63.1 and 63.3 of its 2016 revised IRR.

⁸ Delegation of Authority. The conduct of Shopping and Negotiated Procurement under Emergency Cases, Small Value Procurement and Lease of Real Property and Venue may be delegated to the End-user unit or any other appropriate bureau, committee, or support unit duly authorized by the BAC through a Resolution approved by the HOPE.

For Shopping under Section 52.1(a) and Negotiated Procurement under Emergency Cases, due to the urgent nature of the attendant circumstances, the BAC and the HOPE through a Resolution and Office Order, respectively, may delegate to specific officials, personnel, committee or office in the Procuring Entity the conduct of Shopping and award of contract to efficiently and expeditiously deal with the emergency sought to be addressed.

As a final point, the authority to approve or disapprove the use of alternative modes of procurement lies with the Head of the Procuring Entity or his duly authorized representative. The previous requirement of a GPPB approval for government contracts entered into through alternative methods of procurement involving an amount of at least Five Hundred Million Pesos (Php 500,000,000.00) has already been rescinded by Section 1⁹ of Executive Order No. 34, series of 2017.¹⁰

The above opinion was made on the basis of the particular facts presented and circumstances availing, and may not, therefore, be applicable given a different set of facts and circumstances.

We hope to have sufficiently clarified the matter at hand.

Sincerely yours,



ROWENA CANDICE M. RUIZ
Executive Director V *RM*

//rd10 *anton*

⁹ Section 1. Section 4 of EO No. 423, as amended, is hereby further amended to read as follows:

Section 4. Approval of Government Contracts Entered Into Through Alternative Methods of Procurement. Where the Head of the Procuring Entity has made a determination that a Government contract, including Government contracts required by law to be acted upon and/or approved by the President, regardless of amount, falls under any of the exceptions from public bidding described in Section 3 hereof, the Head of the Procuring Entity may proceed with the alternative methods of procurement according to the law and applicable rules and regulations; Provided, that for Government contracts involving an amount of at least P500 Million, the Head of the Procuring Entity issues a certification under oath that the contract falls within the exceptions from public bidding, is being entered into faithful compliance with all applicable laws, rules and regulations, and is advantageous to the government.

xxx

¹⁰ Entitled "Further Amending Executive Order No. 423, (S. 2005), As Amended, Prescribing the Rules and Procedures on the Review and Approval of All Government Contracts, Pursuant to Republic Act No. 9184, Otherwise Known as the Government Procurement Reform, Act of 2003".