



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

**NPM No. 11-2013**

22 February 2013

**HON. KIM S. JACINTO-HENARES**

*Commissioner*

**BUREAU OF INTERNAL REVENUE (BIR)**

BIR National Office Building,

Quezon City

**Re: Procurement of Information and Communication Technology (ICT) Services**

Dear Commissioner Henares:

We respond to your letter dated 14 January 2013, which we received on 25 January 2013, seeking our opinion on whether it is proper for BIR to treat its ICT services contracts/projects as general support services under **Goods** as defined in Section 5(r)<sup>1</sup> of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, otherwise known as the Government Procurement Reform Act (GPRA).

As represented, BIR has been maintaining several ICT projects to sustain and support effective and efficient tax collection and enforcement for the past years. These contracts include (a) lease/subscription of licenses/solution not owned by BIR;<sup>2</sup> (b) BIR-owned support and maintenance licenses;<sup>3</sup> (c) maintenance of BIR system/application;<sup>4</sup> and (4) mixed contract<sup>5</sup>. In categorizing ICT services as general support services under **Goods**, BIR relies on (1) the letter of the Presidential Management Staff considering ICT services as "support services for the operations of the agency"<sup>6</sup>; (2) Section 7.1<sup>7</sup> of Memorandum

<sup>1</sup> **Goods**. Refer to all items, supplies, materials and general support services, except consulting services and infrastructure projects, which may be needed in the transaction of public businesses or in the pursuit of any government undertaking, project or activity, whether in the nature of equipment, furniture, stationery, materials for construction, or personal property of any kind, including non-personal or contractual services, such as, the repair and maintenance of equipment and furniture, as well as trucking, hauling, janitorial, security, and related or analogous services, as well as procurement of materials and supplies provided by the procuring entity for such services. The term "related" or "analogous services" shall include, but not be limited to, lease or purchase of office space, media advertisements, health maintenance services, and other services essential to the operation of the procuring entity.

<sup>2</sup> Nessus Vulnerability Assessment Tool, Websense Web Content Filtering Software, Managed Office Automation System and Lease of Intrusion Detection and Prevention System.

<sup>3</sup> Oracle Product Support, ACL Software, SASA Software Licenses, Asset Management Solution (K-BOX), Microsoft Software License, and Stonegate Firewall/VPN Software and Servers.

<sup>4</sup> eDST System Maintenance and Support, Enhancement and Maintenance of Electronic Filing and Payment System, Application Support and Maintenance for Integrated Tax Information System, IT Infrastructure Maintenance, Enhancement of Portal Enhancements with Knowledge Base Integration, Security Upgrade and Lease of Hardware.

<sup>5</sup> Data Center Hosting Services.

<sup>6</sup> Dated 6 September 2006.

<sup>7</sup> The standardized bidding procedures for the procurement of goods and services as provided for under GPRA and its IRR-A shall apply to the procurement of ICT goods and consulting services. ...

Circular (MC) No. 2004-01 of the National Computer Center (NCC) dated 7 June 2004; (3) Section 3<sup>8</sup> of NCC MC No. 2001-01 dated 5 March 2001; and (4) Section 5(aa)<sup>9</sup> of the IRR of RA 9184. It is within this context that the BIR seeks clarification on the propriety of categorizing ICT projects as **Goods** while it awaits the issuance of the appropriate guidelines on ICT procurement by the Government Procurement Policy Board (GPPB).

### **Nature of Procurement**

Please note that for the procurement of ICT services, the Procuring Entity (PE) is tasked to determine the nature of the contract as to whether it will be classified as Goods, Infrastructure Project, or Consulting Services. Section 5(r) of the IRR defines **Goods** to refer to all items, supplies, materials and general support services, except consulting services and infrastructure projects, which may be needed in the transaction of government undertaking, project or activity. General support services refer to services that are essential, indispensable, or necessary to support the operations of any of the PEs or for the enhancement of the welfare of its personnel.<sup>10</sup> On the other hand, Infrastructure Projects may include the civil works components of information technology projects,<sup>11</sup> while for Consulting Services, the ICT services include but are not limited to, information systems design and development, and network design and installation<sup>12</sup>.

### **Procuring Entity may Define Nature of Procurement**

The GPPB and its Technical Support Office cannot encroach upon the authority of the BIR or of any PE, for that matter, on how to classify or categorize its various ICT procurement activities. We are of the view that the PE, ably guided by RA 9184 and its IRR, is in the best position to determine the correct classification of its procurement activities, whether it be Goods, Infrastructure Projects or Consulting Services, based on its identified needs and the best way by which these needs may be addressed, managed and satisfied.

In case of mixed procurements, Section 5(aa) of the IRR clearly states that the PE may determine its nature based on the **primary purpose** of the contract.<sup>13</sup> Thus, the motivation and underlying reason behind the project is of primordial importance as this will dictate the nature and categorization of the procurement and the process and procedures to be adopted moving forward.

### **Primary Purpose of the Project**

To determine the primary purpose of a project or contract, it is advisable to refer to the three essential requisites of a contract, which must concur with Article 1318 of the Civil Code of the Philippines. The requisites are: (1) consent of the contracting parties; (2) object

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<sup>8</sup> Information and Communications Technology (ICT) is the totality of the means employed to systematically collect, process, store, present and share information. It encompasses computers, telecommunications and office system technologies, as well as the accompanying methodologies, processes, rules and conventions.

<sup>9</sup> **Procurement.** Refers to the acquisition of goods, consulting services, and the contracting for infrastructure projects by the procuring entity. In case of projects involving mixed procurements, the nature of the procurement, *i.e.*, goods, infrastructure projects, or consulting services, shall be determined based on the primary purpose of the contract. Procurement shall also include the lease of goods and real estate. With respect to real property, its procurement shall be governed by the provisions of R.A. 8974 and other applicable laws, rules and regulations.

<sup>10</sup> Section 3 of the Revised Guidelines on the Extension of Contracts for General Support Services (GPPB Resolution No. 23-2007 dated 28 September 2007).

<sup>11</sup> Section 5(u) of the IRR of RA 9184.

<sup>12</sup> Section 6.5(f), Annex "B", IRR of RA 9184, General Principles on Consulting Services.

<sup>13</sup> NPM No. 17-2010 dated 1 June 2010.


certain which is the subject matter of the contract; and (3) cause of the obligation which is established. We note that the particular motives of the parties in entering into a contract are different from the cause thereof.<sup>14</sup> [T]he motives which impel one to a sale or purchase are not always the consideration of the contract as that term is understood in law. One may purchase an article not because it is cheap, for in fact it may be dear, but because he may have some particular use to which it may be put, because of a particular quality which that article has, or the relation which it will bear to other articles with which it will be associated. These circumstances may constitute the *motive* which induces the purchase, but the *real* consideration of the purchase is the money which passed.<sup>15</sup> Hence, it is the motivation or intention of the BIR in pursuing an ICT project that will determine the primary purpose of a project or contract, and its corresponding classification as to Goods, Infrastructure Projects or Consulting Services.

In recognizing that ICT procurement may be considered as goods procurement, the Supreme Court in *Department of Foreign Affairs, et.al. v. Hon. Franco T Falcon*<sup>16</sup> held that:

[T]he IRR of Republic Act No. 9184 has some provisions that are particular to infrastructure projects and other provisions that are applicable only to procurement of goods or consulting services. Implicitly, the civil works component of information technology projects is subject to the provisions on infrastructure projects, **while the technological and other components would be covered by the provisions on procurement of goods or consulting services as the circumstances may warrant.** (*Emphasis supplied*)

A careful perusal of the ICT projects procured by the BIR, as represented in the Honorable Commissioner's letter, shows that - (a) lease/subscription of licenses/solutions not owned by the BIR; (b) BIR-owned support and maintenance licenses; and, (c) maintenance of BIR system/application fall within the category of **Goods**, which is consistent with the classification provided in GPPB Resolution No. 10-2007<sup>17</sup> or the Customized Procurement Manual of the BIR. In addition and per representations made, it does not appear that these ICT contracts were procured as an integral whole or a system or a network per Section 6.5(f) of Annex "B" of the IRR of RA 9184. As regards mixed contract/procurement, the controlling provision is found in Section 5(aa) of the IRR where the classification is left to the sound determination of the PE.

### **Determination of Nature of Procurement is Subject to Lawful Limitations**

It is worthy to emphasize, however, that the PE does not possess unbridled authority to classify ICT procurement as to Goods, Infrastructure Projects or Consulting Services, as when by its nature, the procurement activity falls within the definition of Consulting Services under Section 5(i) of the IRR of RA 9184, in which case the PE cannot categorize the acquisition as Goods procurement without violating the mandatory provisions of the law and the rules. Hence, it is vital that the motivation and primary purpose of the PE, alongside RA 9184 and its IRR, be considered in categorizing or classifying any ICT procurement activity. 

<sup>14</sup> Article 1351 of the Civil Code of the Philippines.

<sup>15</sup> *De Jesus v. G. Urrutia & Co.*, G.R. No. L-10863, January 11, 1916.

<sup>16</sup> G.R. No. 176657, September 1, 2010.

<sup>17</sup> Dated 31 May 2007.

## Summary

All told, although we consider that procurement of - (a) lease/subscription of licenses/solutions not owned by the BIR; (b) BIR-owned support and maintenance licenses; and, (c) maintenance of BIR system/application falls within **Goods** category and the mixed procurement can be considered as **Goods** based on the primary purpose of the PE, it is our position that the BIR can best determine based on its primary purpose, motivation and intention, and on the nature of the contract, whether the procurement of ICT services may be classified as Goods, Infrastructure Projects or Consulting Services. For general support services under **Goods** in Section 5(r) of the IRR of RA 9184, it is important that the services are essential, indispensable, or necessary to support the operations of any PE or for the enhancement of the welfare of its personnel. In exercising this power of determination, the PE should be guided by the parameters and conditions in the relevant provisions of RA 9184 and its IRR on what should be considered as Goods, Infrastructure Projects or Consulting Services procurement.

We hope that our advice provided sufficient guidance on the matter. Please note that this opinion is being rendered on the basis of the facts and particular situations presented, and may not be applicable given a different set of facts and circumstances. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,



**DENNIS S. SANTIAGO**

*Executive Director III*

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