

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

**NPM No. 18-2014**

16 June 2014

**ENGR. JORGE L. GUDUYO**  
*Chair, Bids and Awards Committee (BAC)*  
**BUTUAN CITY WATER DISTRICT (BCWD)**  
Gov. Jose A. Rosales Avenue, Butuan City

**Re: Classification of procurement project; Negotiated Procurement under Section 53.4 of the revised Implementing Rules and Regulations of Republic Act No. 9184 (Adjacent/Contiguous); Warranty**

Dear Engr. Guduyo:

This refers to your letter dated 28 February 2014<sup>1</sup>, seeking clarification on the following issues:

1. Whether the project for extension/expansion of reservoir tank is classified as goods or infrastructure project;
2. Whether Negotiated Procurement under Section 53.4 (Adjacent/Contiguous) of the IRR of RA 9184 may be resorted even though the original contract has already been completed.
3. What other modality of procurement may be resorted in order to ensure that the previous contractor's warranty will not be forfeited by the extension/expansion of the reservoir tank.

It is represented that BCWD awarded the contract to supply, deliver and install a 200-cubic meter reservoir to Reftec Industrial Supply & Services Inc., through public bidding. With the unexpected increase in the number of concessionaires due to the establishment of resettlement area, the existing 200-cubic meter reservoir cannot adequately supply the current demand for water. Thus, the extension/expansion of the reservoir tank is required. BCWD approved the extension project with the Approved Budget for the Contract (ABC) of Php1,100,000.00. However, BCWD-BAC had a difficulty of classifying whether such project is considered as goods or infrastructure project. The reservoir tank to be installed is goods in nature comprising of 90% of the cost of corrugated blue-orb sheets, but it can also be considered as infrastructure project since it involves the improvement of the existing tank and cost 10% of the total project. On the other hand, BCWD-BAC is contemplating on resorting to Negotiated Procurement under Section 53.4 (Adjacent/Contiguous) of the IRR of RA 9184 in order to avoid nullifying the warranty of the existing reservoir tank. However,

<sup>1</sup> Received on 3 March 2014.

the original contract for the procurement of the first tank has long been completed on 18 December 2012. On the other hand, if the extension contract will be awarded to another contractor, Reftec's fifteen (15)-year warranty may be nullified since the extension will be placed above the existing tank. It is in this context that the aforementioned issues are being raised.

### **Classification and/or Nature of Procurement**

For your guidance, Section 5(aa) of the IRR of RA 9184 states that "in case of projects involving mixed procurement, the nature of the procurement, i.e., goods, infrastructure projects or consulting services, shall be determined based on the primary purpose of the contract". As discussed in our previous opinion<sup>2</sup>, it is the procuring entity that is in the best position to determine the correct classification of its procurement based on its identified needs and the best way by which these needs may be addressed, managed, and satisfied. The procuring entity 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. In this wise, procuring entities are deemed to have the capability, and the concomitant accountability, in discerning whether its procurement may be considered as goods, infrastructure project or consulting services based on the definitions provided in RA 9184 and its IRR.

Based on the foregoing, it is the position of the GPPB-TSO that the nature of a mixed procurement, such as in the case at bar, shall be determined by BCWD as the procuring entity, based on the identified primary purpose of the contract.

### **Negotiated Procurement under Section 53.4 (Adjacent/Contiguous)**

As regards your second query, we wish to inform you that pursuant to Section 10 of RA 9184 and its IRR, all procurement, as a general rule, shall be done through competitive bidding. Alternative methods of procurement, however, are allowed in highly exceptional cases in order to promote economy and efficiency subject to the prior approval of the Head of the Procuring Entity (HOPE) upon favorable recommendation of the BAC<sup>3</sup>.

The determination and decision to resort to the alternative modality of Negotiated Procurement (Adjacent or Contiguous) under Section 53.4 of the IRR of RA 9184 in the procurement of the reservoir expansion is subject to the prior approval of the HOPE, upon favorable recommendation of the BAC, provided that the conditions set forth therein are present, one of which is that "**the negotiations for the procurement are commenced before the expiry of the original contract**".

### **Warranty**

At this juncture, we wish to clarify that the reservoir's warranty by the previous contractor is not automatically nullified by the extension project that may be undertaken by another contractor. Section 62.2.4 of the revised IRR of RA 9184 states that in case of Structural Defects/Failure occurring during the applicable warranty period provided in Section 62.2.3.2, the procuring entity shall undertake the necessary restoration or reconstruction works and shall be entitled to full reimbursement by the parties found to be

<sup>2</sup> NPM Opinion No. 138-2013 dated 27 December 2013.

<sup>3</sup> NPM Opinion No. 26-2011 dated 27 December 2011.

liable for expenses incurred therein upon demand, without prejudice to the filing of appropriate administrative, civil or criminal charges *against responsible persons* as well as the forfeiture of warranty securities posted in favor of the procuring entity. Section 62.2.3.1(a) further provides that the Contractor shall be held responsible where the Structural Defects/Failures arise due to the faults attributed to *improper construction, use of inferior quality/substandard materials, and any violation of the contract plans and specifications.*

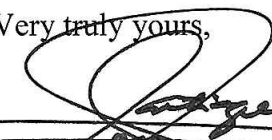
### Summary

All told, we wish to clarify the following matters relative to your concerns:

1. The nature of a mixed procurement shall be determined by BCWD as the procuring entity, based on its identified primary purpose of the contract;
2. Resort to the alternative modality of Negotiated Procurement under Section 53.4 (Adjacent or Contiguous) of the IRR of RA 9184 is subject to the prior approval of the HOPE, upon favorable recommendation of the BAC, provided that the conditions set forth therein are present, one of which is that "the negotiations for the procurement are commenced before the expiry of the original contract";
3. The reservoir's warranty by the previous contractor is not automatically nullified by the extension project that may be undertaken by another contractor. The procuring entity shall be entitled to full reimbursement by responsible parties upon demand, without prejudice to the filing of appropriate administrative, civil or criminal charges against responsible persons as well as the forfeiture of warranty securities posted in favor of the procuring entity, due to the faults attributed to improper construction, use of inferior quality/substandard materials, and any violation of the contract plans and specifications.

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.

Very truly yours,

  
**DENNIS S. SANTIAGO**  
*Executive Director*

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