

NPM No. 02-2009

09 January 2009

MR. JORGE MENDOZA JUDAN

President and Chief Executive Officer

PHILIPPINE INTERNATIONAL TRADING CORPORATION

5th Floor, NDC building, 116 Tordesillas Street,
Salcedo Village, Makati City

Re : Direct Contracting

Dear Mr. Judan:

This refers to your letter dated 21 November 2008 relative to the Philippine International Trading Corporation (PITC)'s procurement of double folded tents and ammunitions for the Philippine Army (PA) and the Armed Forces of the Philippines - General Headquarters (AFPGHQ).

As per your representation, we have gathered the following:

1. PITC has been engaged by the PA/AFPGHQ for the procurement of the latter's double folded tents and ammunitions requirements;
2. The technical specification, design and prototypes of said items have been specially developed by some suppliers, jointly and in accordance with specifications and technical requirements of the PA/GHQ; and thereafter approved by the latter;
3. PITC has complied with the usual procedures for the public bidding of these items, e.g. pre-procurement, advertisement, etc.;
4. In the course of the bidding process, PITC learned that the suppliers involved in the preparation of the design and technical specifications were able to secure from the Intellectual Property Office (IPO) the exclusive right to manufacture and sell the items, without the consent of the PA/AFPGHQ; and
5. The concerned suppliers are claiming that the items being bid out should instead be procured through "Direct Contracting" in view of its proprietary nature.

PITC now seeks guidance on whether it should still pursue with the public bidding even if the items being procured have allegedly been “patented” or resort, instead, to Direct Contracting.

In light of the principle of presumption of regularity in the performance of public duty under Section (3) (m) Rule 131 of the Rules of Court, it is the considered opinion of this Office that the procuring entity, or the PITC, may pursue with the public bidding it commenced in accordance with the provisions of Republic Act No. 9184 (R.A. 9184) for the procurement of the aforementioned goods.

It is provided, however, under the *Reservation Clause* found in Section 41 of R.A. 9184 and its Implementing Rules and Regulations Part A (IRR-A), that procuring entities may reserve the right to reject any and all bids, declare a failure of bidding, or not award the contract in the following situations:

- a) If there is *prima facie* evidence of collusion between the appropriate public officers and employees of the procuring entity, or between the Bids and Awards Committee (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;
- b) If the BAC is found to have failed in following the prescribed bidding procedures; or
- c) For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the Government as follows: (i) if the physical and economical conditions have significantly changed so as to render the project no longer economically, financially or technically feasible as determined by the Head of the Procuring Entity (HOPE); (ii) if the project is no longer necessary as determined by the HOPE; and (iii) if the source of the funds for the project has been withheld or reduced through no fault of the procuring entity.¹

Hence, unless the procuring entity lawfully determines that any of the following grounds exists in the procurement of the said goods, it may not discontinue the public bidding process without violating the Constitutional rights of due process and equal protection of the participating and eligible bidders.

Direct Contracting as an Alternative Method of Procurement

Section 10 of IRR-A of R.A. 9184 states that all procurement shall be done through competitive bidding, except as provided under Rule XVI thereof, which speaks of the alternative methods of procurement. One of such alternative methods allowed by law is Direct Contracting as provided under Section 50 of the IRR-A of R.A. 9184, to wit:

¹ See Section 41 of Republic Act No. 9184 and its Implementing Rules and Regulations Part A (IRR-A)

" x x x Direct contracting may be resorted to by concerned procuring entities under any of the following conditions:

x x x x

a) *Procurement of Goods of proprietary nature, which can be obtained only from the proprietary source, i.e. when patents, trade secrets and copyrights prohibit others from manufacturing the same item;*"
(Emphasis supplied)

Therefore, it is only upon the determination of the BAC² that the items to be procured are of a proprietary nature and available only from a proprietary source, that it shall recommend to the HOPE the use of the alternative method of Direct Contracting for the procurement of the double folded tents and ammunitions. Further, resort to this alternative mode must be included in the procuring entity's Annual Procurement Plan (APP) and approved by the HOPE.

"Tailor Fitting" of Specifications

For your guidance, please be advised that while procuring entities can make the technical specifications in their bid documents more detailed, to encourage competition, however, they cannot "tailor fit" to a particular brand.

Section 18 of R.A. 9184 and its IRR-A, is clear on this point:

Specifications for the procurement of goods shall be based on relevant characteristics and/or performance requirements. Reference to brand names shall not be allowed.

Inclusion in the bid documents of such detailed design and technical descriptions that leave the procuring entity no other option but to procure from a particular brand or supplier, defeats the very essence and purpose of public bidding. In such case where procurement from a specific brand is necessary, indispensable and justified under the pertinent Rules, alternative methods may be availed of.

Conflict of Interest

In relation to the foregoing, and in view of the facts represented, may we advise further, that without prejudice to other administrative and criminal liabilities, it shall be unlawful under R.A. 9184 for a bidder that has conflict of interest to participate in the procurement process. A bidder that has a relationship directly or through common third parties, that puts them in a position to have access to information about or influence the decisions of the procuring entity regarding the bidding process is considered to have a general conflict of interest and may not join the bidding. In like manner, a bidder who has participated as a consultant in the preparation of the design or technical specifications of the


² See Section 12 of R.A. 9184 and Section 12.1 of IRR-A.

goods and related services that are the subject of the bid, is also disqualified from participating in the bidding thereof.³

Anent all the foregoing, we trust that your queries have been sufficiently addressed.

This opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not be necessarily applicable upon a different set of facts or circumstances.

Very truly yours,


for **RUBY U. ALVAREZ**
Executive Director III

³ Guidelines on the Establishment of Procurement Systems and Organizations (Volume 1), page 64.



Atty. Uyca,
Is. new Revised Draft for info. Good work.
Bry,
Pls. finalize as revised:
PN: PITC. Direct Contracting

TECHNICAL SUPPORT OFFICE

Unit 2506 Raffles Corporate Center,
F. Ortigas Jr. Avenue, Ortigas Center,
Pasig City, Philippines 1605

11/27/08

28 November 2008

MR. JORGE MENDOZA JUDAN
President and Chief Executive Officer
PHILIPPINE INTERNATIONAL TRADING CORPORATION

Re : Direct Contracting

Dear Mr. Judan:

This refers to your letter dated 21 November 2008, which we received on 24 November 2008. In the said letter, you posited the following queries, to wit: *seeking guidance relative to PITC's procurement of double-folded tents & ammunitions for the PD/AFPGHQ*

As per your representation, we gathered the following:
1. }
2. } see Revised Draft
3. }
4. }
5. }

1. Should the PITC still pursue Public Bidding for the procurement of these items which have 'patented' design or invention under IPO laws issued in the name of a particular entity or should procurement thereof be through Direct Contracting; and
2. Whether this alternative mode of procurement can be pursued at this point in time when PITC had already advertised the procurement in the newspapers under Public Bidding."

These issues were raised in connection with the procurement of double-folded tents and ammunitions by the Philippine International Trading Corporation (PITC) for the Philippine Army and the AFPGHQ.

PITC now seeks guidance on whether it should still pursue with the public bidding even if the items being procured have been patented, or resorted instead to Direct Contracting.

In light of the principle of presumption of regularity in the performance of public duty under Section (3) (m) Rule 131 of the Rules of Court, it is the considered opinion of this Office that the procuring entity, or the PITC, must pursue with the public bidding it commenced in accordance with the provisions of Republic Act No. 9184 (R.A. 9184) for the procurement of the aforementioned goods.

It is provided, however, under the *Reservation Clause* found in R.A. 9184, that procuring entities may reserve the right to reject any and all bids, declare a failure of bidding, or not award the contract in the following situations:

- a) If there is *prima facie* evidence of collusion between the appropriate public officers and 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;

- b) If the BAC is found to have failed in following the prescribed bidding procedures;
- c) For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the Government as follows: (i) if the physical and economical conditions have significantly changed so as to render the project no longer economically, financially or technically feasible as determined by the Head of the Procuring Entity (HOPE); (ii) if the project is no longer necessary as determined by the HOPE; and (iii) if the source of the funds for the project has been withheld or reduced through no fault of the procuring entity.¹

Hence, ~~we are of the view that~~, unless the procuring entity lawfully determines that any of the following grounds exists in the procurement of the said goods, ~~PTC~~ may not discontinue the public bidding process and ~~adopt Direct Contracting~~ without violating the Constitutional rights of due process and equal protection of the participating and potential bidders.

Direct Contracting as an Alternative Method of Procurement

Section 10 of IRR-A of R.A. 9184 states that all procurement shall be done through competitive bidding, except as provided under Rule XVI thereof, which speaks of the alternative methods of procurement. One of such alternative methods allowed by law is Direct Contracting as provided under Section 50 of the IRR-A of R.A. 9184, to wit:

" x x x Direct contracting may be resorted to by concerned procuring entities under any of the following conditions:

x x x x

a) *Procurement of Goods of proprietary nature, which can be obtained only from the proprietary source, i.e. when patents, trade secrets and copyrights prohibit others from manufacturing the same item;*" (Emphasis supplied)

¹ See Section 41 of Republic Act No. 9184 and its Implementing Rules and Regulations Part A (IRR-A)

Therefore, ~~in the present case~~, it is only upon the determination of the BAC² that the items to be procured are of proprietary nature and available only from a proprietary source, that it shall recommend to the HOPE the use of the alternative method of Direct Contracting for the procurement of the double folded tents and ammunitions.

- This made doubt
also be included in the agency's
PPMP & integrated in the APP. & approved
by the HOPE.

"Tailor Fitting" of Specifications

For your guidance, please be advised that while procuring entities can make the technical specifications in their bid documents more detailed, to encourage competition, however, they cannot "tailor fit" to a particular brand.

Section 18 of R.A. 9184 and its IRR-A, is clear on this point:

Specifications for the procurement of goods shall be based on relevant characteristics and/or performance requirements. Reference to brand names shall not be allowed.

Inclusion in the bid documents of such detailed design and technical descriptions that leave the procuring entity no other option but to procure from a particular brand or supplier, defeats the very essence and purpose of public bidding. In such case where procurement from a specific brand is necessary, indispensable and justified under the pertinent Rules, alternative methods may be availed of.

Conflict of Interest

In relation to the foregoing and in view of the facts represented, may we advise further, that without prejudice to other administrative and criminal liabilities, it shall be unlawful under R.A. 9184 for a bidder that has conflict of interest to participate in the procurement process. A bidder that has a relationship directly or through common third parties, that puts them in a position to have access to information about or influence the decisions of the procuring entity regarding the bidding process is considered to have a general conflict of interest and may not join the bidding.

In like manner, a bidder who has participated as a consultant in the preparation of the design and technical specs. of the goods and related services that are the subject of the bid, is likewise disqualified from participating in the bidding thereof.

Anent all the foregoing, we trust that your queries have been sufficiently addressed. Please bear in mind that this opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not be necessarily applicable upon a different set of facts or circumstances.

Very truly yours,


EMILUISA C. PEÑANO
Deputy Director

² See Section 12 of R.A. 9184 and Section 12.1 of IRR-A.

³ Guidelines on the Establishment of Procurement Systems and Organizations (Volume 1), page 64.

Atty. Glycer

24/11/2008 14:32

Please draft reply. This is a bit complicated. However, since public bidding has already been commenced, PITC should speak their words with it still, unless they could meet the condition for exercising their rights under Sec. 41 RA 9184 + (RR-A). Include guidance on use of Direct Contracting + tailor-fitting of specifications, plus possible conflict of interest.

PITC: COUNTERTRADE

PAGE 01

11/26/08

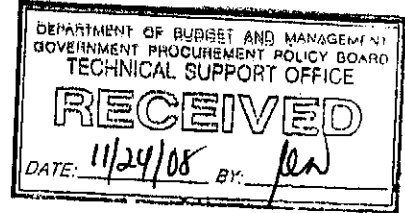


PITC

Philippine International Trading Corporation

November 21, 2008

Government Procurement Policy Board
Unit 2506 Raffles Corporate Center
Emerald Ave., Ortigas Center
Pasig City



ATTENTION: ATTY. RUBY U. ALVAREZ
Executive Director III
Technical Support Office

*Ennis,
Pls. handle. Sign in
my behalf.*

11/25/08

Re: Request for Opinion: Direct Contracting

Gentlemen:

We wish to submit for consideration and opinion of the GPPB on the appropriate mode of procurement for goods, the technical specification, design and prototypes of which were **specially developed** by a supplier, jointly and in accordance with specifications and technical requirements of a government end-user, which goods are now going to be procured adopting the said technical specifications and/or design.

BACKGROUND:

Our institution, Philippine International Trading Corporation (PITC) is a self-sustaining government owned and controlled corporation under the Department of Trade and Industry (DTI). As a corporation mandated by its charter, P.D. 1071, to engage in trading of all types of goods, one of its main business activity is the sourcing and supply of goods for government clients. PITC adopts and complies with the provisions of R.A. 9184 and its IRR-A and relevant amendments in the sourcing of goods for its government clients, particularly on public bidding.

Recently, PITC has been engaged by its clients, the Philippine Army and AFPGHQ to procure double folded tents and ammunition. PITC complied with the usual procedures for public bidding for these items, including pre-procurement, advertisement in the newspapers, etc. Subsequent hereto, PITC was made informed by some suppliers that the design and technical specifications of these two items, were developed/improved/tailor-fit specially for the PA/GHQ by said suppliers. After these designs/specifications were approved by the PA/GHQ, but without the knowledge or consent of the PA/GHQ, these suppliers registered their "designs" and "inventions" with the Intellectual Property Office (IPO) which have granted them the exclusive right to manufacture and sell these items.

1.



Thereafter, the same technical descriptions and specifications of these "patented" items were provided to PITC by the PA/GHQ for inclusion as part of the technical parameters in the bid documents for these projects.

Now, the concerned suppliers have raised the issue of "proprietary" nature of their design and invention and requesting that PITC source these items under "Direct Contracting" invoking Section 50 of the IRR-A of R.A. 9184, instead of Public bidding.

QUERY

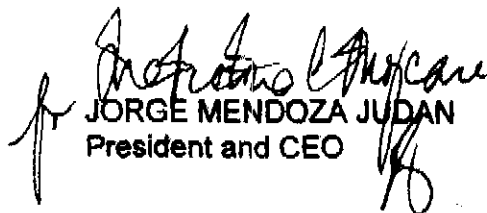
Given the foregoing, PITC requests the opinion of this honorable office on the following:

- 1) Should PITC still pursue Public bidding for the procurement of these items which have "patented" design or invention under IPO laws issued in the name of a particular entity or should procurement thereof be through Direct Contracting; and
- 2) Whether this alternative mode of procurement can be pursued at this point in time when PITC had already advertised the procurement in the newspapers under Public Bidding.

Considering the urgent need for these items by the PA and AFGHQ, your usual kind assistance on this matter is highly appreciated.

Thank you.

Very truly yours,


JORGE MENDOZA JUDAN
President and CEO

cc: vcm

STAY RECEIPT	
PORT OF PASIG - EAST POST OFFICE	
Post Office	PASIG METRO MANILA
Letter/Package No.	PHILIPPINES 001658
Posted on	JAN 12 2009
Preserve this receipt for reference in case of inquiry	
NO	
Postmaster/Teller	

NPM No. 02-2009

09 January 2009

MR. JORGE MENDOZA JUDAN

President and Chief Executive Officer

PHILIPPINE INTERNATIONAL TRADING CORPORATION

5th Floor, NDC building, 116 Tordesillas Street,
Salcedo Village, Makati City

Re : Direct Contracting

Dear Mr. Judan:

This refers to your letter dated 21 November 2008 relative to the Philippine International Trading Corporation (PITC)'s procurement of double folded tents and ammunitions for the Philippine Army (PA) and the Armed Forces of the Philippines - General Headquarters (AFPGHQ).

As per your representation, we have gathered the following:

1. PITC has been engaged by the PA/AFPGHQ for the procurement of the latter's double folded tents and ammunitions requirements;
2. The technical specification, design and prototypes of said items have been specially developed by some suppliers, jointly and in accordance with specifications and technical requirements of the PA/GHQ; and thereafter approved by the latter;
3. PITC has complied with the usual procedures for the public bidding of these items, e.g. pre-procurement, advertisement, etc.;
4. In the course of the bidding process, PITC learned that the suppliers involved in the preparation of the design and technical specifications were able to secure from the Intellectual Property Office (IPO) the exclusive right to manufacture and sell the items, without the consent of the PA/AFPGHQ; and
5. The concerned suppliers are claiming that the items being bid out should instead be procured through "Direct Contracting" in view of its proprietary nature.

PITC now seeks guidance on whether it should still pursue with the public bidding even if the items being procured have allegedly been "patented" or resort, instead, to Direct Contracting.

In light of the principle of presumption of regularity in the performance of public duty under Section (3) (m) Rule 131 of the Rules of Court, it is the considered opinion of this Office that the procuring entity, or the PITC, may pursue with the public bidding it commenced in accordance with the provisions of Republic Act No. 9184 (R.A. 9184) for the procurement of the aforecited goods.

It is provided, however, under the *Reservation Clause* found in Section 41 of R.A. 9184 and its Implementing Rules and Regulations Part A (IRR-A), that procuring entities may reserve the right to reject any and all bids, declare a failure of bidding, or not award the contract in the following situations:

- a) If there is *prima facie* evidence of collusion between the appropriate public officers and employees of the procuring entity, or between the Bids and Awards Committee (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;
- b) If the BAC is found to have failed in following the prescribed bidding procedures; or
- c) For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the Government as follows: (i) if the physical and economical conditions have significantly changed so as to render the project no longer economically, financially or technically feasible as determined by the Head of the Procuring Entity (HOPE); (ii) if the project is no longer necessary as determined by the HOPE; and (iii) if the source of the funds for the project has been withheld or reduced through no fault of the procuring entity.¹

Hence, unless the procuring entity lawfully determines that any of the following grounds exists in the procurement of the said goods, it may not discontinue the public bidding process without violating the Constitutional rights of due process and equal protection of the participating and eligible bidders.

Direct Contracting as an Alternative Method of Procurement

Section 10 of IRR-A of R.A. 9184 states that all procurement shall be done through competitive bidding, except as provided under Rule XVI thereof, which speaks of the alternative methods of procurement. One of such alternative methods allowed by law is Direct Contracting as provided under Section 50 of the IRR-A of R.A. 9184, to wit:

¹ See Section 41 of Republic Act No. 9184 and its Implementing Rules and Regulations Part A (IRR-A)

" x x x Direct contracting may be resorted to by concerned procuring entities under any of the following conditions:

x x x x

a) *Procurement of Goods of proprietary nature, which can be obtained only from the proprietary source, i.e. when patents, trade secrets and copyrights prohibit others from manufacturing the same item;*"
(Emphasis supplied)

Therefore, it is only upon the determination of the BAC² that the items to be procured are of a proprietary nature and available only from a proprietary source, that it shall recommend to the HOPE the use of the alternative method of Direct Contracting for the procurement of the double folded tents and ammunitions. Further, resort to this alternative mode must be included in the procuring entity's Annual Procurement Plan (APP) and approved by the HOPE.

"Tailor Fitting" of Specifications

For your guidance, please be advised that while procuring entities can make the technical specifications in their bid documents more detailed, to encourage competition, however, they cannot "tailor fit" to a particular brand.

Section 18 of R.A. 9184 and its IRR-A, is clear on this point:

Specifications for the procurement of goods shall be based on relevant characteristics and/or performance requirements.
Reference to brand names shall not be allowed.

Inclusion in the bid documents of such detailed design and technical descriptions that leave the procuring entity no other option but to procure from a particular brand or supplier, defeats the very essence and purpose of public bidding. In such case where procurement from a specific brand is necessary, indispensable and justified under the pertinent Rules, alternative methods may be availed of.

Conflict of Interest

In relation to the foregoing, and in view of the facts represented, may we advise further, that without prejudice to other administrative and criminal liabilities, it shall be unlawful under R.A. 9184 for a bidder that has conflict of interest to participate in the procurement process. A bidder that has a relationship directly or through common third parties, that puts them in a position to have access to information about or influence the decisions of the procuring entity regarding the bidding process is considered to have a general conflict of interest and may not join the bidding. In like manner, a bidder who has participated as a consultant in the preparation of the design or technical specifications of the

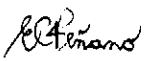
² See Section 12 of R.A. 9184 and Section 12.1 of IRR-A.

goods and related services that are the subject of the bid, is also disqualified from participating in the bidding thereof.³

Anent all the foregoing, we trust that your queries have been sufficiently addressed.

This opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not be necessarily applicable upon a different set of facts or circumstances.

Very truly yours,


RUBY U. ALVAREZ
Executive Director III

³ Guidelines on the Establishment of Procurement Systems and Organizations (Volume 1), page 64.