

NPM No. 07-2008

20 June 2008

ATTY. EDNA E. DIÑO
Chairperson
Bids and Awards Committee for Consultancy Services
SUPREME COURT
Manila

Re : Request for Clarification on GPPB Resolution Nos. 03-2007 and 18-2007

Dear Atty. Diño:

We respond to your letters dated 28 and 22 April 2008 questioning the authority of the Government Procurement Policy Board (GPPB) to include consulting and infrastructure within the coverage of Section 53 (e) under GPPB Resolution No. 03-2007, entitled AMENDING SECTION 53 (E) OF IRR-A OF R.A. 9184 TO INCLUDE INFRASTRUCTURE PROJECTS AND CONSULTING SERVICES, and seeking clarification on the provisions of GPPB Resolution No.18-2007 or the IMPLEMENTING GUIDELINES ON AGENCY-TO-AGENCY AGREEMENTS UNDER SECTION 53 (E) OF THE IRR-A OF R.A. 9184.

At the outset, it bears stressing that GPPB Resolution No. 03-2007 emanated from the need to reconcile the language of the 1st sentence of Section 53¹ with that of Section 53 (e) of IRR-A. Section 53 of the IRR-A, prior to its amendment under GPPB Resolution No. 03-2007, reads as follows:

Section 53. Negotiated Procurement

Negotiated Procurement is a method of procurement of goods, infrastructure projects, and consulting services, whereby the procuring entity directly negotiates a contract with a technically, legally and financially capable supplier, contractor or consultant only in the following cases:

¹ Please note that the first sentence of Section 53 is legally grounded on Section 48 (e) of R.A. 9184 which reads:

“Negotiated Procurement – a method of procurement that may be resorted under the extraordinary circumstances provided for in Section 53 of this Act and other instances that shall be specified in the IRR, whereby the Procuring Entity directly negotiates a contract with a technically, legally and financially capable supplier, contractor or consultant.”

x x x

- e) Purchases of goods from another agency of the Government, x
x x [Emphasis supplied]

We definitely concur with your observation that Section 53 (e) of R.A. 9184 and IRR-A clearly state "purchases of goods". However, in view of the confusion raised by many other agencies, the GPPB saw the need to reconcile this provision with the 1st sentence of Section 53. One cardinal principle in statutory construction is that a statute must be construed and given effect as a whole and that apparently conflicting provisions should be reconciled and harmonized.

The decision to reconcile these two provisions by including consultancy and infrastructure projects within the coverage of Section 53 (e) was based on a careful study of the legislative intent and policy analysis of the issue. Rest assured, that in the exercise of its function to formulate and amend the implementing rules and regulations, the GPPB is deeply mindful of its concomitant duty to remain within the boundaries of the law. In this regard, we are fortunate that some members of the GPPB either authored or actively participated in the congressional deliberations during the passage of R.A. 9184.

With regard to your request for clarification on the provisions of GPPB Resolution No.18-2007 or the IMPLEMENTING GUIDELINES ON AGENCY-TO-AGENCY AGREEMENTS UNDER SECTION 53 (E) OF THE IRR-A OF R.A. 9184 (hereafter, the *Guidelines*), please be advised that:

1. Reference to the 1st paragraph of Section 53 (e) of IRR-A under Item 2 of the Guidelines refers to the 1st paragraph of Section 53 (e), and not to Section 53 (a), as you opined. We believe this statement is clear as it is concise. All the instances under Section 53 do not require public bidding.

2. We confirm your interpretation that the 2nd paragraph of Section 53 (e) refers to the outsourcing of the procurement activity to another agency. This distinction is what differentiates the 1st from the 2nd paragraph of Section 53 (e): the 1st paragraph refers to the procurement of services from another government agency while the 2nd paragraph refers to the outsourcing of the procurement activity to another government agency.

3. Lastly, both the third whereas clause of GPPB Resolution No. 18-2007 and paragraph 4 (c) of the Guidelines should refer to Section 53 (e). We apologize for any confusion these typographical errors may have caused.

In ending, allow us to express our heartfelt thanks for your comments and unwavering support to procurement reform.

Very truly yours,

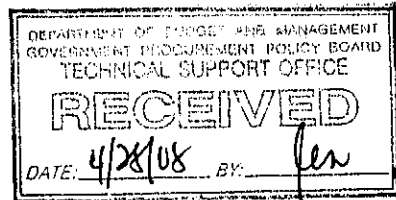


RUBY U. ALVAREZ
Executive Director III

*Permis,
Please draft response.
Let's discuss before we release
opinion.*



*74.
4/26/08*



*→ Enuncie. Lab. priority
4/23/08*

Republic of the Philippines
Supreme Court
Manila

Bids and Awards Committee for Consultancy Services

April 28, 2008

Atty. **RUBY U. ALVAREZ**
Board Secretary
Government Procurement Policy Board
& Executive Director, GPPB-TSO

Re: Request for Clarification on GPPB Resolutions Nos. 03-2007 and 18-2007

Dear Atty. Alvarez:

We respectfully request that a response to our request for clarification on GPPB Resolutions Nos. 3-2007 and 18-2007, which we sent to you by fax and by mail on April 22, 2008, be prioritized. A copy of the letter for clarification dated April 22, 2008 is hereto attached for easy reference.

Since this Committee is about to report to the Chief Justice on a pending urgent procurement activity, may we please expect a response from you before May 2, 2008?

Thank you for your prompt action on our request.

Very truly yours,

EDNA E. DIÑO
BACCS Chairperson



Republic of the Philippines
Supreme Court
Manila

Bids and Awards Committee for Consultancy Services

April 22, 2008

Atty. **RUBY U. ALVAREZ**
Board Secretary
Government Procurement Policy Board
Executive Director, GPPB-TSO

Re: Request for Clarification on GPPB Resolutions Nos. 03-2007 and 18-2007

Dear Atty. Alvarez:

The Bids and Awards Committee for Consultancy Services (BACCS) respectfully requests clarification on the coverage of consultancy services by GPPB Resolution No. 03-2007 (*Amending Section 53 [e] of IRR-A of R.A. No. 9184 to Include Infrastructure Projects and Consulting Services*) and GPPB Resolution No. 18-2007 (*Approving the Implementing Guidelines on Agency-to-Agency Arrangements under Section 53 [e] of the IRR-A of R.A. 9184*).

The instant request for clarification is prompted by the provision of Republic Act No. 9184 (*Government Procurement Reform Act*), the legal basis for the said Guidelines, which states:

SEC. 53. *Negotiated Procurement.* – Negotiated Procurement shall be allowed only in the following instances:

X X X X X X X X X;

(e) Subject to the guidelines specified in the IRR, purchases of Goods from another agency of the Government, such as the Procurement Service of the DBM, which is tasked with a centralized procurement of

commonly used **Goods** for the government in accordance with Letters (sic) of Instruction No. 755 and Executive Order No. 359, series of 1989. (Emphasis supplied.)

The Government Procurement Policy Board (GPPB), exercising its rule-making authority under Section 63 of Republic Act No. 9184, interpreted this provision of law in the Implementing Rules and Regulations A of Republic Act No. 9184 (IRR-A), as follows:

Section 53. Negotiated Procurement

Negotiated Procurement is a method of procurement of goods, infrastructure projects and consulting services, whereby the procuring entity directly negotiates a contract with a technically, legally and financially capable supplier, contractor or consultant only in the following cases:

x x x x x x x x x;

- e) *Purchases of goods* from another agency of the Government, such as the PS-DBM, which is tasked with a centralized procurement of *commonly used Goods* for the government in accordance with Letters of Instruction No. 755 and Executive Order No. 359, series of 1989. Further, in order to hasten project implementation, agencies which may not have the proficiency or capability to undertake a particular procurement, as determined by the head of the procuring entity concerned, may request other agencies to undertake such procurement for them, or at their option, recruit and hire *consultants* or procurement agents to assist them directly and/or train their staff in the management of the procurement function; (Bold italics supplied.)

Under GPPB Resolution No. 03-2007, Section 53 (e) of IRR-A now reads:

- e) **Procurement of infrastructure, consulting services and goods** from another agency of the Government, such as the PS-DBM, which is tasked with a centralized procurement of commonly used Goods for the government in accordance with Letters of Instruction No. 755 and Executive Order No. 359, series of 1989. **For purposes of this paragraph, the term agency shall exclude GOCCs incorporated under Batas Pambansa Blg. 168, otherwise known as the Corporation Code of the Philippines.**

In order to hasten project implementation, agencies which may not have the proficiency or capability to undertake a particular procurement, as determined by the head of the procuring entity concerned, may request other agencies to undertake such procurement for them, or at their option, recruit and hire consultants or procurement

agents to assist them directly and/or train their staff in the management of the procurement function;

The GPPB shall issue guidelines to implement this provision.
(Emphasis in the original.)

By the clear provision of Section 53 (e) of Republic Act No. 9184, only goods shall be covered thereby. Notably, LOI No. 755 and EO No. 359, s. 1989 are mentioned therein to underscore the policy of the government of adopting an integrated procurement system to achieve economy and efficiency. Had Congress intended to include the procurement of *services* of consultants and works contractors, Congress would have expressly included such services in Section 53 (e). It should be observed that paragraphs (b) to (d) of Section 53 of Republic Act No. 9184 do not mention goods but by its terms, these three paragraphs refer not only to goods but also to consultancy services and infrastructure projects. Thus, by expressly mentioning **goods** in Section 53 (e), the legislative intent is to delimit its coverage to **goods**. // *sum. all*

However, Section 53 (e) of IRR-A mentions *consultants* and hence, Section 53 (e) of Republic Act No. 9184 appears to have been expanded by the GPPB thru IRR-A and Resolutions Nos. 3-2007 and 18-2007 to cover not only the procurement of goods but also the procurement of consultancy services and infrastructure projects. Similarly, under the maxim *expressio unius est exclusio alterius*, paragraph 3 of the Guidelines approved by GPPB Resolution No. 18-2007 providing for its scope and application, which expressly excludes from its coverage a type of infrastructure project and the procurement of goods from the Procurement Service, implicitly includes in its coverage consultancy services in general.

The BACCS believes that consultancy services should not be covered by Section 53 (e) of IRR-A, as amended by GPPB Resolutions Nos. 3-2007 and 18-2007, as such coverage is in derogation of the clear provision of Section 53 (e) of Republic Act No. 9184 that covers only goods.

Assuming without admitting that the GPPB indeed is authorized to expand the coverage of Section 53 (e) of Republic Act No. 9184, the *Guidelines* approved by GPPB Resolution No. 18-2007, as published in the *Official Gazette* (Vol. 104, No. 2, page 239 – 241), vaguely states in paragraph 2 that the guidelines were issued “to strictly prescribe the conditions when a government agency may procure from another government agency without need of public bidding pursuant to the 1st paragraph of Section 53 (e) of IRR-A.” The first paragraph referred to must be Section 53 (e) of IRR-A, as amended by GPPB Resolution No. 03-2007. However, since paragraph 2 on “purpose” of the *Guidelines* speaks of procurement from another agency “without need of public bidding,” could the section mentioned be actually Section 53 (a) of IRR-A? Would this mean that there need not be two failures of bidding before procuring the services of another government agency by negotiated procurement as provided for by Section 53 (a) of Republic Act No. 9184? After all, the *Administrative Code of 1987* encourages cooperation among

government agencies and allows the rendering of services by a government agency in favor of another such agency by merely entering into a memorandum of agreement.

Moreover, does the second paragraph of Section 53 (c), as amended by GPPB Resolution No. 3-2007, simply mean that a government agency may request another agency (servicing agency) to **conduct procurement activities** for it? Or, does the paragraph mean that a government agency may **procure the services of another government agency**?

Furthermore, may we be enlightened on the provisions of **Section 53 (3) of IRR-A** mentioned in the third whereas clause of GPPB Resolution No. 18-2007 and **Section 53 (2) of IRR-A** mentioned in paragraph 4 (c) on definition of terms in the *Guidelines*? Even as amended, IRR-A does not have Sections 53 (2) and (3).

While the BACCS adheres to the principle that an interpretation of the law by administrative bodies charged with its enforcement is entitled to **great weight**, with all due respect, there is another basic principle that should be considered and observed – administrative agencies should not expand or change the law from which its interpretative authority springs; otherwise, the administrative agency would supplant legislative wisdom with its own.

The BACCS may need immediately the services of another government agency to implement a project. It is in this light that this request for clarification is made.

May we be honored by your usual prompt written clarification on the matters raised?

Thank you very much.

Very truly yours,



EDNA E. DINO
BACCS Chairperson