



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

NPM No. 91-2012

16 July 2012

MR. ARTURO C. MANUEL

Director

BANGKO SENTRAL NG PILIPINAS (BSP)

SECURITY PLANT COMPLEX (SPC)

DEPARTMENT OF GENERAL SERVICES

East Avenue, Quezon City

Re: Exemption from Performance and Warranty Securities

Dear Director Manuel:

This is in response to your letter dated 16 April 2012 seeking our opinion on whether the procurement of Liquefied Petroleum Gas (LPG) through Direct Contracting from Petron Corporation (Petron) may be exempt from the submission of performance and warranty securities.

It is represented that the SPC of BSP directly transacts business with Petron for the supply of LPG through Direct Contracting. It is further represented that Petron is the owner of LPG tanks installed at SPC in accordance with the "Equipment Lease Agreement" (ELA) executed in the year 1986 between Petrophil Corporation (Petrophil) and the former Central Bank (CB) of the Philippines. It is likewise represented that Petron does not submit the required performance security to SPC claiming that it is against company policy. It is in this context that you are seeking guidance on whether the procurement of goods through Direct Contracting may be exempted from the submission of performance and warranty securities.

Posting of Performance and Warranty Securities

Section 39.1 of the Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 provides that a winning bidder shall post a performance security prior to the signing of the contract to guarantee the faithful performance of its obligations under the contract in accordance with the Bidding Documents. After the acceptance by the Procuring Entity (PE) of the delivered goods, the winning bidder should post a warranty security for a minimum period of three (3) months in the case of expendable supplies, or a minimum period of one (1) year in the case of non-expendable supplies, to assure that it will correct the manufacturing defects of the delivered goods¹.

Moreover, Section 54.5 of the IRR of RA 9184 provides that, as a general rule, performance and warranty securities are required except for procurement under Section 52 (Shopping), 53.2 (Emergency Cases), 53.9 (Small-value Procurement), 53.10 (Lease of Real Property) and 53.13 (UN Agencies). A

¹ Section 62.1 of the IRR of RA 9184.

Direct Contracting is not one of the exceptions to the requirements of posting of performance and warranty securities. Hence, SPC could not validly exempt Petron from the said requirements at the mere expedient of claiming that it is against company policy.

Moreover, please note the under RA 9184, the PE shall adopt public bidding as the primary mode of procurement. Alternative methods of procurement are resorted to only in highly exceptional cases set forth in Sections 48-54 of RA 9184 and its IRR². Moreover, in all instances, the procuring entity shall ensure that the most advantageous price for the Government is obtained³.

Procurement through Direct Contracting

As discussed in a previous opinion⁴, in order to justify the need to procure through direct contracting, the Bids and Awards Committee (BAC) should conduct a survey of the industry and determine the supply source. The survey should confirm the exclusivity of the source of goods to be procured. In all cases where direct contracting is contemplated, the survey must be conducted prior to the commencement of the procurement process. In addition, specifications for the procurement of goods shall be based on relevant characteristics and/or performance requirements⁵.

The PE must justify the necessity for an item that may only be procured through direct contracting, and it must be able to prove that there is no suitable substitute in the market that can be obtained at more advantageous terms⁶. It is only after the BAC has conducted its survey and determined that one of the conditions under Section 50 of RA 9184 is present that proper recommendation to the HOPE for the use of Direct Contracting⁷ may be made.

LPG is a generic product which could be acquired by SPC from several sources. In the absence of proof that SPC needs a special LPG which is patented by Petron, the immediate resort to direct contracting, in lieu of competitive bidding, may not be justified. SPC could not validly do away with competitive bidding by executing a Sales Agreement and ELA. SPC should always observe and abide by the provisions of RA 9184 and its IRR in its procurement of goods and services.

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 circumstances presented. 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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² Section 10 of RA 9184 and its IRR; Section 48.2 of the IRR of RA 9184.

³ Section 48.1 of the IRR of RA 9184.

⁴ NPM No. 029-2007 dated 30 July 2007.

⁵ Section 12 of RA 9184.

⁶ Section 4, Part 1, Step 4, Generic Procurement Manual, Manual for the Procurement of Goods and Services (Volume 2).

⁷ Section 18 of RA 9184.