



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

NPM No. 110-2014

6 November 2014

MR. GERARDO A. SULLANO
Chairperson, Bids and Awards Committee (BAC)
METROPOLITAN WATERWORKS AND SEWERAGE SYSTEM
REGULATORY OFFICE (MWSS RO)
Katipunan Road, Balara, Quezon City 1105

Re: Direct Contracting

Dear Mr. Sullano:

This refers to your letter¹ seeking our opinion on whether the MWSS RO can resort to Direct Contracting for the procurement of the subscription to Bloomberg Professional Service (BPS).

As represented, MWSS RO is in the process of evaluating the procurement of subscription to BPS under Direct Contracting for the compilation and tracking of updates on key economic, financial and corporate information that will be used in the determination of the Appropriate Discount Rate (ADR) in future rate rebasing exercises. It was noted that in the 2013 rate rebasing exercise, although other sources of information that are proprietary in nature were used, BPS was the predominant source for the ADR determination, resulting to the conclusion that BPS is best suited for the needs of the MWSS RO. Additionally, it was noted that BPS is protected by copyrights, trademarks, services marks, international treaties, and/or other proprietary rights and laws of the United States of America (USA) and other countries, where the service is also protected as a collective work or compilation under USA copyright and other laws and treaties, while all individual articles, columns and other elements making up the service are also copyrighted works.

It is likewise represented that the opinion of the Office of the Government Corporate Counsel (OGCC) on whether the service being procured would meet the conditions required by law for procurement through Direct Contracting was sought. In response, the OGCC, in its 11 July 2014 Memorandum to MWSS RO, stated that "MWSS RO may resort to Direct Contracting in the procurement of Bloomberg's service" and suggested that the consent of the Government

¹ With the following attached Documents:

1. Copy of the 11 July 2014 OGCC Memorandum to MWSS RO;
2. Copy of the ADR Variables and Sources of Information;
3. Copy of the 9 June 2014 Letter from Bloomberg Legal (Asia Pacific) to MWSS RO re: Exclusive Distributorship of the BPS;
4. Copy of the 11 June 2014 Letter from Bloomberg Philippines LL C to MWSS RO re: Unique Services and Features of BPS; and
5. Copy of the 17 June 2014 Letter from Bloomberg Philippines LL C to MWSS RO re: BPS.

Procurement Policy Board (GPPB) be obtained. It is in this light that you raised that above-mentioned query.

Consent/Approval of the GPPB

We wish to clarify that the approval of the Government Procurement Policy Board (GPPB) before a Procuring Entity (PE) may proceed with the alternative method of procurement is only necessary for government contracts involving an amount of at least 500 Million Pesos, where the Head of the Procuring Entity (HOPE) has made a determination that such contract falls under any of the exceptions from public bidding². Thus, if the amount of the government contract to be procured through alternative method of procurement is less than 500 Million Pesos, GPPB approval is not necessary. In such case, the PE may, in order to promote economy and efficiency, resort to any alternative methods of procurement provided under Republic Act No. (RA) 9184 and its revised Implementing Rules and Regulations (IRR), subject to the prior approval of the HOPE, and whenever justified by the conditions required by the procurement law and the rules³.

For government contracts requiring GPPB approval (amount is at least 500 Million Pesos and mode of procurement is alternative method of procurement), we refer you to the provisions of the Internal Rules for the Exercise by the GPPB of its Approval Power under Executive Order 423 that was adopted by the GPPB, through GPPB Resolution No. 11-2006⁴ as amended by Resolution No. 22-2012⁵, for the necessary processes and documentary requirements.

Direct Contracting

Aside from the general conditions set forth under Section 48.1 of the IRR of RA 9184, Direct Contracting or Single Source Procurement, as an alternative method of procurement, can be resorted to by the PE only upon determination of the existence of any conditions set forth in Section 50 of the revised IRR of RA 9184, *to wit*:

1. Procurement of goods of proprietary nature which can be obtained only from the proprietary source, *i.e.* when patents, trade secrets, and copyrights prohibited others from manufacturing the same item;
2. When the procurement of critical components from a specific supplier is a condition precedent to hold a contractor to guarantee its project performance, in accordance with the provisions of its contract; or
3. Those sold by an exclusive dealer or manufacturer which does not have sub-dealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the GOP.

For the first and third conditions to apply, the fundamental consideration is whether there are other suppliers or manufacturers that can provide the goods needed by the PE. It must be emphasized that Direct Contracting is also known as "*Single Source*" Selection, that is, the good to be procured is not available elsewhere or from other sources except from the trademark, patent or copyright holder under the first condition. On the other hand, under the third condition, the

² Section 4 of Executive Order No. 423 Series dated 18 September 2003 Prescribing the Rules and Procedures on the Review and Approval of All Government Contracts to Conform to Republic Act No. 9184 otherwise known as the "Government Procurement Reform Act", as amended by Executive Order No. 645 dated 31 July 2007.

³ Section 48.1 of the IRR of RA 9184.

⁴ Dated 14 June 2006.

⁵ Dated 24 September 2012.

requirement is not solely on the exclusive distributorship or proprietary nature of a particular product, but more importantly, the singularity of supplier or manufacturer that can deliver the requirement of the PE.

From the foregoing, and for the first and third conditions under Section 50 of the IRR to apply, it is incumbent upon the PE to ensure that based on the technical specifications of the goods subject of procurement, only one supplier, distributor or manufacturer can supply and deliver the goods. The PE, through the End-User, and the BAC should conduct a survey of the industry and determine the supply source to confirm the exclusivity of the source of goods to be procured.⁶ Moreover, 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 terms.⁷

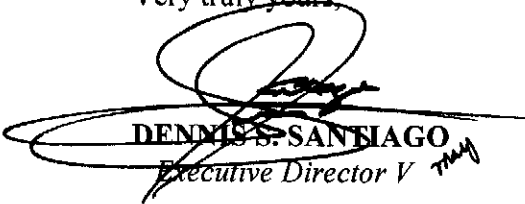
Mere presence of Certificate of Exclusive Distributorship by one company does not sanction resort to Direct Contracting as there may be other companies who can offer a similar product that complies with the technical specifications of the goods needed by the PE. When there are other suppliers or manufacturers which can provide the goods within the parameters established by the PE disavows resort to Direct Contracting and requires the use of Competitive Bidding as the default method of procurement.

In sum, we wish to clarify the following matters relative to your concerns:

1. Prior approval of GPPB is only necessary for government contracts involving an amount of at least 500 Million Pesos where the HOPE has made a determination that such contract falls under any of the exceptions on public bidding; and
2. In resorting to Direct Contracting, the PE must ensure the presence of all the conditions warranting its use and the fact of exclusivity as to the supply and source of the goods to be procured.

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 V



⁶ NPM No. 17-2007 dated 17 July 2007.

⁷ *Ibid.*