



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

NPM No. 140-2012

5 November 2012

MR. LUZVIMINDO T. DAVID
Chairman, Bids and Awards Committee (BAC)
TECHNOLOGY RESOURCE CENTER (TRC)
Jacinta Building 2, EDSA,
Guadalupe Nuevo, Makati City

Re: Direct Contracting under Section 50(c) of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) 9184

Dear Mr. David:

We respond to your letter dated 24 September 2012 requesting our opinion on whether TRC can resort to Direct Contracting, in lieu of public bidding, as provided in Section 50 of RA 9184 and its IRR.

It is represented that TRC would like to procure the RF Spectrum/WLAN Analyzer for the Information and Communication Technology Office (ICTO) – Department of Science and Technology (DOST) Cloud Top Project. According to the Cloud Top technical personnel, the system for the RF Spectrum/WLAN Analyzer is exclusively designed, developed and produced by National Instruments Corporation (NIC) based in Austin, Texas, USA, but some of its components/parts are not exclusively produced or manufactured by NIC. In the Philippines, some of its components/parts are distributed and sold by the sole authorized company in the country, which is the National Instruments Philippines, although a couple of the system's components can be sourced from local suppliers. In addition, NIC-Singapore has issued a Certification dated 10 September 2012, which was notarized on the same day and authenticated by the Embassy of the Philippines on 12 September 2012, stating that the company exclusively designs, develops, manufactures, sells, and supports hardware and software products worldwide.

We wish to inform you that Section 10 of the IRR of RA 9184 requires the Procuring Entity (PE) to adopt competitive or public bidding as the primary mode of procurement. It is only under highly exceptional circumstances, whenever justified by existing conditions that promote economy and efficiency, subject to the approval of the Head of the Procuring Entity (HOPE), that resort to alternative methods of procurement will be allowed.¹ Thus, the determination and accountability for using any of the forms of alternative modes of procurement rest primarily with the PE as it is in the best position to determine the existence of the required conditions.²

¹ Sections 48.1 and 48.2 of the IRR of RA 9184.

² NPM No. 58-2012 dated 14 May 2012.

For your guidance, however, Section 50 of the revised IRR of RA 9184 contemplates of three (3) conditions when resort to Direct Contracting may be allowed, the existence of which must be validated by the Procuring Entity (PE) before any of these may be utilized as bases to undertake Direct Contracting. These conditions refer to: (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; (b) 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 (c) 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 government.

In resorting to Direct Contracting on the basis of Section 50(c) of the revised IRR, it is imperative for the PE to establish that, aside from the fact that the item to be procured is sold by an exclusive dealer or manufacturer, which does not have sub-dealers selling at lower prices, such item also has no suitable substitute that can be obtained at more advantageous terms to the government.

In addition, we wish to direct your attention to the Guidelines in the Determination of Eligibility of Foreign Suppliers, Contractors, and Consultant to Participate in Government Procurement Projects³, which lay down the rules concerning the eligibility of foreign bidders to participate in domestically-funded public procurement opportunities, specifically, Sections 5 and 6 thereof.

Based on the foregoing, we wish to clarify that it is within the authority and responsibility of the PE to determine the applicability of any alternative method of procurement to a particular acquisition, and it is incumbent upon such PE, through the relevant end-user office, to provide the necessary justifications and supporting documents to establish the existence of conditions warranting resort to the identified alternative modality. Thus, for Section 50(c) of the revised IRR to apply in the procurement of the RF Spectrum/WLAN Analyzer, all the conditions for its use must be satisfied by TRC.

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 situations presented, and may not be applicable given different set of facts and circumstances. 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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³ GPPB Resolution No. 18-2005 dated 12 September 2005.