

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

*Unit 2506 Raffles Corporate Center, Emerald Avenue, Ortigas Center, Pasig City
Telefax Nos. (02) 900-6741 to 44*

NPM No. 160-2004

December 21, 2004

MR. DANILO C. CARDENAS

Chairman

Bids and Awards Committee

Philippine Council for Agriculture, Forestry
and Natural Resources Research and Development

Department of Science and Technology

Los Baños 4030, Laguna

Dear Mr. Cardenas:

This refers to your letter dated 07 December 2004, which we received on even date, seeking clarification on whether or not the Philippine Council for Agriculture, Forestry and Natural Resources Research and Development (PCARRD) may adopt Direct Contracting or Negotiated Procurement as an Alternative Method of Procurement in the procurement of Auditing Services for the Surveillance Audit of PCARRD's Quality Management Systems (QMS) for purposes of its continued compliance with the requirement of ISO 9001:2000 standards.

Based on the letter of Assistant Director Cirila S. Botor of the Department of Trade and Industry, a QMS Certificate issued by a certification body has a validity period of three (3) years subject to continuing surveillance audits of the QMS certification body. It is then logical that services of this type be entered into for a period of three (3) years in order to ensure the validity of the QMS Certificate issued in favor of the requesting entity. However, since PCARRD failed to enter into a multi-year contract for this purpose, it now intends to procure the services of the certification body that issued its QMS Certificate by way of Direct Contracting or Negotiated Procurement.

Conditions for Direct Contracting and Negotiated Procurement Not Present

The general rule is that procuring entities shall adopt public bidding as the mode of procurement and shall see to it that the procurement program allows sufficient lead time for such public bidding. Alternative methods of procurement provided under Rule XVI of Republic Act 9184 (R.A. 9184) and its Implementing Rules and Regulations Part A (IRR-A) may be resorted to only in the highly exceptional cases provided therein.¹

¹ Section 48.2, IRR-A, R.A. 9184.

Accordingly, we need only to identify the existence of the conditions provided under R.A. 9184 and its IRR-A in order to determine whether a particular alternative method of procurement may be used in a particular procurement project.

A cursory reading of Section 50 of R.A. 9184 will reveal that Direct Contracting is a recourse available only in procurement of goods; more specifically, when any of the conditions enumerated in the same section in its IRR-A are present. In as much as the procurement of services for QMS certification is considered consulting services, Direct Contracting as an alternative method of procurement is not applicable.

With respect to the use of Negotiated Procurement, although it may be used for procurement of consulting services, Section 53 of the IRR-A provides specific cases when such method may be applied, namely:

- a) Where there has been failure of public bidding for the second time as provided in Section 35 of the Act and this IRR-A;
- b) In case of imminent danger to life or property during a state of calamity, or when time is of the essence arising from natural or man-made calamities or other causes where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities. In the case of infrastructure projects, the procuring entity has the option to undertake the project through negotiated procurement or by administration or, in high security risk areas, through the AFP;
- c) Take-over of contracts, which have been rescinded or terminated for causes provided for in the contract and existing laws, where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities;
- d) Where the subject contract is adjacent or contiguous to an on-going infrastructure project: *Provided, however,* That (i) the original contract is the result of a Competitive Bidding; (ii) the subject contract to be negotiated has similar or related scopes of work; (iii) it is within the contracting capacity of the contractor; (iv) the contractor uses the same prices or lower unit prices as in the original contract less mobilization cost; (v) the amount involved does not exceed the amount of the ongoing project; and (vi) the contractor has no negative slippage: *Provided, further,* That negotiations for the procurement are commenced before the expiry of the original contract. Whenever applicable, this principle shall also govern consultancy contracts, where the consultants have unique experience and expertise to deliver the required service;
- e) Purchase 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;

- f) In the case of individual consultants hired to do work that is (i) highly technical or proprietary; or (ii) primarily confidential or policy determining, where trust and confidence are the primary consideration for the hiring of the consultant: *Provided, however,* That the term of the individual consultants shall, at the most, be on a six month basis, renewable at the option of the appointing head of the procuring entity, but in no case shall exceed the term of the latter; or
- g) Upon prior approval by the President of the Philippines, and when the procurement involves major defense equipment for use by the AFP and the Secretary of National Defense has determined that the interests of the country shall be protected by negotiating directly with an agency or instrumentality of another country with which the Philippines has entered into a defense cooperation agreement or otherwise maintains diplomatic relations: *Provided, however,* That the performance by the supplier of its obligations under the procurement contract shall be covered by a foreign government guarantee of the source country covering one hundred percent (100%).

Considering that the circumstances present in the subject procurement do not fall squarely in any of the above-mentioned cases, Negotiated Procurement cannot be resorted to by your agency.

In view of the foregoing, we are of the opinion that neither Direct Contracting nor Negotiated Procurement may be used by PCARRD in procuring the services for its QMS certification; instead, the rules and procedures for Competitive Bidding should be complied with.

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

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director III

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December 7, 2004

MR. DANILO C. CARDENAS

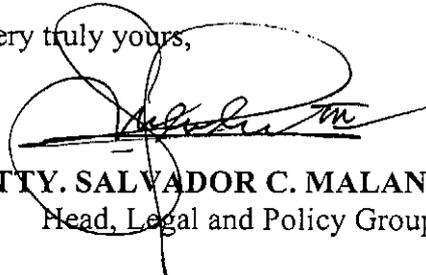
Chairman
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Dear Mr. Cardenas:

This refers to your letter dated 07 December 2004, which we received on even date, addressed to the Chairperson of the Government Procurement Policy Board (GPPB), requesting for clarification on Republic Act 9184 and its Implementing Rules and Regulations Part A, specifically with respect to its application on the procurement of Auditing Services for the Surveillance Audit of your agency's quality management systems.

We wish to inform you that we shall respond to your concerns either through phone or in writing at the earliest possible opportunity, or raise the same to the GPPB for appropriate resolution should referral thereto becomes necessary.

Very truly yours,



ATTY. SALVADOR C. MALANA III
Head, Legal and Policy Group