

NPM No. 17-2007

17 July 2007

Mr. CARLITO S. PUNO
Chairman
COMMISSION ON HIGHER EDUCATION
5th Floor Upper DAP Bldg., San Miguel Avenue
Ortigas Center, Pasig City

**Re: Procurement of Goods under an Exclusive
Distributorship/Exclusive Publishing Partner**

Dear Mr. Puno:

We refer to your letter dated 11 April 2007. You wish to know “whether purchase of goods under an exclusive distributorship/exclusive publishing partner contract or goods protected under the Intellectual Property Rights would require to going through the usual or proper bidding procedure under Republic Act No. 9184 (R.A. 9184)”.

Under R. A. 9184, the procuring entity shall adopt public bidding as the general mode of procurement. Alternative methods are resorted to only in highly exceptional cases set forth in Sections 48-54 of R. A. 9184 and its Implementing Rules and Regulations-Part A (IRR-A).¹ Moreover, in all instances, the procuring entity shall ensure that the most advantageous price for the Government is obtained.²

Procurement of goods sold by an exclusive dealer or manufacturer or those goods which can be obtained only from the proprietary source may be procured by direct contracting under Section 50 of R. A. 9184 and its IRR-A under the following conditions:

SEC. 50. Direct Contracting. – Direct Contracting may be resorted to only in any of the following conditions:

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;

¹ Section 10 of R.A. 9184 and its IRR-A; Section 48.2 of the IRR-A of R.A. 9184.

² Section 48.1 of the IRR-A of R. A. 9184.

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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. (Emphasis supplied)

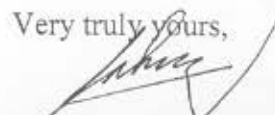
Under the above-quoted Section 50 (a), direct contracting is applicable when the goods being procured are covered by a patent, trade secret, or copyright duly acquired under the law. Under the Intellectual Property Code of the Philippines (Republic Act No. 8293) the registered owner of a patent, copyright, or any other form of intellectual property has exclusive rights over the product, design or process covered by such patent, copyright, or registration. Such exclusive right includes the right to use, manufacture, sell or otherwise derive economic benefit from the item, design or process (Section 4, Part 2, Volume 2, Manual of Procedures for the Procurement of Goods and Services).

On the other hand, under Section 50 (c), this condition anticipates a situation where the goods are sold by an exclusive dealer or distributor, or directly sold by the manufacturer. In this instance, it is highly unlikely that sub-dealers can sell the same at lower prices. Further, the procuring entity has not identified a suitable substitute for the product that can be procured at terms more advantageous to the government (Section 4, Part 2, Volume 2, Manual of Procedures for the Procurement of Goods and Services).

It also bears stressing that in order to justify the need to procure through direct contracting, the Bids and Awards Committee 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. Moreover, the procuring entity 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 (Section 4, Part 2, Volume 2, Manual of Procedures for the Procurement of Goods and Services). In addition, specifications for the procurement of goods shall be based on relevant characteristics and/or performance requirements (Section 18, R. A. 9184).

We hope to have clarified the matter. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,


RUBY U. ALVAREZ
Executive Director III

REGISTRY RECEIPT

Post Office _____

Letter/Package No. **006799**

Posted on _____ 19 _____

Preserve this receipt for reference in case of inquiry.

JUL 20 20

Postmaster/Teller _____