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NPM No. 29-2007

30 July 2007

MR. MELBURGO S. CHIU

*Vice President Hydro Generation and
 Chairman, Bids and Awards Committee*

National Power Corporation

Quezon Avenue corner Agham Road
 Diliman, Quezon City

Re: Procurement of Fuel Additive by Direct Contracting

Dear Mr. Chui:

We respond to your letter dated 20 November 2006. You wish to know “whether the supply of a fuel additive, being manufactured by a foreign company with international patent protection both for technology and its application and solely distributed by a local distributor, falls within the provisions of the Implementing Rules and Regulations-A of Republic Act No. 9184.” We understand that the National Power Corporation wishes to exercise its option to procure a one (1) year supply of the fuel additive from International Fuel Technology through direct contracting on the ground that the product is from a proprietary source and exclusively distributed by a local dealer.

Under R. A. 9184, the procuring entity shall adopt public bidding as the general mode of procurement. Alternative methods of procurement 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:

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

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.

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;

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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 [Manual]).

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).

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). In addition, specifications for the procurement of goods shall be based on relevant characteristics and/or performance requirements (Section 18, R. A. 9184).

If the BAC of your office, after conducting the survey, has determined that all the conditions under Section 50 of the IRR-A are present, the BAC may make the proper recommendation to the head of the procuring entity for the use of direct contracting (Section 12, R. A. 9184). The head of the procuring entity may approve or disapprove said recommendation (Section 48.1 IRR-A, 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