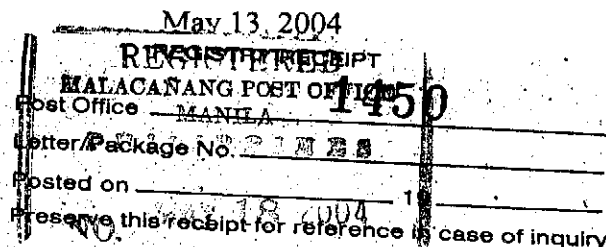


REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

Mezzanine 125, Mabini Hall, Malacañang, Manila
Telefax Nos. (02) 735-4962; (02) 736-5758

NPM No. 067-2004

Hon. MILAGROS V. REGALADO
Assistant Commissioner – Legal Service
Bureau of Internal Revenue
Agham Road, Diliman, Quezon City



Re : **Procurement of Licenses of Software Products through Direct Contracting as an Alternative Method of Procurement**

Dear Asst. Comm. Regalado:

This refers to your letter dated April 21, 2004 addressed to Secretary Emilia T. Boncodin, Chairperson of the Government Procurement Policy Board ("GPPB"), which was referred to our office on April 30, 2004, requesting for confirmation whether the Bureau of Internal Revenue ("BIR") may procure through "Direct Contracting" the licenses for SSA Software Products and ACL Software Products considering that those licenses are sold only by exclusive distributors. Clarification is also being sought by your office on the proper procedure for Direct Contracting as an alternative method of procurement, that is whether the BIR may simply ask for a price quotation from the exclusive distributors abroad without negotiation in the Philippines.

Direct Contracting as an Alternative Method of Procurement

Undoubtedly, goods that are sold by an exclusive dealer or manufacturer may be procured through Direct Contracting as an alternative method of procurement, under Section 50 of Republic Act No. 9184 ("R.A. 9184") and its Implementing Rules and Regulations ("IRR-A"), to wit:

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;

b) When the Procurement of critical components from a specific manufacturer, supplier or distributor is a condition precedent to hold a contractor to guarantee its project performance, in accordance with the provisions of his 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. (Emphasis supplied)

However, while Section 50 of R.A. 9184 and its IRR-A allows a procuring entity to directly purchase goods from an exclusive dealer or manufacturer, this is to be done with utmost prudence and judiciousness. Under the law, procuring entities are mandated to adopt public bidding as the general mode of procurement and alternative methods are resorted to only in highly exceptional cases set forth in Sections 48-54 of R.A. 9184 and its IRR-A.¹ Moreover, the procuring entity shall ensure that the most advantageous price for the Government is obtained.²

Accordingly, before resorting to said alternative method, your Bids and Awards Committee ("BAC") shall prudently determine that there is no existing substitute for said product in the market that may be procured at more advantageous terms to the Government. In this connection, it is suggested that the BIR's BAC first conduct a survey of the software industry, prior to the commencement of the procurement process, to determine the availability of substitutes in the supply market, and finally to confirm the exclusivity of the distributors to the licenses for the softwares.

If the foregoing conditions are satisfied, such that it is more advantageous to continue using the software and the exclusivity of dealership is confirmed, then the BIR may resort to Direct Contracting in the procurement of licenses for the software products. As to the methodology on how to conduct said alternative method, we are providing you with the following guidelines:

- 1) In the Annual Procurement Plan ("APP"), the BAC shall include a recommendation to the Head of the Procuring Entity on the use of Direct Contracting for the particular procurement.
- 2) The Head of the Procuring Entity shall approve the same.
- 3) The BAC through the Technical Working Group ("TWG") and the BAC Secretariat, shall prepare the Request for Quotation, Technical Specifications and Draft Contract in accordance with the procedures laid down in the IRR-A of R.A. 9184.
- 4) The BAC, through the Secretariat, shall identify the exclusive distributor from whom the goods will be procured.
- 5) The BAC, through the Secretariat, shall post the procurement activity in:
 - a) the Government Electronic Procurement System ("G-EPS")

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, IRR-A of R.A. 9184.

- b) the website of the Procuring Entity and its electronic procurement service provider, if any,
 - c) any conspicuous place in the premises of the Procuring Entity
- 6) The BAC shall send the Request for Quotation to the exclusive distributor. If necessary, negotiations may be conducted to ensure that the Government is able to procure the goods at the most advantageous terms. Furthermore, such negotiations may be conducted through correspondence, if the exclusive distributor is based abroad.
- 7) The BAC shall then proceed with Contract Award, Signing and Approval in accordance with R.A. 9184 and its IRR-A.

With the foregoing elucidations, we hope that our opinion has provided the BIR with the needed information on the procurement of goods through Direct Contracting under Section 50 of R.A. 9184 and its IRR-A.

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

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN SYQUIA
Executive Director



REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

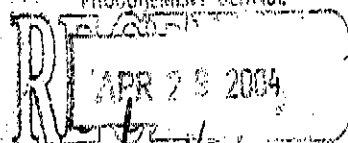


April 21, 2004

Hon. Emilia T. Boncodin
Secretary, Department of Budget and Management
Chairman, Government Procurement Policy Board

Thru: Mr. Estanislao C. Granados
Director, Procurement Service
Department of Budget and Management
Cristobal St., Paco, Manila

DEPARTMENT BUDGET AND MANAGEMENT
PROCUREMENT SERVICE



BY: *[Signature]*
DIRECTOR'S OFFICE

ED. Manika S.
[Signature]

Madam: :

This has reference with the BIR's renewal of the contracts for the licenses for the **SSA Software Products** with Search Software America, SPL WorldGroup Software, Inc., 1445 East Putnum Avenue, Old Greenwich CT 06870 and the **ACL Software Products** with Prodigy Data Solutions, 79-B Pagoda St., Singapore.

We would like to inform you, that the SSA Software Products was purchased by ACPS on behalf of the BIR on April 1, 1996 and was assigned to the BIR on May 1999. Search Software America granted BIR a one-time exception from the annual fee applicable to the year ending December 31, 2000. The BIR and Search Software America executed a contract for the period from January 1, 2001 to December 31, 2001 and was renewed annually. For the ACL Software Products, it was purchased by the BIR on March, 2003 only.

Please be informed further, that in the BIR's Annual Procurement Plan for CY 2004, the mode of procurement of the above said licenses is "Direct Contracting" considering that both companies are exclusive distributors. However, they have no counterpart here in the Philippines, thus, nobody can represent in the negotiation.

In view thereof, we would like to seek clarification from your good office if we can proceed with the said alternative mode of procurement, wherein we just simply ask the contractor from abroad to submit a price quotation through e-mail and that no negotiation will be undertaken within the Philippines.

For your immediate consideration and appropriate action.

Milagros V. Regalado
MILAGROS V. REGALADO
Assistant Commissioner, Legal Service
Chairman
Bids and Awards Committee

