

NPM No. 003-2020

23 March 2020

HEADS OF PROCURING ENTITIES

Re: Negotiated Procurement under Emergency Cases

Dear Sir/Madam:

In anticipation of requests for clarification on the application of **Negotiated Procurement (Emergency Cases)** under Section 53 (b) of Republic Act (RA) No. 9184¹ and Section 53.2 of its 2016 revised Implementing Rules and Regulations (IRR), the Government Procurement Policy Board-Technical Support Office (GPPB-TSO) is issuing this opinion to guide all Procuring Entities (PEs) in the conduct of their Procurement Projects under this modality.²

RECENT GPPB ISSUANCES

On 9 March 2020, the GPPB issued Resolution No. 03-2020³ on the Adoption of Efficient, Effective, and Expedient Procurement Procedures during a State of Public Health Emergency. In particular, the GPPB further simplified the rules in this wise:

- (1) Clarify that Negotiated Procurement (Emergency Cases) modality shall be allowed in the following instances:
 - (a) in case of imminent danger to life or property during a state of calamity;
 - (b) when time is of the essence arising from natural or man-made calamities; or
 - (c) other causes where immediate action is necessary to prevent damage to or loss of life property, or to restore vital public services, infrastructure facilities and other public utilities.

The instances or situations where the foregoing conditions may be applied include the provision of immediate response and initial recovery steps to avoid loss of life, injury, disease and other negative effects on human, physical, mental and social well-being, together with damage to property, destruction of assets, loss of services, social and economic disruption and environmental degradation;

¹ Entitled the "Government Procurement Reform Act."

² Item No. 1.3 of GPPB Circular No. 06-2019, defining a Procurement Project. It shall refer to a specific or identified procurement covering goods, infrastructure project or consulting services. A Procurement Project shall be described, detailed, and scheduled in the Project Procurement Management Plan prepared by the agency which shall be consolidated in the Procuring Entity's Annual Procurement Plan (APP)

³ Approved on 9 March 2020, and published in the Philippine Daily Inquirer on 12 March 2020.

(2) To simplify the process, allow the End-user unit or any other appropriate bureau, committee, support or procuring unit to recommend to the Head of the Procuring Entity (HoPE) any revision of the Annual Procurement Plan (APP) to cover the Procurement Project that will be resorting to Negotiated Procurement (Emergency Cases) subject to the validation by the appropriate office in the PE that there are funds in the budget to cover for the same. **Thus, the Bids and Awards Committee (BAC) need not be the one to recommend the revision of the APP;**

Moreover, by approving the APP, the HoPE effectively confirms the existence and veracity of the ground(s) relied upon in resorting to Negotiated Procurement (Emergency Cases). **Thereby dispensing with the previous written confirmation requirement from the HoPE prior to approval of contract;**

(3) Similarly, **the HoPE may now authorize the End-user unit or any other appropriate bureau, committee, support or procuring unit to directly negotiate with a legally, technically, and financially capable supplier, contractor, or consultant. Hence, the BAC need not be the one to negotiate or procure.**

(4) Allow **the HoPE to delegate the awarding of contract** to any official of the PE, except to those where there exists conflict of interest such as the BAC Chairperson, members or person authorized to negotiate the bidding; and

(5) **Include** in the Procurement Projects that may be covered by Negotiated Procurement (Emergency Cases) **the lease of real property or venue for use as quarantine centers, evacuation sites, medical relief and aid distribution locations, warehousing facilities, or similar temporary disaster or emergency response facility.**

This was followed by GPPB Resolution No. 05-2020,⁴ which **allows the submission of the recently expired Mayor's or Business Permit and the Official Receipt as proof of application and payment for the renewal of the permit and an unnotarized Omnibus Sworn Statement (OSS)** subject to submission of the Mayor's Permit and notarized OSS after award of contract.

FREQUENTLY ASKED QUESTIONS

To further guide the PEs in the application of Negotiated Procurement (Emergency Cases) under Sections 53(b) of Republic Act (RA) No. 9184 and 53.2 of its 2016 IRR, we have prepared the following for easy reference:

(1) When can PEs resort to Negotiated Procurement (Emergency Cases)?

PEs shall be allowed to apply the rules on Negotiated Procurement (Emergency Cases) in any of the following:

(a) in case of ***imminent danger* to life or property during a state of calamity**;

⁴ Approved on 20 March 2020.

- (b) when ***time is of the essence*** arising from actual or man-made calamities or other causes where ***immediate action is necessary to prevent damage to or loss of life or property***; or
- (c) to ***restore vital public services, infrastructure facilities and other public utilities***. (Section 53.2 of the 2016 IRR of RA No. 9184)

The instances or situations where the foregoing conditions may be applied include the provision of immediate response and initial recovery steps to avoid loss of life, injury, disease and other negative effects on human, physical, mental and social well-being, together with damage to property, destruction of assets, loss of services, social and economic disruption and environmental degradation. (GPPB Resolution No. 03-2020)

(2) What types of Procurement Projects may Negotiated Procurement (Emergency Cases) be applied? And can it be used for lease of real property or venue?

Negotiated Procurement (Emergency Cases) covers Goods, Civil Works projects and Consulting Services.

Yes, it includes the lease of real property or venue such as those for use as quarantine centers, evacuation sites, medical relief and aid distribution locations, warehousing facilities, or similar temporary disaster or emergency response facility. (GPPB Resolution No. 03-2020)

(3) Is the HoPE required to issue a written confirmation on the existence and veracity of the grounds used for Negotiated Procurement (Emergency Cases) prior to the approval of contract?

No more, by approving the APP containing the Procurement Project subject to Negotiated Procurement (Emergency Cases), the HoPE effectively confirms the existence and veracity of the grounds relied upon in resorting to this modality. (GPPB Resolution No. 03-2020)

(4) What are the requirements before the HoPE approves the APP covering the Procurement Project subject to Negotiated Procurement (Emergency Cases)?

- (a) **The HoPE shall** confirm the existence and veracity of the grounds relied upon in the adoption of Negotiated Procurement (Emergency Cases).

This means that the HoPE must be able to **relate the projects to be procured to the emergency situation or condition it is intending to address**, for e.g. provision of food packs, lease of venue or real property for use as quarantine facilities, purchase of COVID-19 testing kits and the like. The HoPE shall likewise **consider the appropriate timing or the proximity of time between the actual procurement activity to be conducted and the emergency sought to be addressed**, such that when the reason or cause for the emergency has already been abated, adoption of Competitive Bidding or other applicable Alternative Modes of Procurement should be considered; and

(b) **The HoPE shall validate from the appropriate office that there are funds in the budget to cover the Procurement Project** subject to Negotiated Procurement (Emergency Cases).

(5) Who will undertake the negotiations or procurement in the case of Negotiated Procurement (Emergency Cases)?

(a) the BAC; or

(b) the End-user unit or any other appropriate bureau, committee, support or procuring unit authorized by the HoPE.

(GPPB Resolution No. 03-2020)

(6) What are the mandatory documentary requirements for Negotiated Procurement (Emergency Cases)?

PEs already maintaining a bidder's updated file on any of the following requirements, whether through the Philippine Government Electronic Procurement System (PhilGEPS) Certificate of Registration and Membership or its own records, shall not require its re-submission.

Otherwise, PEs shall require:

(a) **Mayor's or Business Permit;**

For projects with an ABC⁵ above PhP500,000.00

(b) **Income Tax Returns (Annual Income Tax Return of the preceding tax year) OR Business Tax Returns (Value Added Tax or Percentage tax return covering the previous six months)⁶**

(c) **Omnibus Sworn Statement (OSS)**

Additional requirements for infrastructure projects:

(d) **PCAB⁷ License;** and

(e) **Net Financial Contracting Capacity (NFCC) for infrastructure projects with an ABC above PhP500,000.00.**

(7) What if the local government unit has not issued the Mayor's or Business Permit, is the PE allowed to accept a substitute?

Yes. The PE is allowed to accept the recently expired Mayor's or Business Permit and the Official Receipt as proof of application and payment for the

⁵ Approved Budget for the Contract

⁶ Sections 3.2 and 3.3 of Revenue Regulation No. 3-2005.

⁷ Philippine Contractors Accreditation Board

renewal of the permit will suffice, subject to submission of the Mayor's Permit after award of contract. (GPPB Resolution No. 05-2020)

- (8) **Can the PE accept an unnotarized OSS given the difficulty of securing the services of a notary public under a State of Emergency or Calamity or Enhanced Community Quarantine?**

Yes. The PE may accept an unnotarized OSS, subject to compliance therewith after award of the contract. (GPPB Resolution No. 05-2020)

- (9) **When should the documentary requirements for Negotiated Procurement (Emergency Cases) be submitted?**

The documents shall be submitted **at any time before the award of the contract**. Thus, it may be required during:

- (a) submission of offer/s;
- (b) evaluation of offer/s; or
- (c) before issuance of the Notice of Award.

The PE should indicate in the Request for Quotation/Proposal at what stage of the procurement process these requirements shall be submitted.

- (10) **Are bid, performance and warranty securities required for Negotiated Procurement (Emergency Cases)?**

- (a) **Submission of bid security may be dispensed with.**
- (b) **Performance security shall be required for Infrastructure Projects. For Goods and Consulting Services, PEs have the option to require or dispense with the posting of Performance Security** taking into consideration the nature of the emergency sought to be addressed, and the imminent danger to life and property it poses and depending on the nature and requirements of their Procurement Projects, *i.e.* amount of the ABC, delivery requirements, industry practice, etc. (Section 54.5 of 2016 IRR of RA No. 9184)
- (c) **Warranty Security shall not be required in the procurement of Consulting Services. For Goods and Infrastructure Projects, PEs have the option to require or dispense with the posting of warranty security** taking into consideration the nature of the emergency sought to be addressed and the imminent danger to life and property it poses and depending on the nature and requirements of the procurement project, *i.e.* amount of ABC, industry practice, etc. (Section 54.5 of 2016 IRR of RA No. 9184)

- (11) **Can PEs procure from foreign bidders under Negotiated Procurement (Emergency Cases) and if so, what are documents required from them?**

Yes, provided that the PE determined that the foreign bidder is legally, technically, and financially capable to undertake the procurement at hand.

A capable foreign bidder has (i) submitted the mandatory documentary requirements i.e. Mayor's Permit, OSS, and Business or Income tax Returns, PCAB license for infrastructure projects; (ii) complied with the technical specifications set by the PEs, including the required certification under existing rules such as the Certificate of Product Registration issued by the Food and Drug Administration for testing kits; and (iii) submitted the financial requirements of the project such as NFCC, in case of infrastructure projects.

Note as well that **for foreign bidders, the equivalent document in their jurisdiction would suffice** consistent with Section 23.2 of the 2016 IRR of RA No. 9184.

(12) Can PEs make advance payment?

Yes, advance payment is allowed in the following:

- (a) not to exceed fifteen percent (15%) of the contract amount for procurement of Goods required to address contingencies arising from natural or man-made calamities in areas where a "State of Calamity" has been declared by the appropriate authorities;**
- (b) a single advance payment not to exceed fifty percent (50%) of the contract amount for hotel and restaurant services, use of conference or seminar and exhibit areas and lease of office space where down-payment is a standard industry practice;**
- (c) a lump sum or at most two installments not to exceed fifteen percent (15%) of the contract amount as mobilization cost for Infrastructure Projects, subject to the submission of an irrevocable standby letter of credit or bank guarantee or surety bond;**
- (d) not to exceed fifteen percent (15%) of the contract amount for cost of mobilization for Consultancy Services, subject to the submission of an irrevocable standby letter of credit; and**
- (e) Any amount in excess of the foregoing requires prior approval of the President of the Philippines.**

(Section 1 of Memorandum Order No. 172 series of 2005, Annexes D, E and F of the 2016 IRR of RA 9184, and Section 88 of Presidential Decree No. 1445 or the Auditing Code of the Philippines)

PROCUREMENT PROCESS UNDER EMERGENCY CASES

The process involved in Negotiated Procurement (Emergency) Cases under Sections 53(b) of Republic Act (RA) No. 9184 and 53.2 of its 2016 IRR, is summarized as follows:

- (1) The BAC or the End-user unit or any other appropriate bureau, committee, support or procuring unit shall request for the approval of the APP from the HoPE to cover the Procurement Project. This shall be accompanied by documents identifying the projects needed to address the emergency i.e., Technical

Specifications, Scope of Work or Terms of Reference and validating the existence of funds in the budget to cover the same.

The APP may only be approved by the HoPE upon confirmation of the existence and veracity of the ground(s) relied upon in resorting to Negotiated Procurement (Emergency Cases) and the existence of funds for the purpose. Thus, by approving the APP, the HoPE effectively confirms the existence of the grounds for emergency procurement, thereby dispensing with the previous requirement for a written confirmation from the HoPE prior to the approval of contract.

- (2) The BAC or the End-user unit or any other appropriate bureau, committee, support or procuring unit, authorized by the HoPE shall then directly negotiate with a legally, technically, and financially capable supplier, contractor, or consultant.
- (3) Upon recommendation of the BAC or End-user unit or any other appropriate bureau, committee, support or procuring unit duly authorized by the HoPE, the contract shall be immediately awarded to the legally, technically, and financially capable supplier, manufacturer, distributor, contractor, and consultant, contractor, or consultant.

This includes a foreign bidder determined to satisfy any of the legal, technical and financial requirements of the PE.

Note that the HoPE may delegate the authority to award the contract to any official of the PE, except to those where there exists conflict of interest such as the BAC Chairperson and members pursuant to Section 11.2.5 of the 2016 revised IRR of RA No. 9184 and other associated issuances or the person authorized to negotiate the bidding.

- (4) Except for contracts with ABC of Fifty Thousand Pesos (PhP50,000.00) and below, the BAC, through the Secretariat shall post for information purposes the Notice of Award, contract or purchase order, including the Notice to Proceed, if necessary, in (i) the PhilGEPS website; (ii) the website of the PE or its electronic procurement service provider, if any; and (iii) any conspicuous place in the premises of the PE.

For the information and guidance of all.



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