



Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 012-2017



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ENGR. RAUL B. BASALLOTE
Project Manager,
Bicol International Airport Development Project
DEPARTMENT OF TRANSPORTATION (DOTR)
The Columbia Tower, Brgy. Wack-Wack,
Ortigas Avenue, Mandaluyong City 1555

Re: Variation Order; Adjacent or Contiguous Modality of Negotiated Procurement


Dear Mr. Basallote:

This refers to your query pertaining to the proposed Negotiated Procurement for the Consulting Services for the Bicol International Airport Development Project (BIADP).

As represented, the Joint Venture among Schema Konsult, Inc., PERTCONSULT International, DCCD Engineering Corporation and Philipps Technical Consultants Corporation has been engaged to render Consulting/Engineering Services for the BIADP. The scope of services consists of: (1) preparation of architectural and detailed engineering design; (2) assistance in bidding; (3) construction supervision; and (4) defects liability period supervision. As further represented, during the implementation of the subject project, the original scope of work was widened and the additional items were covered by variation order duly approved by and under the direct instruction of the DOTr. Accordingly, the corresponding additional services were rendered. Inasmuch as the latter were not covered by the original Terms of Reference, a Negotiated Agreement was entered into. Hence, this request for opinion on the resort to Negotiated Procurement.

From the attachments¹ in your letter, we note that Section 53.4 of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 is being invoked for the resort to Negotiated Procurement under Adjacent or Contiguous modality.

Variation Order for Consulting Services -

Variation order is in the nature of amendment or modification of an existing contract either through the introduction of new items or change of existing items. It necessarily entails changes in the terms and conditions of the contract, and oftentimes includes additional cost. We shall then discuss the relevant procurement rules and regulations pertaining to modification or changes in a contract for consulting services. 

¹ Memorandum dated 27 June 2017 from the DOTr Undersecretary for Legal Affairs and Procurement and Memorandum dated 30 March 2017 from the Office of the Director for the Project Management Office and the Project Manager of the Bicol International Airport Development Project.

We wish to clarify that under General Conditions of the Contract (GCC) Clause 10 of the Philippine Bidding Documents for the Procurement of Consulting Services (PBDs for Consulting Services), no modification of the terms and conditions of a Consulting Services Contract, including any modification of the scope of the services, shall be allowed, subject to GCC Clause 14² thereof. Accordingly, if there are no modification in the contract, payments for a consultancy project shall not exceed the prescribed ceiling or contract amount of the project.³ It bears stressing that Section 2, Annex "F" of the 2016 revised IRR of RA 9184 or the *Contract Implementation Guidelines for the Procurement of Consulting Services* provides that all consultancy contracts shall be fixed price contracts and that any extension of contract time shall not involve any additional cost. On the other hand, for Lump Sum Consultancy Contracts, GCC Clause 55.3, PBDs for Consulting Services, states that no additional payment for variation order, if any, shall be allowed for the Contract.

Based on the foregoing, variation order in the nature of modification of the scope of consultancy services is not allowed, save in Lump Sum Contracts, but no additional payment is allowed.

Negotiated Procurement; Adjacent or Contiguous Modality -

Under Section 53(d) of RA 9184 and the corresponding provision of Section 53.4 of the 2016 revised IRR of RA 9184, a procuring entity may directly negotiate a contract for infrastructure project with a technically, legally and financially capable contractor, through Negotiated Procurement under the Adjacent or Contiguous modality, whenever the subject contract is adjacent or contiguous to an ongoing Infrastructure Project or Consulting Service where the consultants have unique experience and expertise to deliver the required service, provided that the following conditions are complied with, thus:

1. the original contract is the result of a Competitive Bidding;
2. the subject contract to be negotiated has similar or related scopes of work;
3. it is within the contracting capacity of the contractor;
4. the contractor uses the same prices or lower unit prices as in the original contract less mobilization cost;
5. the amount involved does not exceed the amount of the ongoing project;
6. the contractor has no negative slippage/delay; and
7. the negotiations for the procurement are commenced before the expiry of the original contract.

We would like to emphasize, however, that resort to any alternative method of procurement, such as Negotiated Procurement through Adjacent or Contiguous modality, requires prior approval of the Head of the Procuring Entity (HoPE) pursuant to Section 48 of RA 9184 and its 2016 revised IRR, which mandates, among others, that resort to any of the alternative methods of procurement is subject to the prior approval of the HoPE or the duly authorized representative. Thus, prior to the intended Negotiated Procurement, it is necessary to obtain the approval of the HoPE or the duly authorized representative to ensure that the resort to a specific alternative method

² The Parties recognize that it is impractical for this Contract to provide for every contingency which may arise during the life of this Contract, and the Parties hereby agree that it is their intention that this Contract shall operate fairly as between them, and without detriment to the interest of either of them; and that, if during the term of this Contract either Party believes that this Contract is operating unfairly, the Parties shall use their best efforts to agree on such action as may be necessary to remove the cause or causes of such unfairness, but no failure to agree on any action pursuant to this Clause shall give rise to a dispute subject to arbitration in accordance with GCC Clause 34 hereof.

³ GCC Clause 52.1 of the PBDs for Consulting Services.

of procurement is justified by the presence of the required conditions under RA 9184 and its IRR, alongside the objectives of promoting economy and efficiency in government procurement.

Approval of the HoPE or the duly authorized representative is required prior to the resort to any alternative method of procurements. Since resort to alternative method of procurement for a specific procurement contract requires prior approval, it goes without saying, that the actual implementation of such specific procurement contract likewise necessitates the prior approval of the HoPE or the duly authorized representative. It must be emphasized that resort to and approval of any alternative method of procurement cannot be a mere afterthought as when it is adopted only after the services sought to be procured have, in fact, been rendered and completed already.

The requirement for prior approval of the HoPE to resort to any alternative method of procurement under Section 48 of RA 9184 is not a meaningless rule that can be discarded and be applied as an afterthought. It is a safeguard that resort to any of the alternative methods of procurement, as exception to the general rule that all procurement shall be done through Competitive Bidding, is strictly in accordance with the provisions of RA 9184 and its associated IRR, specifically Article XVI thereof.

Summary -

From the foregoing, we wish to clarify the following:

1. Variation order in the nature of modification of the scope of consultancy services is not allowed, save in Lump Sum Contracts, but no additional payment is allowed; and
2. Procuring entities may resort to Negotiated Procurement under Adjacent or Contiguous modality, provided that the conditions under Section 53(d) of RA 9184 and its associated IRR are complied with and that the requirement of prior approval of the HoPE or the duly authorized representative, among others, under Section 48 of the Procurement Law and its IRR is faithfully observed.

We hope this opinion issued by GPPB-TSO provided sufficient guidance on the matter. Note that this is issued on the basis of particular facts and situations presented, and may not be applicable given a different set of facts and circumstances. Should there be other concerns, please do not hesitate to contact us.

Very truly yours
(sgd.)

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