

NPM No. 084-2017

29 December 2017

MS. GRACE M. CATALAN
Technical Working Group Member
CITY OF MALOLOS WATER DISTRICT (CMWD)
Poblacion, Malolos City, Bulacan

Re: Negotiated Procurement (Emergency Cases) -

Dear Ms. Catalan:

We respond to your electronic mail seeking clarification on whether the City of Malolos Water District (CMWD) can resort to Negotiated Procurement (Emergency Cases) under Section 53.2 of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) 9184, the Government Procurement Reform Act.

As represented, one of the wells servicing a barangay in the City of Malolos collapsed during the earthquake last April 2017. Since then, the CMWD has been rationing water to the affected areas, and its engineering department started Geo Resistivity Testing on possible site for the new pumping station. It is in this light that you are inquiring on the following:

- (1) Can you resort to Negotiated Procurement under the Emergency Case Modality for the reason that water is considered a basic need;
- (2) Is there a threshold amount considering that the projected contract amount is at least Five Million Pesos (PhP5,000,000.00);
- (3) From whom will you seek approval aside from the Head of the Procuring Entity (HoPE); and
- (4) Will the Notice of Award (NOA) be posted at the Philippine Government Electronic Procurement System (PhilGEPS)?

Negotiated Procurement (Emergency Cases) -

At the outset, we wish to emphasize that Section 10 of RA. 9184 and its 2016 IRR mandate that Procuring Entities (PEs) adopt Competitive Bidding as the default mode of procurement; however, in highly exceptional cases, PEs may resort to alternative methods of procurement in accordance with Rule XVI of RA 9184, its 2016 IRR and Annex "H" of the same 2016 IRR relative to the *Consolidated Guidelines for the Alternative Methods of Procurement* (Guidelines).

We wish to emphasize that the determination and accountability for the use of the alternative methods of procurement, and compliance with the conditions and circumstances



upon which these are based rest primarily with the HOPE, upon prior recommendation of the Bids and Awards Committee (BAC)¹.

The bases for Emergency Procurement are found in Section 53.2 of RA 9184 and its 2016 IRR, Procuring Entities (PEs) can directly negotiate a contract with a technically, legally and financially capable supplier, contractor or consultant based of the following:

- 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;
- c) Other causes where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities.

In the case of Infrastructure Projects, the Procuring Entity has the option to undertake the project through negotiated procurement or by administration or, in high security risk areas, through the AFP¹⁵.

The BAC must justify why resort to Negotiated Procurement under Emergency Cases is warranted citing the applicable condition(s) and that upon determination that resorting to Negotiated Procurement is the most advantageous to the Government, recommend the same to the Head of the Procuring Entity for her approval. Upon approval of the latter, the Procuring Entity may negotiate and enter into a contract subject to the procedures provided in Annex "H" of the 2016 IRR relative to the *Consolidated Guidelines for the Alternative Methods of Procurement* (Guidelines).

Thus, Section V.D.2(a) of the Guidelines provides, in part, that:

In all instances where Negotiated Procurement under Emergency Case is to be resorted, the HoPE shall confirm in writing the existence and veracity of the ground or grounds relied upon before approving the ensuing contract. Considering that the underlying reason to support a Negotiated Procurement through the Emergency modality relates to "time element" as when there is – a) imminent danger to life or property; or, b) when time is of the essence; or, c) immediate action is necessary, the Procuring Entity, through the HOPE, BAC, its Secretariat and End-User unit, should consider 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 as the primary mode of procurement shall be considered.

From the foregoing, CMWD may resort to Negotiated Procurement under the Emergency Cases modality only in highly exceptional cases, and based on whether or not the conditions provided in Section 53.2 are present. The determination of existence of an emergency case lies solely with the Procuring Entity, through the BAC and the HoPE.

Threshold Amount -

There is no prescribed threshold amount in Competitive Bidding and in all instances of alternative methods of procurement, except in Shopping and Negotiated Procurement

¹ Non-Policy Matter Opinion No. 98-2012, dated 10 August 2012.

through the Small Value Procurement modality under Sections 52 and 53.9 of the 2016 IRR of RA 9184, respectively.

Contract Approval by Higher Authority -

Further approval of higher authority would depend on the organizational structure and enabling charter of the Procuring Entity. In GOCCs like the CMWD, the governing board or its duly authorized official shall be the HoPE². In case the governing board has delegated its authority and functions as HoPE to a duly authorized official, further approval by the Board as higher authority would depend on the terms and conditions of the delegation.

Please note that in accordance with Section 37.3 of the 2016 IRR, when further approval of higher authority is required, the approving authority for the contract or his duly authorized representative shall be given a maximum of twenty (20) calendar days from receipt thereof to approve or disapprove the recommendation. In the case of GOCCs, the concerned board or its duly authorized representative shall be given a maximum of thirty (30) calendar days from receipt thereof to approve or disapprove it.

PhilGEPS Posting of NOA

Section 54.3 and Part IV(L) of the *Consolidated Guidelines for the Alternative Methods of Procurement* found in Annex "H" of the 2016 IRR of RA 9184 provides that in all instances of alternative methods of procurement, the BAC, through the Secretariat, shall post, for information purposes, the NOA, contract or purchase order, including notice to proceed if necessary, in the PhilGEPS website, the website of the PE concerned, if available, and at any conspicuous place reserved for this purpose in the premises of the PE, except for contracts with Approved Budget for the Contract (ABC) of Fifty Thousand Pesos (₱50,000.00) and below.

Summary -


In sum, we wish to reiterate the following:

- (1) It is the PE that is in the best position to determine the existence of circumstances warranting resort to Negotiated Procurement through Emergency Cases modality sanctioned by Section 53.2 of RA 9184 and its 2016 IRR;
- (2) There is no prescribed threshold amount in the case of Negotiated Procurement through Emergency Cases modality;
- (3) Aside from that of the HoPE, approval of higher authority may be required in accordance with the organizational structure and enabling charter of the Procuring Entity subject to the rules in Section 37.3 of the 2016 IRR; and
- (4) In all instances of alternative methods of procurement, except for contracts with ABC of Fifty Thousand Pesos (₱50,000.00) and below, the NOA shall be posted in the PhilGEPS website, the website of the PE concerned, if available, and at any conspicuous place in the premises of the PE reserved for the said purpose.

² Section 5(t) of the 2016 revised IRR.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this opinion is being issued on the basis of facts and particular 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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Executive Director 


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