



Republic of the Philippines  
**GOVERNMENT PROCUREMENT POLICY BOARD**  
**TECHNICAL SUPPORT OFFICE**



**NPM No. 022-2016**

23 March 2016

[REDACTED]

**Re: Direct Contracting**

Dear [REDACTED]

This refers to your letter requesting our guidance relative to CAAP's procurement of Flight Yield Service (FYS), through Direct Contracting, that is available only from Sita Bureau Services (SBS).

As represented, CAAP presently uses manual computation in its billing system for charging air navigation fees to commercial airlines flying within the Philippines Flight Information Region (FIR). This method of billing has resulted in delays in invoicing and collection disputes with airline records resulting to additional efforts of reconciliation and unidentified missed flights.

You claim that the FYS offered by SBS is currently the only "end to end" management revenue system that proposes to address all deficiencies in the current CAAP manual billing systems and processes as observed by the Commission on Audit (COA). Further, you requested the Office of the Government Corporate Counsel (OGCC), CAAP's statutory counsel, for an opinion on the matter. The OGCC opined that the procurement of the FYS is exempted from the requirement of public bidding, given that direct contracting with SBS, as the sole supplier of the service, is allowed under Republic Act (RA) No. 9184. Thus, this request for opinion.

It is an established public policy,<sup>1</sup> as well as a statutory mandate<sup>2</sup> that all government procurement shall be done through competitive public bidding. However, as an exception, in order to promote efficiency and economy, Article XVI of RA No. 9184 sanctions resort to alternative methods of procurement, which include direct contracting, among others.

<sup>1</sup> *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines, Inc.*, G.R. No. 183789, August 24, 2011, 656 SCRA 214, 241.

<sup>2</sup> Section 10, Article IV of RA 9184 provides that "[a]ll Procurement shall be done through Competitive Bidding, except as provided for in Article XVI of this Act." (RA 9184)

Direct Contracting, as an alternative mode of procurement, applies to the procurement of goods;<sup>3</sup> and is not applicable to procurement of infrastructure projects or consulting services. The parameters for valid direct contracting are found in Section 50 of RA 9184 and its Implementing Rules and Regulations (IRR), thus:

- 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 plant components from a specific supplier is a condition precedent to hold a contractor to guarantee its project performance, in accordance with the provisions of its 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 GOP.

While compliance with only one condition is enough to justify the resort to direct contracting, the other requisites, such as the approval of the Head of the Procuring Entity, promotion of economy and efficiency, and most advantageous price to the government should be equally complied with.<sup>4</sup>

In this regard, Section 50(a) of RA 9184 provides that, direct contracting may be allowed when the procurement involves **goods of proprietary nature**, which **can be obtained only from the proprietary source**, that is, when patents, trade secrets, and copyrights prohibit others from manufacturing the same item. The applicability of said condition was explained by the Supreme Court in the case of *Pabillo v. Comelec*,<sup>5</sup> citing the GPPB Manual for the Procurement of Goods,<sup>6</sup> as follows:

[T]his is applicable when the goods or services being procured are covered by a patent, trade secret or copyright duly acquired under the law. Under the Intellectual Property Code of the Philippines (R.A. No. 8293), the registered owner of a patent, a 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 to derive economic benefit from the item, design or process.

Further, the goods are considered to be of “proprietary nature” when they are owned by a person who has a protectable interest in them or an interest protected by intellectual property laws.<sup>7</sup> Since you claim in your letter that the goods sought to be procured in this

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<sup>3</sup> Section 50. Direct Contracting. Direct Contracting or single source procurement is a method of procurement of goods that does not require elaborate Bidding Documents. ...

<sup>4</sup> Section 48.1 of the IRR of RA 9184.

<sup>5</sup> G.R. 216098, 21 April 2015

<sup>6</sup> Vol. 2, p. 84

<sup>7</sup> See Separate Concurring Opinion of Associate Justice Presbitero J. Velasco, Jr. in the consolidated cases of *Capalla v. COMELEC* G.R. Nos. 201112, 201121, 201127, and 201413, June 13, 2012, 673, SCRA 1, 39, citing BLACK'S LAW DICTIONARY 1339 9th ed.

case refers to an FYS that is only available from SBS, Direct Contracting may be resorted to; provided, however, that the procuring entity (PE) can establish and justify the existence of the condition warranting its use. Likewise, the accountability and responsibility in identifying the existence of such conditions rest with the PE.

As echoed by the Supreme Court in the *Pabillo* case, the GPPB Manual relevantly provides that, "to justify the need to procure through Direct Contracting method, the BAC should conduct a survey of the industry and determine the supply source. This survey should confirm the exclusivity of the source of goods or services 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 PE 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." In addition, specifications for the procurement of goods shall be based on relevant characteristics and/or performance requirements.<sup>8</sup>

It is only after the BAC has conducted its survey and determined that one of the conditions under Section 50 of RA 9184 is present that proper recommendation to the HOPE for the use of Direct Contracting modality may be made. Hence, if there are prospective bidders that can offer the goods subject of the procurement opportunity, Direct Contracting cannot be resorted to.

Based on the foregoing, we wish to reiterate that RA 9184 and its associated IRR adopt Competitive Bidding as the primary method of procurement, and any alternative method may be employed only under highly exceptional circumstances to address economy and efficiency. Consequently, Direct Contracting may be allowed when the procurement involves goods of proprietary nature, which can be obtained only from the proprietary source, that is, when patents, trade secrets, and copyrights prohibit others from manufacturing the same item; but the procuring entity must first justify the necessity for Direct Contracting, and must be able to prove that there is no suitable substitute in the market that can be obtained at more advantageous terms to the government using specifications based on relevant characteristics and/or performance requirements.

We hope that this opinion issued by the 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.)

~~DENNIS S. SANPIAGO~~  
Executive Director *DS*

*sd*

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<sup>8</sup> Section 12 of RA 9184.