



Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 34-2015

28 April 2016

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Re: Lease of Heavy Equipment / Construction Equipment in the Implementation of Infrastructure Projects by Administration

Dear [REDACTED]:

This is in response to your letter requesting for an opinion on whether a procuring entity may lease construction equipment from a private contractor during the implementation of infrastructure projects by Administration in accordance with the Revised Guidelines for the Implementation of Infrastructure Project by Administration¹ (Guidelines) issued by the Government Procurement Policy Board (GPPB).

As represented, the Municipality of Pilar, Bataan, was granted by the National Government five (5) river control projects which are funded by the General Appropriations Act of 2012 through allocations to the National Disaster Risk Reduction and Management Council (NDRRMC). Two (2) of the said projects were implemented by Administration by the Municipality of Pilar in accordance with its Memorandum of Agreement (MOA) with the Department of Public Works and Highways (DPWH), which has also determined that the municipality is capable to implement the project pursuant to the Guidelines.

However, due to the urgency in completing the projects and the unavailability of the equipment owned by the Provincial Government of Bataan, the Municipality of Pilar decided to procure the needed construction equipment by leasing from a private supplier. It is likewise represented that the lease of construction equipment was procured in accordance with the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184. As a result, the contract of lease for construction equipment was awarded to HORAM-ABI BUILDERS, a private entity engaged in Construction and the Renting of Construction, Civil Engineering Machinery and Equipment.

The Commission on Audit (COA) resident auditor found that the Municipality of Pilar that leasing construction equipment from HORAM-ABI BUILDERS is in violation of the Guidelines, which provides that the procuring entity must own the tools and construction equipment to be used or have access to such tools and equipment owned by another government agency², and that no contractor shall be used by the procuring entity, directly or indirectly, for

¹ GPPB Resolution No. 018-2006, dated 6 December 2006.

² Section 3.2 (b).

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works undertaken by Administration³. However, it is represented that HORAM-ABI BUILDERS did not participate in the project as a contractor but only as a lessor of the equipment. It is for this reason that our opinion is sought.

Project Implementation “By Administration”

In line with the Guidelines, the implementation of a project by Administration presupposes that the implementing agency has the independent capability to undertake the project through its own resources with respect to personnel, tools or equipment that will be used for the project. It implies that the agency implements the infrastructure works under its own direction, supervision and administration. It precludes the engagement of other agencies or governmental units and/or the involvement of private contractors in the prosecution of the works. Hence, if the implementation does not satisfy these conditions, it shall be deemed contrary to the requirements of the Guidelines and contrary to the concept of implementation “by administration”.⁴

On the other hand, in case an infrastructure project is undertaken by an implementing agency in accordance with the terms and conditions of an agreement entered into with another government agency, or the project is subject to the direction or supervision of another government agency, the Guidelines is rendered inapplicable. In such instance, the undertaking may be subject to Negotiated Procurement under Section 53.5 (Agency-to-Agency) of the IRR of RA 9184 and the Implementing Guidelines on Agency-to-Agency Agreements⁵.

Accordingly, in determining whether the Guidelines is applicable, it is imperative that the agency is actually and directly executing the project, and is not merely a constructor or implementer for another government agency. The infrastructure project should be initiated by the implementing agency, which exercise direction, supervision, and administration over the project. Hence, if the Municipality of Pilar acted as an instrumentality in behalf of or under the supervision of DPWH to implement the infrastructure project, then the Guidelines is rendered inapplicable. Conversely, if the project is primarily undertaken by the Municipality of Pilar under its own direction, supervision and administration, then the Guidelines will apply.

Lease of Tools and Construction Equipment

In implementing infrastructure projects by Administration, Section 3.2(b) of the Guidelines requires that the implementing agency must own the tools and construction equipment to be used or have access to such tools and equipment owned by other government agencies, while Section 3.5 of the Guidelines allows for the procurement of tools and construction equipment provided that the procurement is subject to the rules on public bidding.

It should be noted that the two provisions are not incompatible. Section 3.2 also provides that the implementing agency, to undertake projects by Administration, must have a track record of having completed, or supervised a project by Administration or by contract, similar to and with a cost of at least fifty percent (50%) of the project at hand⁶. It further provides that the criteria for determining such track record and capability of an implementing agency should be in accordance with the guidelines issued by the DPWH. In this regard,

³ Section 3.4.

⁴ NPM No. 046-2005, dated 14 November 2005.

⁵ Issued through GPPB Resolution No. 18-2007, dated 31 May 2007.

⁶ Section 3.2(a) of the Guidelines.

Section 3.2 of the Guidelines sets the stage in determining whether the implementing agency is capable of executing an infrastructure project by Administration, but it does not limit such agency only to the tools and equipment it owns, or it may access from another government agency.

Accordingly, Section 3.5 of the Guidelines explicitly allows for the procurement of tools and construction equipment provided that it is subject to the rules on public bidding. This provision was introduced to the Guidelines upon its revision pursuant to GPPB Resolution No. 018-2006.⁹ Since procurement of tools and construction equipment has been specifically provided, Section 3.5 is deemed applicable during actual execution of a project implemented through Administration.

In view of the foregoing, the implementing agency may procure and lease the necessary tools and construction equipment from a private supplier under Section 3.5, which shall be in addition to the minimum tools and construction equipment required under Section 3.2 of the Guidelines.

Prohibition on Private Contractors

Section 3.4 of the Guidelines prohibits the implementing agency from using a private contractor, whether directly or indirectly, in implementing works undertaken through Administration, except only for the manual labor component which may be undertaken by the implementing agency through job order or through the *pakyaw* contracting system¹⁰. The implementing agency is prohibited from engaging private contractors since the agency should have the capability of undertaking the infrastructure project given the resources available. Hence, procuring the services of private contractors, directly or indirectly, would run counter to the provisions of the Guidelines and would render the implementing agency incapable of undertaking the project by Administration.

Summary

In view of the foregoing discussion, the Guidelines is applicable in instances where the implementing agency implements the conduct of infrastructure works under its own direction, supervision and administration. In such instance, the implementing agency, in determining whether it has the capability to undertake the project by Administration, needs to establish that it owns the minimum tools and construction equipment, or has access to such tools and equipment owned by another government agency.

Additionally, where the need arises during project implementation, the implementing agency is not precluded from procuring or leasing tools and construction equipment from private suppliers, provided that it is subjected to the rules on public bidding. However, the implementing agency cannot procure the services of a private contractor, directly or indirectly, in implementing works undertaken by Administration except for the manual labor component through job order or *pakyaw* contracting system.

⁹ Issued 4 December 2006.

¹⁰ Section 3.7 of the Guidelines.

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.)

MELISSA A. SANTIAGO-YAN
Officer-in-Charge

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