



Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 036-2016

17 May 2016

[REDACTED]

Re: Emergency Cases Modality of Negotiated Procurement

Dear [REDACTED]

This refers to the letter of the Honorable Assistant Secretary requesting our opinion in relation to the requirements for the Aircraft Rental for Cloudseeding Operations in El Niño Affected Areas.

As represented, based on the Drought/Dry Spell Outlook issued by the Philippine Atmospheric, Geophysical and Astronomical Services Administration (PAGASA) on 6 January 2016, 20% of the country will likely experience drought by the end of January, while by the end of May, 43% of the country will likely experience the same. Hence, it is your conclusion that the situation becomes an emergency based on imminent danger to property. In this light, our opinion is sought on whether the procurement requirements for the Aircraft Rental for Cloudseeding Operations in El Niño Affected Areas due to signs of adverse climate condition (drought/dry spell brought about by El Niño) falls within the second condition under Section 53 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, particularly this condition:

“x x x when time is of the essence arising from natural or man-made calamities or other causes where immediate action is necessary to prevent damage to or loss of life or property x x x”. (Emphasis supplied)

At the outset, we wish to clarify that the determination of the appropriate procurement method to be used for a particular project rests within the authority and accountability of the Head of the Procuring Entity (HOPE), as the approving authority, and the Bids and Awards Committee (BAC), as the recommendatory body.¹ We adhere to the position that no other agency, office or official may interfere with these functions of the HOPE and the BAC and dictate the appropriate procurement method to be used for a particular project. Guided by the provisions of RA 9184 and its revised Implementing Rules and Regulations (IRR), the Procuring Entity (PE), through the HOPE and the BAC, is in the best position to determine

¹ Section 12.1 of the IRR of RA 9184 in relation to Section 48.1 of the IRR of RA 9184.

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the appropriate method of procurement for all its projects taking into consideration all the surrounding circumstances for each procurement project.

Section 10 of RA 9184 mandates that all procurement shall be done through competitive bidding, except as provided for in Article XVI thereof, which enumerates the allowable alternative methods of procurement. Accordingly, alternative methods of procurement may be resorted to only upon prior approval of the HOPE, in order to promote economy and efficiency, and whenever justified by the conditions for each alternative method of procurement specified in Sections 49 to 53 of the IRR of RA 9184.² This is consistent with the pronouncement of the Supreme Court that competitive bidding may not be dispensed with nor circumvented, and that alternative methods of procurement may only be resorted to in the instances provided for by law.³

For guidance, we have previously opined⁴ that the application of *Emergency Cases* as a modality of Negotiated Procurement under Section 53.2 of the IRR of RA 9184 contemplates the following instances:

1. In case of imminent danger to life or property during a state of calamity;
2. When time is of the essence arising from natural or man-made calamities;
3. ***Other causes where immediate action is necessary to prevent damage to or loss of life or property;*** and
4. To restore vital public services, infrastructure facilities and other public utilities. (Emphasis ours)

In resorting to *Emergency Cases* modality of Negotiated Procurement, or any other alternative method of procurement for that purpose, it is incumbent upon the PE to justify the presence of any of the conditions warranting its use. Thus, it is necessary to assess, evaluate, and determine that the grounds and causes adverted to, justifying the use of Negotiated Procurement through the *Emergency Cases* modality, are truly existing and the harm or danger or loss sought to be prevented are real and not merely based on speculation, surmise or weak probability.⁵

For the third condition of *Emergency Cases* modality to apply, as being invoked, it must be couched upon actual circumstances and situations determined through a careful and meaningful assessment of all causes supporting a reasonable conclusion that there is an impending or imminent danger to or loss of life or property if the subject matter of the procurement is not procured immediately through negotiation based on an emergency.⁶ To reiterate, however, the determination of whether this third condition of *Emergency Cases* modality covers a particular situation, such as the drought/dry spell brought about by El Niño, rests within the sole authority and accountability of the HOPE and the BAC of the PE.

All told, it is our considered view that the PE, through the HOPE and the BAC, is in the best position to determine and verify, after careful and meaningful assessment, the

² Section 48.1 of the IRR of RA 9184.

³ *Manila International Airport Authority, et al v. Olongapo Maintenance Services Inc., et al; Antonio P. Gana, et al. v. Triple Crown, etc.; Triple Crown etc. v. Manila International Airport Authority, et al.*, G.R. Nos. 146184-85/ G.R. No. 161117/ G.R. No. 167827, January 31, 2008.

⁴ NPM No. 31-2012 dated 4 April 2012.

⁵ NPM No. 95-2012 dated 8 August 2012.

⁶ *Ibid.*

existence of the conditions warranting the use of *Emergency Cases* modality of Negotiated Procurement. In case the conditions for its application under Section 53.2 of the IRR of RA 9184 are not present, the procurement should be done through Competitive Bidding or any other applicable method of procurement.

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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