

NPM No. 051-2016

3 October 2016

[REDACTED]

Re: Procurement for the Repair and Maintenance of Ships

Dear [REDACTED]:

This refers to your letter requesting for an opinion relative to your procurement of ship repair and maintenance. Particularly, you are seeking clarification on the following matters:

1. Whether ship repair, which is a complex procurement activity, could be considered as a procurement of infrastructure project;
2. Whether progress payments may be made in the procurement of goods, and if not, may a certification from a recognized organization of shipyards be submitted to establish the fact of industry practice for progress payments;
3. Whether the Philippine Navy (PN) may resort to direct contracting with the same shipyard which was awarded through public bidding for additional and necessary repair works discovered in the course of the repair activity; and
4. Whether the PN may enter into an ordering agreement for repair and maintenance of ships with one or several shipyards.

At the outset, please be guided that the Implementing Rules and Regulations-A (IRR-A) repeatedly referred to in your letter has long been repealed by the revised IRR, which was issued through GPPB Resolution No. 03-2009 on 22 July 2009 and became effective thirty (30) days from its publication in the Official Gazette on 3 August 2009.

We also wish to note that the Government Procurement Policy Board (GPPB) and its Technical Support Office (TSO) only render policy and non-policy opinions respectively, on issues purely relating to the interpretation and application of our procurement laws, rules and regulations. It has no authority to decide for and in behalf of a procuring entity, nor dictate upon the procuring entity how to decide relative to its procurement activities. Hence, this office has consistently refrained from passing upon decisions of the BAC or even by the Head of the Procuring Entity (HOPE) relative to the application of and compliance with Republic Act (RA) No. 9184 and its revised IRR. It is in this wise that we shall limit our discussion on the relevant provisions of the procurement law, rules and regulations pertinent to the issue presented.

Nature of Procurement

On whether the repair and maintenance of ships may be procured as an infrastructure project, we wish to clarify that the Procuring Entity (PE) is in the best position to determine the correct classification of its procurement based on its identified needs and the best way by which these needs may be addressed, managed, and satisfied. It is the motivation or intention of the PE in pursuing the project that will determine the primary purpose of a project.¹

The GPPB and its TSO cannot encroach upon the authority of the Philippine Navy or of any PE, for that matter, on how to classify or categorize its various procurement activities. We are of the view that the PE, ably guided by RA 9184 and its IRR, is in the best position to determine the correct classification of its procurement activities, whether it be Goods, Infrastructure Projects or Consulting Services, based on its identified needs and the best way by which these needs may be addressed, managed and satisfied.

It is worthy to emphasize, however, that the PE does not possess unbridled authority to classify its procurement as to Goods, Infrastructure Projects or Consulting Services, as when by its nature, the procurement activity falls within the definition of a certain type. Hence, it is vital that the motivation and primary purpose of the PE, alongside RA 9184 and its IRR, be considered in categorizing or classifying any procurement activity. The procuring entity, however, may be guided by the definition of what comprises goods procurement *vis-à-vis* those considered civil works procurement.

Progress Payments

Anent your second query, please be advised that whether the type of procurement is goods and services or infrastructure project, progress payments are allowed. Although it is not specifically mentioned how progress payments shall be made in the procurement of goods, Clause 11.2 of the General Conditions of the Contract (GCC) of the Standard Philippine Bidding Documents (PBDs) for Goods² provides that “all progress payments shall first be charged against the advance payment until the latter has been fully exhausted”. Moreover, Clause 17.3 of the same GCC provides that the obligation for the warranty may be covered by a “retention money in an amount equivalent to at least ten percent (10%) of every progress payment”. Thus, it is evident from these provisions that progress payments are allowed for goods procurement as it is the amount from which the advance payment and retention money are deducted.

On the other hand, Clause 40 of the GCC of the PBDs for Infrastructure Projects³ provides guidance on progress payments. Under the said Clause, the Contractor may submit a request for payment for Work accomplished. Such request for payment shall be verified and certified by the Procuring Entity’s Representative/Project Engineer. Thus, a certification from a recognized organization of shipyards need not be submitted to establish the fact of industry practice for progress payments.

Direct Contracting

¹ NPM No. 11-2013 dated 22 February 2013.

² 4th edition, dated December 2010.

³ *Ibid.*

On whether the PN may resort to Direct Contracting with the same shipyard which has been previously awarded a contract through public bidding, we wish to reiterate that it is the PE that has the sole authority and is in the best position to determine the appropriate method of procurement for a specific project based on the identified needs and requirements of the PE and the attending circumstances. It bears stressing, however, that Section 10 of RA 9184 and its IRR mandates that all procurement shall be done through Competitive Bidding, except when resort to alternative methods of procurement is warranted by attending circumstances. More importantly, these alternative methods of procurement shall be resorted to only in highly exceptional cases provided in Sections 49 to 53 of RA 9184 and its IRR. In the absence of these exceptional cases, procurement shall be done through Competitive Bidding.

We had the occasion to clarify the basic requirement of Direct Contracting in our recent opinion⁴ such that Direct Contracting or Single Source Procurement, as an alternative method of procurement, can be resorted to by the PE only upon determination of the existence of any conditions set forth in Section 50 of RA 9184 and its revised IRR, in addition to the general conditions set forth under Section 48.1 of the revised IRR of RA 9184, thus:

1. Procurement of goods of proprietary nature which can be obtained only from the proprietary source, *i.e.* when patents, trade secrets, and copyrights prohibited others from manufacturing the same item;
2. When the procurement of critical 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
3. 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.

In Single Source procurement, the paramount consideration before the PE can resort to Direct Contracting is the singularity of supplier or manufacturer that can deliver the requirement of the PE either because of the proprietary nature of the goods, the existence of a condition in the contract, or the exclusivity of dealer or manufacturer. Given the recognizable fact that there are various shipyards that provide repair and maintenance services existing in the market, procurement of these goods and services may find no legal support from the basic requirement of Direct Contracting or Single Source Procurement.

As to the second condition above, “when the procurement of critical 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”, this is applicable when there is a contract for an infrastructure project consisting of construction/repair/renovation of a structure, and critical components of such structure are prescribed by the contractor for it to guarantee its contract performance. For example, in the construction of a power generation plant, the contractor may require the use of certain components manufactured by a specific manufacturer, whose products have been found to meet certain standards and are compatible with the technology used by the contractor. In this instance, Direct Contracting may be resorted to in the procurement of such critical plant components.

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⁴ NPM No. 01-2015 dated 5 February 2015.

However, the BAC must require technical proof that such critical plant components are the ONLY products compatible with the plant.⁵

Based on the foregoing, the procurement of ship repair and maintenance service can be conducted through Direct Contracting only if the PE, after conducting a diligent market survey, can establish the singularity of the supplier or manufacturer of such goods and services required by the PE or when there is a contract for an infrastructure project and critical components of such structure are prescribed by the contractor for it to guarantee its contract performance. A negative finding on the singularity of the source of the goods and services sought to be procured or the absence of such contract requiring the prescribed components shall be a caveat to PE from resorting to Direct Contracting.

Ordering Agreement

Lastly, for your guidance, Ordering Agreement may be used by the procuring entity for expendable or non-expendable goods, and services for hotel accommodation, air travel, and repair and maintenance, determined to be necessary and desirable to address and satisfy the PE's needs, but by its nature, use, or characteristic, the quantity and/or exact time of need cannot be accurately pre-determined. Since the repair and maintenance of the ships are in the nature of a repair and maintenance service, the Philippine Navy may use ordering agreement mechanism for their procurement. For proper guidance on the processes and procedures for the use of an ordering agreement, kindly refer to the *Revised Guidelines on the Use of Ordering Agreement (Guidelines)*.⁶

Summary

In sum, the PE is tasked to determine the nature of the contract as to whether it will be classified as Goods, Infrastructure Project, or Consulting Services. Similarly, it is within the authority and responsibility of the PE to determine the applicability of any alternative method of procurement to a particular acquisition, and it is incumbent upon such PE, through the relevant end-user office, to provide the necessary justifications and supporting documents to establish the existence of conditions warranting resort to the identified alternative modality, such as Direct Contracting. Moreover, progress payments are impliedly allowed in the payment for the procurement of goods as evidenced by the provisions on advance payment and warranty security. And for Ordering Agreement to apply, all the conditions for its use must be satisfied by the PE.

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. SANTIAGO~~

Executive Director V *MS*

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⁵ Volume 2. Manual of Procedures for the Procurement of Goods.

⁶ Issued through GPPB Resolution No. 01-2012, dated 27 January 2012.