



Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 053-2016

27 October 2016

[REDACTED]

Re: Adjacent or Contiguous Negotiated Procurement Modality

Dear [REDACTED]:

This refers to your letter requesting our opinion on whether or not Phase 2 of Pier 4 Project of the CPA may be procured through Negotiated Procurement under Section 53.4 (Adjacent or Contiguous) of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184.

As represented, the construction of Pier 4 was conceptualized because of the clamor of shipping operators and other stakeholders for more berthing spaces due to heavy congestion already experienced at the base port. Your management then recommended and subsequently approved the construction of Pier 4. However, the construction of Pier 4 had to be done in two (2) phases due to budgetary constraints. The Phase 1 of the project is ongoing and you intend to award the Phase 2 thereof by Negotiated Procurement if the opinion of the Government Procurement Policy Board (GPPB) is favorable. It was also represented that Phase 2 of the project was not immediately bid out for implementation because of the absence of the Bids and Awards Committee (BAC) wherein five (5) of its members, including the Chairman, were suspended by the Ombudsman for three months.

As further represented, in order to fast track the implementation and completion of the Pier 4 project and avoid serious disruption of port operations and public service, you are considering to award Phase 2 of the project through negotiated contract with the existing contractor of the Phase 1 of the project, BNR Construction and Development Corporation as you believe that all conditions set forth in Section 53.4 of the IRR of RA 9184 are present. This notwithstanding, as regard the condition that the "the contractor has no negative slippage," you mentioned that the contractor had incurred a negative slippage of -14.75% last 29 February 2016, but the contractor was able to catch up with this slippage and as of 31 July 2016, the contractor had already posted a positive slippage of 4.32%. As far as you are concerned, the negative slippage or delay was not the fault of the contractor, which is also the legal opinion of your Legal Affairs Division, copy of such opinion is attached to your letter. Hence, this request for our opinion.

GPPB Approval to Resort to Alternative Method of Procurement

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 sole authority and accountability of the Head of the Procuring Entity (HOPE), as the approving authority, and the BAC, as the recommendatory body.¹ The Government Procurement Policy Board (GPPB) and its Technical Support Office (GPPB-TSO) 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 IRR, the Procuring Entity (PE), through the HOPE and the BAC, is in the best position to determine the correct method of procurement for all its projects taking into consideration all the surrounding circumstances for each procurement project.

As an exception, approval of the GPPB, before a PE may proceed with the conduct of procurement, is necessary for government contracts involving an amount of at least 500 Million Pesos, where the HOPE has made a determination that such contract falls under any of the exceptions from public bidding.² Thus, GPPB approval is not necessary in the following cases:

1. When the amount of the government contract to be procured through alternative method of procurement is less than 500 Million Pesos; or
2. Regardless of the amount of government contract where the method of procurement is competitive or public bidding.

Under these instances, the PE may proceed with the conduct of competitive or public bidding, or in exceptional cases, in order to promote economy and efficiency, resort to any alternative methods of procurement provided under Republic Act No. (RA) 9184 and its revised Implementing Rules and Regulations (IRR), subject to the prior approval of the HOPE, whenever justified by the conditions required by the procurement law and the rules.³

For government contracts requiring GPPB approval (amount is at least 500 Million Pesos and the method of procurement is any of the alternative modes), the applicable rule is found in Executive Order (EO) No. 423, series of 2003, as amended by EO 645, series of 2007.

Methods of Procurement

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 9184.⁴ This is consistent with the pronouncement of the Supreme Court that competitive bidding may not be dispensed with nor circumvented, and that

¹ 2016 Revised IRR of RA 9184, Section 12.1 in relation to Section 48.1.

² Section 4 of Executive Order No. 423 Series dated 18 September 2003 Prescribing the Rules and Procedures on the Review and Approval of All Government Contracts to Conform to Republic Act No. 9184 otherwise known as the 'Government Procurement Reform Act', as amended by Executive Order No. 645 dated 31 July 2007.

³ Section 10 in relation to 48.1 of the IRR of RA 9184.

⁴ Section 48.1 of the IRR of RA 9184.

alternative methods of procurement may only be resorted to in the instances provided for by law.⁵

Under Section 53.4 of the 2016 Revised IRR of RA 9184, a PE may directly negotiate a contract for infrastructure project with a technically, legally and financially capable contractor, through Negotiated Procurement under the Adjacent or Contiguous modality, whenever the subject contract is adjacent or contiguous to an on-going infrastructure or consulting services project, provided that the following conditions are complied with:

1. the original contract is the result of a Competitive Bidding;
2. the subject contract to be negotiated has similar or related scopes of work;
3. it is within the contracting capacity of the contractor;
4. the contractor uses the same prices or lower unit prices as in the original contract less mobilization cost;
5. the amount involved does not exceed the amount of the ongoing project;
6. the contractor has no negative slippage/delay: and
7. the negotiations for the procurement are commenced before the expiry of the original contract.

We wish to inform you that we have clarified in Annex “H” of the 2016 Revised IRR of RA 9184 or the *Consolidated Guidelines for the Alternative Methods of Procurement*, which took effect on 28 October 2016, the condition that the contractor must have no negative slippage/delay. Accordingly, the condition is that there should be **no negative slippage/delay in the original contract during the time of negotiation**. Based on your representation, the contractor incurred a negative slippage of -14.75% last 29 February 2016, but it was able to catch up with this slippage and as of 31 July 2016, the contractor had already posted a positive slippage of 4.32%. Thus, the pivotal issue to be resolved by the PCA is whether there was negative slippage/delay at the time of negotiation since the condition requires that the contractor has no negative slippage/delay in the original contract during the time of negotiation.

The abovementioned third (3rd) condition was also explained in Annex “H” of the 2016 Revised IRR of RA 9184. Consequently, such condition requires that the project to be negotiated is within the contracting capacity of the contractor/consultant **considering the legal, technical (e.g., PCAB license, SLCC) and financial (e.g., NFCC for the contiguous project) requirements for eligibility**. In determining the Single Large Completed Contract (SLCC), Net Financial Contracting Capacity (NFCC) and Philippine Contractors Association Board (PCAB) license, the sum of the value of the remaining works for the existing contract and the Approved Budget for the Contract (ABC) of the contiguous or adjacent work shall be considered.

All told, a PE may only resort to Negotiated Procurement Adjacent or Contiguous modality under Section 53.4 of the 2016 Revised IRR of RA 9184 if it has determined that all the conditions warranting its use, as further clarified in the *Consolidated Guidelines for the Alternative Methods of Procurement*, are present. Otherwise, the PE shall undertake its procurement through Competitive Bidding or any other appropriate alternative method of procurement.

⁵ *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.

Summary

In sum, we wish to clarify the following matters:

1. GPPB approval is not necessary whenever a PE undertakes procurement through Competitive Bidding, regardless of the ABC, or where the ABC is less than 500 Million Pesos in case of any alternative method of procurement. In such cases, the determination of the appropriate procurement method to be used for a particular project rests within the sole authority and accountability of the HOPE as the approving authority, and the BAC, as the recommendatory body; and
2. A PE may only resort to Negotiated Procurement Adjacent or Contiguous modality under Section 53.4 of the 2016 Revised IRR of RA 9184 if it has determined that all the conditions warranting its use, as further clarified in the *Consolidated Guidelines for the Alternative Methods of Procurement*, are present. Otherwise, the PE shall undertake its procurement through Competitive Bidding or any other appropriate alternative method of procurement. As regards negative slippage/delay, the contractor shall have no negative slippage/delay in the original contract at the time of the negotiation.

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.

(sgd.)

~~DENNIS S. SANTIAGO~~
Executive Director V_{NS}

11/17/23