

NPM No. 061-2016

3 November 2016

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Re : Documentary Requirements for Direct Contracting

Dear [REDACTED]

This refers to your request for guidance on whether there is an existing policy relative to the documentary requirements for Direct Contracting modality in order for the Procuring Entity (PE) to prove that the bidder is legitimate.

Direct Contracting, as an alternative mode of procurement, applies to the procurement of goods;¹ and is not applicable to procurement of infrastructure projects or consulting services. The parameters for a valid Direct Contracting are found in Section 50² of RA 9184 and its Implementing Rules and Regulations (IRR). Compliance with any of these conditions is enough to justify resort to Direct Contracting. The other requisites, such as the approval of the Head of the Procuring Entity, promotion of economy and efficiency, and securing the most advantageous price to the government should be equally complied with.³

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*,⁴ citing the GPPB Manual for the Procurement of Goods,⁵ 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. 

¹ Section 50. Direct Contracting. Direct Contracting or single source procurement is a method of procurement of goods that does not require elaborate Bidding Documents. ...

² 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.

³ Section 48.1 of the IRR of RA 9184.

⁴ G.R. 216098, 21 April 2015

⁵ Vol. 2, p. 84

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.

It is noteworthy to stress that 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.⁶ In the procurement of advertisement placement, Direct Contracting may be considered; provided, however, that the procuring entity can establish and justify the existence of the condition warranting its use. Moreover, the accountability and responsibility in identifying the existence of such conditions rest with the procuring entity.

As enunciated by the Supreme Court in the *Pabillo* case, the GPPB Manual relevantly provides that:

[T]o 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.

Additionally, specifications for the procurement of goods shall be based on relevant characteristics and/or performance requirements.⁷

Documentary Requirements

In a previous opinion, we had the occasion to explain that, the revised IRR of RA 9184 is silent on whether or not eligibility documents mentioned under Section 23.1 must be submitted when resorting to any of the Alternative Methods of Procurement, except those where competitive bidding or a semblance thereof is still present (e.g. Limited Source Bidding and Two-Failed Biddings).

Consequently, for the procurement of goods via Direct Contracting modality, the decision on what eligibility documents may be required to determine the technical, legal and financial capability of the singular source bidder pursuant to Section 50 of RA 9184 and its IRR is within the sound discretion of the Procuring Entity.

All told, we wish to reiterate the following:

- a) Direct Contracting may be allowed when the procurement involves goods of proprietary nature, which can be obtained only from the proprietary source, that

⁶ 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.

⁷ Section 18 of RA 9184.

is, when patents, trade secrets, and copyrights prohibit others from manufacturing or supplying the same item. However, the procuring entity must 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.

- b) In resorting to the Direct Contracting modality, the decision on what eligibility documents may be required to determine the technical, legal and financial capability of the singular source bidder pursuant to Section 50 of RA 9184 and its IRR is within the sound discretion of the Procuring Entity.

We hope 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 you have further questions, please do not hesitate to contact us.

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~~DENNIS S. SAN LAGU~~
Executive Director *V^{MS}*

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