

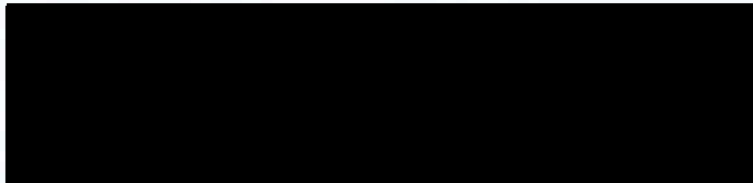


Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 02-2015

18 February 2015



Re : Request for Advice on the Use of Procurement Method

Dear 

This refers to your request for advice relative to the mode of procurement used by the National Dairy Authority (NDA) in its Milk Feeding Program.

You mentioned that the 2013 and 2014 Milk Feeding Program of NDA was covered by fund allocation from various Congressmen who were interested to implement the said Program in identified areas. To purchase the milk needed for the Program, you likewise noted that the NDA resorted to Direct Contracting Method or single source procurement method where it purchased locally supplied milk from NDA-Assisted dairy cooperatives. In case the milk supplier is unable to meet the demand, NDA purchased milk from private entities available in the area without submitting the acquisition to competitive bidding.

Thus, advice is sought to determine whether the mode of procurement used by the NDA violated Republic Act (RA) No. 9184 and its revised Implementing Rules and Regulations (IRR).

At the outset, please be advised that the determination of the legality and/or propriety of the actions and decisions of the Bids and Awards Committee (BAC) is not within the express mandate of this office. The GPPB, likewise, has no authority to act for and decide in behalf of the BAC of the procuring entity concerned.¹

AUTHORITY OF COA

The Commission on Audit's power to conduct comprehensive audit has been defined by the Supreme Court in *Veloso, et al. vs. COA, G.R. No. 193677, September 6, 2011*, thus:

Pursuant to its mandate as the guardian of public funds, the COA is vested with broad powers over all accounts pertaining to government revenue and expenditures and the uses of public funds and property. This includes the exclusive authority to define the scope of its audit and examination, establish

¹ Non-Policy Matter (NPM) No. 005-2008 dated 30 April 2008.

the techniques and methods for such review, and promulgate accounting and auditing rules and regulations. The COA is endowed with enough latitude to determine, prevent and disallow irregular, unnecessary, excessive, extravagant or unconscionable expenditures of government funds. It is tasked to be vigilant and conscientious in safeguarding the proper use of the government's, and ultimately the people's, property. The exercise of its general audit power is among the constitutional mechanisms that gives life to the check and balance system inherent in our form of government.

In *Caltex, Phils., Inc. vs. COA, et al.*², the Supreme Court rejected Caltex' argument that COA cannot make its own interpretation of the laws in the light of the determination of executive agencies which are entitled to great weight.

Indeed, it is well within the jurisdiction of COA to determine whether or not the fiscal responsibility that rests directly with the head of the government agency has been properly and effectively discharged.³

NDA'S PROCUREMENT OF MILK AND DAIRY PRODUCT

Section 16 of Republic Act (RA) No. 7884⁴ mandates that "[t]he government's nutrition programs requiring milk and dairy products shall be sourced from small farmers and dairy cooperatives in coordination with the (NDA)".

On the other hand, the sourcing and acquisition of procuring entities are governed by RA 9184, otherwise known as the Government Procurement Reform Act, and its associated revised Implementing Rules and Regulations (IRR), including allied issuances, which mandates that the primary mode of procurement shall be competitive bidding.⁵ Nonetheless, the law also allows resort to alternative methods of procurement subject to compliance with certain conditions to promote economy and efficiency.⁶ In such instances, the procuring entity shall ensure that the most advantageous price for the Government is obtained.⁷

Every statute should be applied, interpreted and construed in such a way that will harmonize it with existing laws. This principle is expressed in the legal maxim "*interpretare et concordare leges legibus est optimus interpretandi*, that is, to interpret and to do it in such a way as to harmonize laws with laws is the best method of interpretation".⁸

Following this principle, the NDA, in accordance with its mandate, may source its milk requirements from small farmers and dairy cooperatives through competitive bidding as sanctioned by Section 10 of RA 9184 and its IRR. On the other hand, in resorting to alternative methods of procurement, NDA shall comply with the conditions set by law for the use of the specific alternative procurement modality. R

² G.R. No. 92585, May 8, 1992

³ Section 25, P.D. 1445

⁴ An Act Creating the National Dairy Authority to Accelerate the Development of the Dairy Industry in the Philippines, Providing for a Dairy Development Fund, and For Other Purposes

⁵ Section 10, Article IV, RA 9184

⁶ Section 48, Article XVI, *ibid.*

⁷ Section 48.1, Rule XVI, IRR

⁸ *Manila Jockey Club, Inc. v. CA*, G.R. No. 103533, December 15, 1998

Under Section 50 of RA 9184 and its IRR, Direct Contracting as an alternative mode of procurement may be resorted to by concerned Procuring Entities under any of the following conditions:

- 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.

Compliance with any of the foregoing conditions will justify single source selection or Direct Contracting.

We have opined⁹ that for the first and second conditions of Direct Contracting to apply, the fundamental consideration is whether there are other suppliers or manufacturers that can provide the goods needed by the procuring entity. Under the third condition, the requirement is not solely on the exclusive distributorship or proprietary nature of a particular product, but more importantly, the singularity of supplier or manufacturer that can deliver the requirement of the procuring entity. Thus, it is incumbent upon the procuring entity to ensure that based on the technical specifications of the goods subject of the procurement, only one supplier, distributor or manufacturer can supply and deliver the goods. The procuring entity should conduct a survey of the industry and determine the supply source to confirm the exclusivity of the source of goods to be procured. Moreover, the procuring entity 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 to government.

We note that the NDA tapped its assisted dairy cooperatives to supply locally produced milk to be used for the community and school-based feeding program. These cooperatives, being domestic suppliers, are encouraged to participate in the procurement process of various agencies of government as this is consistent with the policy of the government to give preference to the procurement of materials and supplies, produced, made, and manufactured in the Philippines that meet the specified or desired quality in accordance with the provisions of existing laws and treaties or international agreements¹⁰.

The mere fact, however, that the government gives preference to the procurement of domestically produced and manufactured materials and supplies, does not sanction the immediate availment of the alternative methods of procurement such as direct contracting, in lieu of competitive bidding.¹¹ Moreover, the direct purchase of milk from private entities available in the area without benefit of a public bidding must likewise satisfy the conditions

⁹ NPM No. 110-2014 dated 06 November 2014

¹⁰ Article XII, Section 12 of the 1987 Philippine Constitution, Commonwealth Act No. 138 (Flag Law), as amended, and Administrative Order No. 227, Series of 2008.

¹¹ NPM No. 042-2012 dated 25 April 2012.

for Direct Contracting before the BAC can make the recommendation to the HOPE for the use of such alternative modality.

In sum, the fact alone that the NDA-assisted dairy cooperatives are domestic suppliers of milk does not sanction the immediate resort to procurement through Direct Contracting under the third ground, in lieu of Competitive Bidding. Under the rules, the procuring entity must first justify the necessity for purchasing milk from these cooperatives and private entities and it must be able to prove that there is no suitable substitute in the market that can be obtained at more advantageous terms, before it may decide to procure through Direct Contracting.

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.

~~Very truly yours,~~
(sgd.)

~~DENNIS S. SANTIAGO~~

~~Executive Director~~ *Vand*

InH escc
CAO