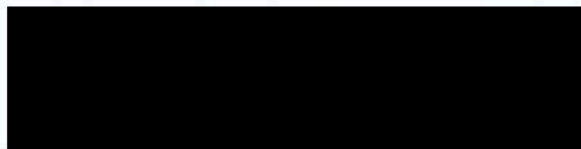


NPM No. 70-2015

12 October 2015



Re : Direct Contracting


Dear [Redacted]

This refers to your letter dated 7 October 2015, requesting our guidance relative to your procurement of Optical Parametric Generator (OPG) that is available only from a foreign company with intellectual property rights on the equipment's design.

As represented, being the program leader of the *SAFEHarvestS* (Sensor for Agricultural and Fishery Ecosystems and Harvests Safety) Program funded by the Department of Science and Technology (DOST) – Philippine Council for Industry, Energy, and Emerging Technology Research and Development (PCIEERD), part of the deliverable of your project is to build a Sum Frequency Generation (SFG) system, which will require an OPG for frequency conversion. The OPG that you need for the set-up, which has a tuning range of 1.35-5 microns from an incoming frequency of 1064 nm is only available from LaserVision, a foreign company owned by Dean R. Guyer, who has an intellectual property rights on the equipment's design. UP Supply and Property Management Office (SPMO) suggested on finding a local supplier for the equipment, as a channel to make the procurement easier. However, such recommendation will double the cost of the equipment from \$52,800 to \$105,600. Hence, this request for opinion.

It is an established public policy,¹ as well as a statutory mandate² that all government procurement shall be done through competitive public bidding. However, as an exception, in order to promote efficiency and economy, Article XVI of Republic Act (RA) No. 9184 sanctions a resort to alternative methods of procurement, among others, *via* Direct Contracting.

The parameters for valid direct contracting are found in Section 50 of RA 9184 and its Implementing Rules and Regulations (IRR), thus:

- 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; 

¹ *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines, Inc.*, G.R. No. 183789, August 24, 2011, 656 SCRA 214, 241.

² Section 10, Article IV of RA 9184 provides that “[a]ll Procurement shall be done through Competitive Bidding, except as provided for in Article XVI of this Act.”(RA 9184)

- 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.

While compliance with only one condition 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 most advantageous price to the government should be equally complied with.³

In this regard, 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 vs. Comelec*,⁴ citing the GPPB Manual for the Procurement of Goods,⁵ as follows:

This (Direct Contracting) is applicable when the goods or services being procured are covered by a patent, trade secret or copyright duly acquired under the law. 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.

Further, the 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 Thus, when the goods sought to be procured in this case refers to a company which is owned by one who has intellectual property rights on the design of such goods, the modality of Direct Contracting may be resorted to; provided, however, that the Procuring Entity (PE) establishes and justifies the existence of the conditions warranting its use. Likewise, the accountability and responsibility in identifying the existence of such conditions rest with the PE.

As echoed by the Supreme Court in the *Pabillo* case, 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

³ Section 48.1 of the IRR of RA 9184.

⁴ G.R. 216098, 21 April 2015

⁵ Vol. 2, p. 84

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.

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.

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

It is only after the BAC has conducted its survey and determined that one of the conditions under Section 50 of RA 9184 is present that proper recommendation to the HOPE for the use of Direct Contracting modality may be made. Consequently, if there are prospective bidders that can offer the same or similar goods subject of the procurement opportunity, such that there are other suppliers, distributors or manufacturers that could respond and comply with the required performance and characteristics of the goods sought to be procured, Direct Contracting cannot be resorted to.

Based on the foregoing, we wish to reiterate 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. However, the procuring entity must first 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. Moreover, RA 9184 and its associated IRR adopt Competitive Bidding as the primary method of procurement, and any alternative method may be employed only under highly exceptional circumstances to address economy and efficiency.

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.)

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Executive Director V *✓*

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⁷ Section 12 of RA 9184.