

**NPM No. 86-2015**

13 October 2015



**Re : Direct Contracting; Executive Order No. 423**



This refers to your letter dated 8 October 2015, requesting our guidance and approval relative to DFPC's plan to engage the services of an identified consultant through Negotiated Procurement of Direct Contracting.

As represented, the Governance Commission for Government-Owned and Controlled Corporation (GCG) in the reorganization and streamlining of GOCCs is encouraging GOCCs to procure the services of reputable Human Resource (HR) consulting firms to ensure an objective, efficient and speedy identification of its problem and needs. DFPC has been advised to finish and submit its Rationalization Plan (RP) for approval by GCG as soon as possible, before the Compensation and Position Classification System (CPCS) is implemented once approved by the Office of the President.

DFPC is now requesting the Government Procurement Policy Board - Technical Support Office (GPPB-TSO) to allow it to engage the services of Towers Watson, as its chosen consultant, through Direct Contracting modality because it has the essential and unique experience in assisting GCG in developing the CPCS. As such, Management has surmised that Towers Watson is highly capable of addressing its needs since it has the exclusive knowledge and expertise in using the CPCS Methodology. Thus, it is in this context that the GPPB-TSO's approval is being sought.

**GPPB Review Pursuant to Executive Order No. 423, as Amended**

The GPPB and its TSO have no power under Republic Act No. 9184 and its Implementing Rules and Regulations to approve any request from procuring entities (PEs) to resort to any of the alternative methods of procurement in lieu of Competitive Bidding. It is within the responsibility of the PEs to select the appropriate mode of procurement for every project included in its approved Annual Procurement Plan.

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However, Executive Order (EO) No. 423,<sup>1</sup> as amended, requires PEs to seek GPPB's approval for contracts to be procured through any of the alternative modalities of procurement with an Approved Budget for the Contract (ABC) of at least PhP 500 Million. The GPPB required approval is limited to the determination on whether the PE has complied with the all the conditions necessary to undertake and justify resort to such identified alternative modality. The decision to choose which particular alternative modality to use rests with the procuring entity.

Rightfully so, if the amount of the contract for the proposed consultancy project is at least PhP 500 Million, and the same will be procured through any of the alternative modalities of procurement, the same should be submitted to the GPPB for determination whether the proposed specific alternative method of procurement is appropriate.

### **Direct Contracting**

It is an established public policy,<sup>2</sup> as well as a statutory mandate<sup>3</sup> 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.

Direct Contracting, as an alternative mode of procurement, applies to the procurement of goods;<sup>4</sup> and is not applicable in the procurement of infrastructure projects or consulting services. Additionally, the adoption of Direct Contracting is subject to the following conditions, thus:

Section. 50. ... Direct Contracting 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 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.

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<sup>1</sup> E.O. 423 (Repealing E.O. 109-A dated September 18, 2003, Prescribing the Rules and Procedures on the Review and Approval of all Government Contracts to Conform with RA 9184), as amended by E.O. 645 (Amending Section 4 of E.O. 423) provides that:

Section 4. Approval of Government Contracts entered into through alternative methods of procurement: Government Contracts involving an amount of **at least Php 500 Million** and the Head of the Procuring Entity has made a determination that it falls under any of the exceptions from public bidding or any of the alternative methods of procurement provided by law and applicable rules and regulations, an approval from the GPPB should first be secured stating therein that said government proposed procurement undertaking falls within the exceptions from public bidding and that the proposed specific alternative method of procurement is appropriate.

<sup>2</sup> *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines, Inc.*, G.R. No. 183789, August 24, 2011, 656 SCRA 214, 241.

<sup>3</sup> 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).

<sup>4</sup> Section 50. Direct Contracting. Direct Contracting or single source procurement is a method of procurement of goods that does not require elaborate Bidding Documents. ...

While compliance with only one condition is enough to justify the resort to Direct Contracting, the other requisites, such as the approval of the Head of the Procuring Entity (HOPE), promotion of economy and efficiency, and most advantageous price to the government should be equally complied with.<sup>5</sup>

As regards its applicability, the Supreme Court in the case of *Pabillo vs. COMELEC*<sup>6</sup> echoed the *GPPB Manual of Procedures for the Procurement of Goods* when it held that, “to 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.” In addition, specifications for the procurement of goods shall be based on relevant characteristics and/or performance requirements.<sup>7</sup>

Thus, for the procurement of goods, 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. Hence, if there are prospective bidders that can offer the goods subject of the procurement opportunity, Direct Contracting cannot be resorted to.

### **Summary**

In sum, we wish to reiterate the following:

1. As a rule, the GPPB and its TSO have no power under Republic Act No. 9184 and its Implementing Rules and Regulations to approve any request from procuring entities to resort to any of the alternative methods of procurement in their procurement activities in lieu of Competitive Bidding.
2. As an exception, Executive Order No. 423, as amended, requires procuring entities to seek GPPB’s approval for contracts to be procured through any of the alternative methods of procurement with an Approved Budget for the Contract of at least Php 500 Million. Such approval should first be secured stating therein that said procurement activity falls within the exceptions from public bidding and that the proposed specific alternative method of procurement is appropriate.
3. Procuring entities cannot resort to Direct Contracting modality, in lieu of Competitive Bidding, in their procurement of consulting services or infrastructure projects since said modality applies only to the procurement of goods. 18

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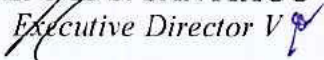
<sup>5</sup> Section 48.1 of the IRR of RA 9184.

<sup>6</sup> G.R. 216098, 21 April 2015.

<sup>7</sup> Section 12 of RA 9184.

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* 

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