

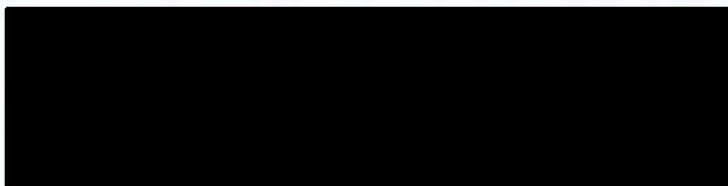


Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 97-2015

13 October 2015



Re: Direct Contracting; Mixed Procurement

Dear [REDACTED]:

This refers to your letter seeking clarification on the propriety of Direct Contracting relative to DBP's Anti-Money Laundering (AML) Management System Upgrading Project (Project).

DBP intends to procure the afore-mentioned Project through Direct Contracting on the ground that SAS, DBP's contractor, has the proprietary rights on DBP's existing System which in turn, would be the one upgraded into the AML System Version 5.1, similarly owned by SAS, so as to address the requirements of the Bank to allow for compliance with the provisions of the AMLA and related issuances of Bangko Sentral ng Pilipinas (BSP).

The Approved Budget for the Contract (ABC) is Seventeen Million Five Hundred Thousand Pesos (PhP 17,500,000.00), comprising the following: (a) Software - Five Million Forty Thousand Pesos (PhP 5,040,000.00); and (b) Services and Training – Twelve Million Four Hundred Sixty Thousand Pesos (PhP 12,460,000.00). However, the foregoing ABC does not include the hardware and database requirements of the Project considering that SAS Philippines is a software provider and will instead be sourced from DBP's existing IT CAPEX following the list of recommended/acceptable hardware and database specifications to be provided by the Solutions Provider.

Although a large share of the total project cost is allotted to the Services and Training of the upgraded System, according to DBP, the Project should still be treated as a procurement of Goods, instead of Consulting Services, thus:

[D]espite having the larger share of the total project cost be allotted for Services and Training, the AML Management System project, as a whole, should still be treated as a **procurement of a good taking into consideration the very essence of the whole project which is to put in place an up-to-date AML Management System for the Bank**. The services to be rendered by the Solutions Provider is directly in relation to the AML System Version

5.1 to be upgrade into which, while already readily available in the market, would be undergoing several customizations so as to maximize its features to be better suited to the needs of the Bank. The AML System Project, in its entirety, is **not being considered as a consulting service** as defined under RA 9184, **on the basic premise and argument that the procurement by the Bank of the AML System Version 5.1, independent of the services to be rendered by SAS Philippines, may still be utilized by the Bank, while the procurement of the services and trainings to be rendered by SAS Philippines, independent of the AML System Version 5.1, would be entirely useless and would be of no benefit to the Bank.** (Emphasis supplied)

It is in this context that DBP is requesting opinion on whether it could adopt the modality of Direct Contracting under Section 50(a) of Republic Act (RA) No. 9184 and its revised Implementing Rules and Regulations (IRR), which provides:


[D]irect contracting may be resorted only in 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; (Emphasis supplied)

At the outset, we would like to clarify that the Government Procurement Policy Board (GPPB) and its Technical Support Office (TSO) render policy and non-policy matter opinions, respectively, on issues purely pertaining to the interpretation and application of procurement laws, rules and regulations. It has no authority to determine the specific procurement method to be adopted by Procuring Entity (PE) in the conduct of its procurement activity, which authority is specifically granted to the PE by RA 9184¹.

Direct Contracting under Section 50(a) of the IRR of RA 9184

Section 50(a) of RA 9184 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 (RA 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 process².

A cursory reading of Section 50 of RA 9184 will reveal that Direct Contracting is a recourse available only in the procurement of goods defined under Section 5(r)³ of the IRR of RA 9184. 

¹ Non-Policy Matter (NPM) Opinion No. 001-2015 dated 5 February 2015.

² Generic Procurement Manual, Volume 2, Page 84.

³ **Goods.** Refer to all items, supplies, materials and general support services, except consulting services and infrastructure projects, which may be needed in the transaction of public businesses or in the pursuit of any government undertaking, project or activity, whether in the nature of equipment, furniture, stationary, materials for construction, or personal property of any kind, including non-personal or contractual services, such as, the repair and maintenance of equipment and furniture, as well as trucking, hauling, janitorial, security, and related

On the other hand, in NPM Opinion No. 160-2004 dated 21 December 2004, this office clarified that Direct Contracting is not applicable as an alternative modality for the procurement of consulting services as defined under Section 5(i)⁴ of RA 9184.

Accordingly, the propriety of the resort to Direct Contracting under Section 50(a) of RA 9184 for DBP's procurement for the upgrading of its AML System depends on whether the Project is classified as Goods or Consulting Services, which is entirely dependent on how the procuring entity views the project subject to the "primary purpose of the contract"⁵ to be procured.

Mixed Procurement

In addressing whether the proposed upgrading of AML System is considered as procurement of goods or consulting services, we wish to reiterate our earlier opinion,⁶ explaining that "the PE, ably guided by RA 9184 and its IRR, is in the best position to determine the correct classification of its procurement activities, whether it be Goods, Infrastructure Projects or Consulting Services." When the procurement consists of a mix of goods, infrastructure project, or consulting service, it shall be considered a mixed procurement, and the nature of the procurement shall be determined based on the primary purpose of the contract.⁷

For your guidance, in NPM Opinion No. 88-2013, we have clarified the nature of ICT procurements as follows:

[t]aking into consideration the definition of Goods, Infrastructure Projects and Consulting Service" under RA 9184 and its IRR, we may infer that "Hardware" and readily available "Software" would fall under the term "Goods". On the other hand, "Manpower/People ware" and "Services" would fall either under the term "Goods" if such would involve general support services, or under the term "Consulting Services" if such services are highly technical and would involve professional expertise that are beyond the capability/capacity of the PE to undertake.

In view of the foregoing, the classification of the procurement project is incumbent upon the PE to determine. Such determination should be based on the PE's identified needs and the best way by which these needs may be addressed, managed and satisfied.⁸ It is from the

or analogous services, as well as procurement of materials and supplies provided by the procuring entity for such services. The term "related" or "analogous services" shall include, but not limited to, lease or purchase of office space, media advertisements, health maintenance services, and other services essential to the operation of the procuring entity.

⁴ **Consulting Services.** Refer to services for infrastructure projects and other types of projects or activities of the GOP requiring adequate external technical and professional expertise that are beyond the capability and/or capacity of the GOP to undertake such as, but not limited to: (i) advisory and review services; (ii) investment or feasibility studies; (iii) design; (iv) construction supervision; (v) management and related services; and (vi) other technical services or special studies. General principles on consulting services are provided for in Annex "B" of this IRR.

⁵ Section 5(aa), IRR of RA 9184.

⁶ NPM Opinion No. 11-2013, dated 22 February 2013.

⁷ NPM Opinion No. 17-2010, dated 1 June 2010.

⁸ *Supra note 5.*

identified need that the PE then classifies whether the procurement activity is treated as goods, infrastructure project or consulting services based on the definition of these terms as found in the procurement law and the IRR.

Summary

All told, we wish to clarify that:

1. Section 50(a) of RA 9184 applies only in the procurement of Goods as defined under Section 5(r) of the IRR of RA 9184;
2. When the procurement consists of a mix of goods, infrastructure project, or consulting service, it shall be considered a mixed procurement, and the nature of the procurement shall be determined based on the primary purpose of the contract.

We hope this opinion issued by 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.

Very truly yours,
(sgd.)


DENNIS S. SANTIAGO
Executive Director V 

skp