



APPROVING THE ISSUANCE OF A POSITION PAPER OF THE GOVERNMENT PROCUREMENT POLICY BOARD ON THE COMMISSION ON AUDIT REPORT ON OVERPRICED MEDICAL AND HEALTH EQUIPMENT PURCHASED BY THE DEPARTMENT OF HEALTH, THROUGH THE PROCUREMENT SERVICE-DEPARTMENT OF BUDGET AND MANAGEMENT, FOR THE FIGHT AGAINST COVID-19

WHEREAS, on 11 August 2021, the Commission on Audit (COA) released its Consolidated Annual Audit Report (Audit Report) findings on the Department of Health (DOH), where it flagged various deficiencies involving public funds intended for national pandemic response;

WHEREAS, the Senate¹ and the House of Representatives (HoR)² have convened their respective Committees to conduct hearings, in aid of legislation, on the COA findings on the use of the DOH of its Coronavirus Disease 2019 (COVID-19) funds;

WHEREAS, at the outset of both the hearings in the Senate and the HoR, the Government Procurement Policy Board–Technical Support Office (GPPB-TSO) has been monitoring said hearings even before a formal invitation was extended to the Office;

WHEREAS, on 23, 24 and 26 August 2021, the HoR and the Senate, respectively, sent invitations to the Department of Budget and Management (DBM) and the GPPB-TSO to serve as resource persons for the hearings;

WHEREAS, on 26 August 2021, during the HoR budget hearing, questions were raised based on the COA Audit Report on the overpriced medical and health equipment purchased by the DOH through the Procurement Service–DBM for the fight against COVID-19;

WHEREAS, invitations for hearings were continuously received by the GPPB-TSO, and after attending several hearings, in both the Senate Committee on Accountability of Public Officers (Senate Blue Ribbon Committee)³ and the House Committee on Good Government and Public Accountability,⁴ the GPPB-TSO received a copy of the *Subpoena Duces Tecum*⁵ on 06 September 2021 from the Senate Blue Ribbon Committee requesting the GPPB-TSO to submit the following:

1. Minutes of the Meeting/s when GPPB Resolution No. 03-2020 was adopted;
2. All *Bayanihan* 1⁶ and 2⁷ and pandemic related resolutions; and

¹ On 12 August 2021, Senate Minority Leader Franklin M. Drilon called for a Senate inquiry in aid of legislation into the poor handling by the DOH of the funds meant to respond to the Corona Virus Disease 2019 (COVID-19) pandemic, which may be accessed through this link: http://legacy.senate.gov.ph/press_release/2021/0812_drilon1.asp

² On 16 August 2021, the House Makabayan Bloc filed House Resolution No. 2129 proposing a thorough congressional inquiry in aid of legislation, the grave inefficiency, gross incompetence and criminal negligence allegedly committed by the DOH in its management of funds to combat the COVID-19 pandemic.

³ On 18, 25, 27 August and 7, 10, 13, 17, 21, 24, 30 September 2021, the GPPB-TSO, upon invitation of the Senate Blue Ribbon Committee, attended the Public Hearings relative to the “COA Report on the DOH COVID-19 Funds.

⁴ On 15, 20, 27 September and 4 October 2021, the GPPB-TSO also attended the HoR Committee on Good Government and Public Accountability Hearings on “Inquiry re the COA Report on the Alleged Overpriced Medical and Health Equipment Purchased by the DOH relative to the COVID-19 Pandemic.

⁵ Dated 04 September 2021.

⁶ Republic Act (RA) No. 11469, also known as *Bayanihan* to Heal as One Act, dated 24 March 2020.

⁷ RA No. 11494, also known as *Bayanihan* to Recover as One Act, dated 11 September 2020.

3. All contracts with Pharmally Pharmaceutical Corporation, Cosmic Technologies, Inc., and EMS Component Assembly, Inc., including those before and after *Bayanihan*.

Accordingly, the GPPB-TSO submitted its compliance to the said *Subpoena Duces Tecum*,⁸

WHEREAS, on 13 September 2021, the GPPB-TSO received the House Committee on Good Government and Public Accountability invitation which requested the submission of a position paper, presentation, and other documents that may assist the Committee in its inquiry, in aid of legislation;

WHEREAS, under GPPB Resolution No. 38-2017,⁹ the GPPB delegated the submission of initial comments on Senate and House Bills to the GPPB-TSO, subject to (i) the quarterly and/or annual review of the Inter-Agency Technical Working Group and the GPPB and (ii) the GPPB's issuance of a Position Paper, when requested;

WHEREAS, during the Congressional hearings, several statements were made and issues were raised involving procurement rules, hence, the GPPB-TSO recommended that a position paper be submitted to both Houses of Congress to explain the authority of the GPPB in issuing procurement rules, as this was questioned before the HoR, and highlight the actions taken by the Board in response to the COVID-19 pandemic;

WHEREAS, during the 8th GPPB Meeting on 14 October 2021, the GPPB-TSO presented to the Board a brief background of the COA Audit Report on the DOH's use of COVID-19 funds and the procurement issues raised during the Congressional hearings, particularly, the authority of the GPPB to issue procurement rules and the Guidelines on *Bayanihan* Procurement under Republic Act No. 11469, splitting of contracts, and due diligence in all government transactions. The GPPB-TSO also prepared a draft position paper for the consideration of the Board;

WHEREAS, during the same meeting, after the Board has been apprised of the issues, the Board approved in principle the issuance of a position paper, subject to the comments of the members;¹⁰

WHEREAS, on 15 October 2021, the GPPB-TSO sent to the members, via electronic mail, a copy of the draft position paper and requested them to provide their comments on or before 20 October 2021. The Private Sector Representative to the GPPB provided his comments,¹¹ particularly: (i) suggesting to add a definitive position to address the different interpretations of the GPPB's intent on what constitutes "a legally, technically, and financially capable supplier, distributor, manufacturer, contractor, or consultant," and (ii) emphasizing the exercise of due diligence in government transactions;

WHEREAS, on 22 and 28 October 2021, the GPPB-TSO received further comments from the DOH and the Department of Transportation respectively, which were also considered in the draft position paper;

WHEREAS, after careful review and upon incorporation of the comments received from the GPPB members in the Position Paper, the GPPB adopted and confirmed the submission of the Position Paper;

⁸ On 06 October 2021.

⁹ Dated 7 November 2017.

¹⁰ Position Paper shall be finalized through the approval of the members ad referendum.

¹¹ Received comments from the private sector representative on 16 October 2021.

NOW, THEREFORE, for and in consideration of the foregoing, **WE**, the Members of the **GOVERNMENT PROCUREMENT POLICY BOARD**, by virtue of the powers vested on **US**, by law and other executive issuances, hereby **RESOLVE**, to confirm, adopt, and approve, as **WE**, hereby confirm, adopt, and approve the issuance of a Position Paper, the copy of which is hereto attached as Annex "A," addressed to the Senate Blue Ribbon Committee and to the House Committee on Public Accounts.

This Resolution shall take effect immediately.

APPROVED this 14th day of October 2021 at Pasig City, Philippines.

Sgd

TINA ROSE MARIE L. CANDA
GPPB, Chairperson
**DEPARTMENT OF BUDGET AND
MANAGEMENT**

Sgd.

ROLANDO U. TOLEDO
Alternate to the Chairperson
**DEPARTMENT OF BUDGET AND
MANAGEMENT**

**NATIONAL ECONOMIC AND
DEVELOPMENT AUTHORITY**

DEPARTMENT OF EDUCATION

Sgd.

DEPARTMENT OF ENERGY

DEPARTMENT OF FINANCE

Sgd.

DEPARTMENT OF HEALTH

Sgd.

**DEPARTMENT OF INTERIOR AND LOCAL
GOVERNMENT**

Sgd.

**DEPARTMENT OF NATIONAL
DEFENSE**

Sgd.

**DEPARTMENT OF PUBLIC WORKS AND
HIGHWAYS**

Sgd.

**DEPARTMENT OF SCIENCE AND
TECHNOLOGY**

DEPARTMENT OF TRADE AND INDUSTRY

DEPARTMENT OF TRANSPORTATION

**DEPARTMENT OF INFORMATION AND
COMMUNICATION TECHNOLOGY**

Sgd.

PHILIPPINE SPACE AGENCY

PRIVATE SECTOR REPRESENTATIVE

**Position Paper of the
Government Procurement Policy Board on the
Commission on Audit Report on Overpriced Medical and Health Equipment
Purchased by the Department of Health Through
Procurement Service – Department of Budget and Management,
For the Fight Against COVID-19**

Procurement Modality under RA No. 9184

Section 10 of Republic Act (RA) No. 9184, otherwise known as the “Government Procurement Reform Act” mandates that all procurement shall be done through Competitive Bidding, except only in highly exceptional cases provided for in Article XVI thereof, which enumerates the allowable alternative methods of procurement. Accordingly, alternative methods of procurement may be resorted to only upon prior approval of the Head of the Procuring Entity (HoPE), in order to promote economy and efficiency, and whenever justified by the conditions for each alternative method of procurement specified in Sections 49 to 53 of the Implementing Rules and Regulations (IRR) of RA No. 9184. In all instances, the Procuring Entity (PE) shall ensure that the most advantageous price for the Government is obtained. This is consistent with the pronouncement of the Supreme Court that Competitive Bidding may not be dispensed with nor circumvented, and that alternative methods of procurement may only be resorted to in the instances provided for by law.¹²

One of the alternative methods of procurement under RA No. 9184 is Negotiated Procurement-Emergency Cases (NP - EC) in case of imminent danger to life or property during a state of calamity, or when time is of the essence arising from natural or man-made calamities or other causes where immediate action is necessary to prevent damage to or loss of life or property or to restore vital public services, infrastructure facilities and other public utilities under Section 53(b) of RA No. 9184 and Section 53.2 of its 2016 revised IRR.

COVID-19 Procurement under RA No. 9184

On 08 March 2020, the President signed Proclamation No. 922,¹³ declaring a State of Public Health Emergency throughout the Philippines upon the recommendation of the Department of Health (DOH) following the confirmed local transmission of the Coronavirus Disease 2019 (COVID-19). Thus, even before the effectivity of the Declaration of State of Calamity,¹⁴ the Government Procurement Policy Board (GPPB), in anticipation of the challenges in the procurement of COVID-19-related items, streamlined and harmonized the rules in NP–EC under Section 53(b) of RA No. 9184 and Section 53.2 of its IRR, through its issuance of GPPB Resolution No. 03-2020 dated 09 March 2020.¹⁵ Among the enhancements introduced are:

- a. Inclusion of the provision of immediate response and initial recovery steps to avoid loss of life, injury, disease, and other negative effects on human, physical, mental, and social well-being, among others;

¹² *Manila International Airport Authority, et al v. Olongapo Maintenance Services Inc., et al; Antonio P. Gana, et al. v. Triple Crown, etc.; Triple Crown etc. v. Manila International Airport Authority, et al.*, G.R. Nos. 146184-85/ G.R. No. 161117/ G.R. No. 167827, January 31, 2008.

¹³ Uploaded on the Official Gazette last 09 March 2020, which may be accessed through this link: <https://www.officialgazette.gov.ph/2020/03/08/proclamation-no-922-s-2020/>

¹⁴ Proclamation 926, uploaded on the Official Gazette last 17 March 2020, took effect on 16 March 2020, which may be accessed through this link: <https://www.officialgazette.gov.ph/2020/03/16/proclamation-no-929-s-2020/>

¹⁵ Published on the Philippine Daily Inquirer (PDI) last 13 March 2020, effective immediately, which may be accessed through this link: <https://www.gppb.gov.ph/issuances/Resolutions/GPPB%20Resolution%20No.%2002-2020.pdf>

- b. Inclusion of lease of venue for use as quarantine centers, evacuation sites, medical relief, and aid distribution locations, warehousing facilities, or similar temporary disaster or emergency response facilities;
- c. Authorize the HoPE to delegate the conduct of direct negotiations to the End-User unit or any other appropriate bureau, committee, support, or procuring unit instead of the Bids and Awards Committee (BAC);
- d. Authorize the HoPE to delegate, the award of the contract to any official of the PE, subject to the rules on conflict of interest; and
- e. Dispense with the requirement of a written confirmation from the HoPE on the existence and veracity of the grounds used for Emergency Procurement prior to award of the contract. Instead, approval of the HoPE of the updated Annual Procurement Plan (APP) effectively confirms the existence and veracity of the grounds relied upon in resorting to NP-EC.

In the same GPPB Resolution, the Board approved the list of items that are needed to address the current State of Public Health Emergency, for inclusion in the list of Common-use Supplies and Equipment (CSE) of the Procurement Service-Department of Budget and Management (PS-DBM), as recommended by the DOH.¹⁶ The DOH requested the assistance of the PS-DBM in sourcing several items,¹⁷ which all government entities will be availing, to address the COVID-19 emerging threat to the country and the need to ramp up prevention and response efforts, and to ensure the protection of all government employees. The PS-DBM agreed to the DOH's above recommendation as it intends to utilize its experience and market knowledge in order to procure the said items in a timely manner. Further, as explained by the PS-DBM, centralized procurement of these necessary items will not only ensure fair pricing for the acquisition but ultimately means that government can focus on more pressing concerns regarding the curtailment and elimination of the COVID-19 threat aside from the acquisition of these items listed.

Moreover, in view of the suspended operations of financial institutions, regulatory agencies, and other government offices resulting from a State of Calamity, or implementation of community quarantine or similar restrictions declared, PEs were also allowed, through GPPB Resolution No. 05-2020 dated 20 March 2020,¹⁸ to accept alternate documents i.e., an expired Business or Mayor's permit with the Official Receipt of the application renewal, subject to the submission of the Business or Mayor's permit after the award of the contract, and an unnotarized Omnibus Sworn Statement, subject to compliance therewith after the award of the contract and prior to payment, as supplemented in GPPB Resolution No. 09-2020, dated 07 May 2020,¹⁹ due to limited movement and limited conduct of business transactions, so as not to hamper or delay the procurement activities.

The abovementioned enhancements are on top of the recent amendments to the IRR which already provide for avenues by which PEs may streamline, simplify, and expedite the conduct of procurement, such as the use of videoconferencing, webcasting, and similar

¹⁶ Annex B of GPPB Resolution No. 03-2020, Supra note 4.

¹⁷ COVID-19 test kits, gown, coveralls, N95 masks, gloves, face shield, goggles, head cover, shoe cover, aprons, and surgical masks.

¹⁸ Published on the PDI last 24 March 2020, effective 20 March 2020, which may be accessed through this link: <https://www.gppb.gov.ph/issuances/Resolutions/GPPB%20Resolution%20No.%2005-2020.pdf>

¹⁹ GPPB Resolution 09-2020, dated 07 May 2020, published on the PDI last 15 May 2020, effective immediately, which may be accessed through this link: <https://www.gppb.gov.ph/issuances/Resolutions/GPPB%20Resolution%20No.%2009-2020%20with%20SGD.pdf>

technology for meetings,²⁰ and the use of digital signature for procurement related documents.²¹

Procurement Rules under RA No. 11469 or *Bayanihan 1*

By virtue of the enactment of RA No. 11469 or the *Bayanihan* to Heal as One Act (*Bayanihan 1*) on 24 March 2020, the President was authorized under Sec. 4(k) to undertake the procurement of the items cited therein, as the need arises, in the most expeditious manner, as exemptions from the provisions of RA No. 9184 and other relevant laws. Pursuant thereto, the Executive Secretary, by authority of the President, issued a Memorandum dated 28 March 2020, directing the Secretary of the Department of Budget and Management (DBM), who is likewise the Chairperson of the GPPB,²² to craft guidelines for procurement activities that are entirely exempt from RA No. 9184, with **clear and simple rules** on liquidation, a liberal procedure in determining the **price most advantageous** to the government considering the urgency of the present situation, and **measures to reasonably prevent abuses and corruption but not too restrictive** as to delay the process.

Thus, GPPB Circular No. 01-2020 dated 06 April 2020²³ on the Guidelines on the Emergency Procurement under the *Bayanihan 1* (*Bayanihan* Procurement) was issued pursuant to the authority granted unto the President under Section 4 of the said law. Accordingly, the GPPB Circular was formulated to ensure the timely procurement of highly needed supplies, materials, equipment, utilities, telecommunications, and other critical services authorized under the *Bayanihan 1*, at the most advantageous price to the government with the necessary safeguards for the prevention of abuses and corruption in the procurement process.

It is imperative to note that pursuant to the exemption provided under RA No. 11469, nowhere in the said Circular did it state that the rules under RA No. 9184 shall be applied. Furthermore, what the Circular identified are the COVID-19 items that are covered under the *Bayanihan* Procurement and not the instances where NP– EC may be used as provided in RA No. 9184.

The GPPB - Technical Support Office (TSO) also issued an anticipatory Non-Policy Matter (NPM) Opinion No. 04-2020 dated 16 April 2020,²⁴ in order to address possible issues in the conduct of Emergency Procurement under the *Bayanihan* Act. This includes a discussion on procedure for *Bayanihan* Procurement being *similar* to NP–EC under RA No. 9184, in so far as it allows for **direct negotiation** with a legally, technically, and financially capable supplier, distributor, manufacturer, contractor, or consultant. This was crafted precisely in compliance with the **directive of the President for simple and easy** to understand **rules** and intended **so as not to confuse PEs and bidders** by introducing new terms, requirements, or procedures given the urgency of their need and to avoid delay in the procurement process and considering that they are already familiar with the NP-EC modality.

In any case, being similar does not mean the same. Unlike NP-EC, the Circular was specifically crafted based on *Bayanihan 1* in consideration of the needs and circumstances prevailing brought about by the COVID-19 pandemic, to wit:

²⁰ GPPB Resolution No. 24-2018, dated 04 December 2018, published on the Official Gazette last 26 August 2019, effective immediately, which may be accessed through this link:

<https://www.gppb.gov.ph/issuances/Resolutions/GPPB%20Resolution%20No.%2024-2018.pdf>

²¹ GPPB Resolution No. 16-2019, dated 17 July 2019, published on the Official Gazette last 26 August 2019, effective immediately, which may be accessed through this link:

<https://www.gppb.gov.ph/issuances/Resolutions/GPPB%20Resolution%20No.%2016-2019.pdf>

²² Item C 5 of the Office of the Executive Secretary (OES) Memorandum, which may be accessed through this link:

<https://gcg.gov.ph/files/ink4fUZCs7IOBDCw75ig.pdf>

²³ Published in the Philippine Star last 12 April 2020, effective immediately, which may be accessed through this link:

<https://www.gppb.gov.ph/issuances/Circulars/GPPB%20Circular%20No.%2001-2020.pdf>

²⁴ Dated 16 April 2020, which may be accessed through this link: https://www.gppb.gov.ph/gppb-admin/monitoring/npm/NPM%20No.%2004-2020_Emergency%20Procurement%20under%20Bayanihan%20Act%201.pdf

Factors	Bayanihan Procurement	NP- Emergency Cases under RA No. 9184
Legal Basis	RA No. 11469 GPPB Resolution No. 06-2020 GPPB Circular No. 01-2020	Section 53(b) of RA No. 9184 Section 53.2 IRR of RA No. 9184 Consolidated Guidelines on Alternative Methods of Procurement or Annex "H" Item (D)(2) GPPB Resolution Nos. 03-2020, ²⁵ 05-2020, ²⁶ and 09- 2020 ²⁷
Applicability	Limited to procurement activities that will mitigate, if not contain, the transmission of COVID-19 as identified in the <i>Bayanihan Act</i> .	Any procurement activity provided that it meets the conditions for NP – EC.
Annual Procurement Plan (APP)	Procurement may commence without the approved updated APP as long as there is a budget for the purpose, but subject to compliance after.	Approved updated APP is required prior to procurement.
Posting Requirement	Posting of the updated APP, Notice of Award (NOA), Contract or Purchase Order (PO), and other information relative to the procurement project, ²⁸ on the website of the PE or if none, in any conspicuous place in the premises of the PE <i>and</i> the GPPB Online Portal ²⁹	Philippine Government Electronic Procurement System (PhilGEPS) posting of the NOA, Contract or PO and Notice to Proceed, if necessary is required, ³⁰ also, on the website of the PE and in any conspicuous place in the premises of the PE.
Refusal of Bidders to prioritize and accept contracts for materials and services	Constituted as a crime ³¹	None

²⁵ Supra note 4.

²⁶ Supra note 7.

²⁷ Supra note 8.

²⁸ Item 9 of the GPPB Circular No. 01-2020, Supra note 12; Item 2.0 of GPPB-TSO Advisory No. 05-2020, dated 17 June 2020, which may be accessed through this link: https://www.gppb.gov.ph/assets/pdfs/Adv_Online%20Portal.pdf

²⁹ Items 5.0 and 6.0 of GPPB-TSO Advisory No. 05-2020, dated 17 June 2020, which may be accessed through this link: https://www.gppb.gov.ph/assets/pdfs/Adv_Online%20Portal.pdf

³⁰ No. 4 under the sub-heading Procurement Process under Emergency Cases, NPM No. 03-2020, dated 23 March 2020, which may be accessed through this link:

<https://www.gppb.gov.ph/gppb-admin/monitoring/npms/NPM%20No.%2003%20-%202020%20Negotiated%20Proc%20Emergency%20Case%20under%20Sec%2053.2.pdf>

³¹ Sec. 6 d of Bayanihan 1 Act:

Sec. 6. Penalties. - xxx

(a) xxx

xxx

(d) Refusal to prioritize and accept contracts for materials and services necessary to promote the herein declared national policy;

Period of Application	From the effectivity of the Circular, until the validity of RA No. 11469 or until 23 June 2020 ³²	No specific period and may be applied from the effectivity of the 2016 revised IRR of RA No. 9184 and related issuances.
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A legally, technically, and financially capable supplier, distributor, manufacturer, contractor, or consultant is one who has complied with the: (i) mandatory requirements provided under Item 4.1 of the Circular; (ii) technical specifications set by the PEs; and (iii) financial requirements of the project such as the Net Financial Contracting Capacity, in case of infrastructure projects with an Approved Budget for the Contract (ABC) above PhP 500,000.00 and Income Tax Returns (Annual Income Tax Return of the preceding tax year) or Business Tax Returns (Value Added Tax or Percentage Tax Return covering the previous six months) for all projects with an ABC above PhP 500,000.00.

The same Item of the Circular likewise requires an Omnibus Sworn Statement for any project with an ABC above PhP 500,000.00 and a Philippine Contractors Accreditation Board license for all infrastructure projects regardless of the ABC.

The GPPB Circular also provides how the PEs will determine the most advantageous price for the government, and that is through market scoping and price negotiation based on:

- a. existing price data of the agency, the Department of Trade (DTI), and Industry or other relevant agencies.
- b. preliminary market scanning is done by the agency showing prevailing market prices and practice.
- c. In the case of agricultural products, the market price, or the recommended retail price by the local price coordinating council.³³

Moreover, in order to curb any corrupt practice, the said Circular required the PEs to (i) post their procurement in the GPPB Online Portal; (ii) make use of the Online Blacklisting Portal; (iii) include a warranty clause in the contract assuring goods delivered or works done are free from defect; and (iv) include of a provision on *estafa* in the Omnibus Sworn Statement (OSS). As provided in the said Circular, the PEs are to post the updated APP, NOA, Contract, or PO, and other information relative to the procurement project,³⁴ on the website of the PE or if none, in any conspicuous place in the premises of the PE *and* the GPPB Online Portal on or before 30 September 2020.³⁵

To ensure transparency and accountability in the implementation of the *Bayanihan 1*, in relation to government procurement, the GPPB Online Portal³⁶ mentioned above was established. This Online Portal serves as the source of data or information used by the GPPB and its TSO to comply with the reportorial requirements under the *Bayanihan 1*. The public can certainly see the transactions of the Government in the said portal with its different sub-menus on Market Listing, Awarded Contracts, Project Requirements, and Updated APPs. The TSO also summarized the transactions under *Bayanihan 1* from 01 April to 30 September 2020, through the creation of the GPPB Online Portal Dashboard,³⁷ which displays primary

³² Three (3) months from 25 March 2020, the effectivity of the *Bayanihan 1* Act (Item 11 of the Circular).

³³ Resolved Clause C. 3 of The Inter-Agency Task Force for the Management of Emerging Infectious Diseases Resolution No. 21, series of 2020, dated 06 April 2020, which may be accessed through this link: <https://www.officialgazette.gov.ph/downloads/2020/04apr/20200406-IATF-RESOLUTION-NO-21-RRD.pdf>; Item 6.3 of GPPB Circular No. 01-2020, Supra note 12.

³⁴ Item 9 of the GPPB Circular No. 01-2020, Supra note 12; Item 2.0 of GPPB-TSO Advisory No. 05-2020, Supra note 17.

³⁵ Item 3.2 of the GPPB Circular No. 01-2020, Supra note 12; Item 5.0 of the GPPB-TSO Advisory No. 05-2020, Supra note 17; Item 3.0 of the GPPB-TSO Advisory No. 08-2020, entitled, "Extended Deadline of Posting of Procurement Data for all Contracts Awarded Under Emergency Procurement Under the *Bayanihan* Act," dated 03 AUGUST 2020, which can be accessed through this link: https://gppb.gov.ph/assets/pdfs/Adv_Extended%20Deadline%20of%20Posting.pdf

³⁶ The GPPB Online Portal may be accessed through this link: <https://gppbgovph.com/>

³⁷ The GPPB Online Portal Dashboard may be accessed through this link: <https://datastudio.google.com/u/0/reporting/06eb59c0-5f86-47fc-a37d-956eb2f47566/page/QPBkE>

procurement statistics such as success rates, bid statistics, and supplier participation, and analyzes procurement information to help procurement practitioners make strategic procurement decisions and increase transparency in government procurement. The effectiveness of the use of the GPPB Online Portal is affirmed by the later adoption thereof by Congress in RA No. 11494 or the *Bayanihan* to Recover as One Act (*Bayanihan 2*) and in RA No. 115251 or the COVID-19 Vaccination Program Act in the posting of information and documents related to the *Bayanihan* Procurement and COVID-19 vaccines procurement.

To protect the PE, the supporting OSS contained new provisions where the bidders shall:

- a. be prosecuted for Swindling (*Estafa*) or the commission of fraud with unfaithfulness or abuse of confidence in case advance payment was given and the supplier failed to perform or deliver any of the obligations and undertakings in the contract;
- b. be blacklisted for a period of two (2) years in all Government procurement in failing to perform and deliver all the obligations and undertakings, including the warranty provisions; and
- c. warrant that for the period stipulated the object of the contract shall be free from defects and conform to quality standards and technical specifications of the said contract.

In addition, the *Bayanihan 1* helped our local farmers who were left with excess supply of farm and agricultural products as a result of the imposition of community quarantines and channel these supplies to government agencies which are tasked with the provision of social amelioration benefits. Through the *Bayanihan 1*, the GPPB allowed PEs to directly purchase agricultural products from local farmers and farmers' associations or cooperatives in accordance with the procedure and requirements³⁸ provided in the Circular. Said Circular likewise streamlined the disbursement requirements when dealing directly with local farmers.³⁹ It may be well to note that when the *Bayanihan 2* was enacted, said direct purchase was adopted by Congress and expanded to include fishery products from fisherfolk and agricultural cooperatives as a form of direct assistance in accordance with RA No. 11321, or the *Sagip Saka Act*.

On the matter of advance payment, the rules on the prohibition against advance payment on government contracts are found under paragraph 1 of Section 88 of Presidential Decree (PD) No. 1445 or the "Government Auditing Code of the Philippines." In the same law, it allows for advance payment *upon prior approval of the President* without cap as to the amount that may be approved by the President, thus:

"Section 88. Prohibition against advance payment on the government contracts.

Except with the prior approval of the President (Prime Minister) the government shall not be obliged to make an advance payment for services not yet delivered under any contract therefor. No payment, partial or final, shall be made on any such contract except upon a certification by the head of the agency concerned to the effect that the services or supplies and materials have been rendered or delivered in accordance with the terms of the contract and have been duly inspected and accepted."

³⁸ Item 6.2 of GPPB Circular No. 01-2020. PEs intending to directly procure from a local farmer need only to ask the submission of any of the following:

- a. a certification that the farmer is in the Registry System for Basic Sectors in Agriculture (RSBSA);
- b. RSBSA identification card; or
- c. Barangay Certification that the supplier is a *bonafide* farmer.

³⁹ Item 6.4 of GPPB Circular No. 01-2020. The disbursement voucher prepared by the PE needs only to be signed by the farmer-supplier and the same shall serve as both the (i) delivery invoice showing the quantity, description of the articles, unit and total value of the items delivered and (ii) proof of actual delivery and receipt of payment.

In relation to paragraph 1 of Section 88 of PD No. 1445, two Memorandum Orders (MO) were issued in relation to advance payment under RA No. 9184, particularly for Contract Implementation Guidelines for the Procurement of Goods, Supplies, and Materials. These are MO No. 172 dated 19 May 2005,⁴⁰ and MO No. 15 dated 09 May 2011.⁴¹ The same percentages were used in Item 7.0 of the GPPB Circular No. 01-2020.

At the start of the pandemic, upon consultation made by the GPPB-TSO, advance payment is one of the most pressing concerns in the procurement of medical supplies and Personal Protective Equipment (PPE), as suppliers tend to prioritize buyers who are willing to make partial or full payment upon placing their orders. This was echoed by the PS-DBM, where based on its market scanning, suppliers demand advance payment of at least thirty percent (30%) of the contract amount for the supply of the required medical supplies and PPEs. The GPPB then recommended and endorsed for approval of the President the following relative to the rules on advance payment, below is an excerpt from the Memorandum for the President dated 03 April 2020:⁴²

- 6.1. Increase the allowable advance payment from fifteen percent (15%) pursuant to Section 88(1) of Presidential Decree No. 1445 or the Government Accounting Code of the Philippines and Memorandum Order (MO) No. 119 to thirty percent (30%) of the contract amount for procurement activities covered by Section 4(k) of RA No. 11649. Suppliers demand advance payment of at least thirty percent (30%) of the contract amount for the supply of the required medical supplies and PPEs based on the recent market scanning of the PS-DBM;
- 6.2. Maintain the maximum amount of fifty percent (50%) for Advance Payment of the contract amount for contracts entered into by PEs for the services where the requirement of a down payment is a standard industry practice, as authorized under MO No. 172, in the lease of real property or venue for use to house health workers or serve as quarantine centers, medical relief, and aid distribution locations or temporary medical facilities; and
- 6.3. Direct PEs to promptly release the advance payment within three (3) working days from the award of contract to support the supplier or contractor during the delivery of the necessary items or services.

The Board's recommendation on the increase in the allowable advance payment was submitted to the Office of the President, which was then approved, and eventually, MO No. 48⁴³ was issued that allowed advance payment not exceeding thirty percent (30%) of the contract amount for items covered under the *Bayanihan Act*, and a single advance payment not exceeding fifty percent (50%) of the contract amount shall be allowed for contracts entered into by a PE for services *where the requirement of a down payment is a standard industry practice such as in the lease of real property or venue* to house health workers or serve as quarantine centers, medical relief, and aid distribution locations or temporary medical facilities. Further, all PEs shall release the advance payment to the supplier, contractor, or lessor *within three (3) working days from the award of the contract*.

⁴⁰ Effective immediately or on 09 August 2005, which may be accessed through this link:

<https://www.officialgazette.gov.ph/2005/05/19/memorandum-order-no-172-s-2005/>

⁴¹ Effective immediately, which may be accessed through this link:

<https://www.officialgazette.gov.ph/2011/05/09/memorandum-order-no-15-s-2011/>

⁴² Copy of the Memorandum for the President, may be accessed through this link:

<https://gppbgov->

[my.sharepoint.com/personal/levega_gppbgov_onmicrosoft_com/Documents/Microsoft%20Teams%20Chat%20Files/GPPB-TSO_Memorandum_DBM-OP_Advance%20Payment_3Apr2020%20\(1\).pdf](https://my.sharepoint.com/personal/levega_gppbgov_onmicrosoft_com/Documents/Microsoft%20Teams%20Chat%20Files/GPPB-TSO_Memorandum_DBM-OP_Advance%20Payment_3Apr2020%20(1).pdf)

⁴³ Dated 20 April 2020, effective immediately, which may be accessed through this link:

<https://www.officialgazette.gov.ph/2020/04/20/memorandum-order-no-48-s-2020/>

Due Diligence in Government Transactions

The PEs, through its HoPE, its BAC and BAC Secretariat, and even the BAC Technical Working Group, must exercise due diligence in checking the compliance of the bidders with requirements of the ***existing and applicable rules***. In a long line of cases, the Supreme Court consistently ruled that public officers must exercise due diligence in the performance of their respective official duties relative to government procurement as failure to do so would result in disadvantage to the Government.

The Supreme Court rules that there is failure to exercise diligence, when there is absence of an allotment for the project, thus rendering all related documents and transactions irregular on their face. In the case of *Garcia, Jr. v. Office of the Ombudsman*,⁴⁴ the Supreme Court relied on the COA's report that **the allotment's absence should have roused Roman's suspicions, as regards the project's legality, and, in consequence, prevented them from approving the disbursements therefor.** The Local Chief Executive of the Province was primarily charged with the issuance of allotments, he was in the position to know if the allotment requirement had, in the first place, been complied with, but as the COA found, no such funds were certified as available.

In another case, the non-intervention of the public officer having a conflict of interest in the bidding process denotes due diligence. It was shown in the case of *Caballero, et. al. v. Sandiganbayan, et. Al.*,⁴⁵ then **municipal Mayor Caballero, inhibited himself in all the proceedings of the BAC**, even if he is the Chairperson by law, after learning that his wife's business entity was among those invited to bid. Thus, the Court held that **such an act of the mayor shows that he had never intended to influence or pressure the members of the BAC to favor his wife's bid.**

In *Joson III vs COA*,⁴⁶ the Court held that mere signature does not result in a liability of the official involved without any showing of irregularity on the document's face such that a detailed examination would be warranted. Under R.A. No. 9184, the determination of whether a prospective bidder is eligible falls on the BAC.

The PE must validate the prospective bidder's capacity. In *Information Technology Foundation of the Philippines v. Commission on Elections*,⁴⁷ the Court struck down the contract awarded to Mega-Pacific, since it found out that the COMELEC awarded the contract in inexplicable haste despite the latter's non-participation in the public bidding process, and that it even **failed to qualify under the financial, technical, and legal requirements.** In nullifying the contract with Mega-Pacific, the Court ruled that COMELEC violated the policy on public biddings, especially when the latter allowed the winning bidder to alter the contract.

Due diligence is applied in the evaluation of the product when testing has been done such as in the case of *Sajul v. Sandiganbayan*,⁴⁸ where the former Regional Director of the defunct Land Transportation Commission was charged with unlawfully entering into an allegedly manifestly and grossly disadvantageous transaction with Bato-Bato Enterprises. **A Performance Quality Test was conducted where one fire extinguisher was picked from the said supplier, was able to successfully put out the fire that was built and kept burning for ten (10) minutes.** A canvass of different suppliers with their corresponding prices should have been procured, as it is rather unfair to conclude that the price of Bato-Bato Enterprises was exorbitant on the basis alone of a submitted quotation of one company and to further rule that the contract was grossly injurious to the government.

⁴⁴ G.R. No. 197567, November 19, 2014.

⁴⁵ G.R. No. 137355-58, September 25, 2007.

⁴⁶ G.R. No. 223762, November 7, 2017.

⁴⁷ G.R. No. 159139, January 13, 2004.

⁴⁸ G.R. No. 135294, November 20, 2000.

Due diligence is observed if the government is amply protected in the contract or transaction. In the case of *Froilan v. Sandiganbayan*,⁴⁹ an Information for violation of Section 3 (g) of RA No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act, was filed with the Sandiganbayan with the crime of entering into a contract that was alleged to be grossly and manifestly disadvantageous to the government. The Sandiganbayan found Froilan guilty, but the Supreme Court reversed the ruling, since Froilan **gave his guarantee to refund whatever overpricing the COA will find out later on.** According to the Supreme Court, Froilan, being the one who gave the written guarantee and who saved the government from any perceived injury, must likewise be acquitted.

The public officer must provide proper attention to a task expected of him/her, policies or guidelines for inspection must be dutifully observed, such as in the case of *Office of the Deputy Ombudsman for the Military and Other Law Enforcement Offices v. Saligumba*.⁵⁰ The Court explained that members of the Inspection and Acceptance Committee (IAC) fell short of the reasonable diligence required of them, **for failing to perform the task of inspecting the deliveries in accordance with the conditions of the procurement documents and rejecting said deliveries in case of deviation.** As the Ombudsman ruled, while persons other than those formally appointed as inspectors may be authorized to conduct the inspection, the members of the IAC are still expected to exercise due diligence in seeing to it that the policies or guidelines for inspection are dutifully observed, which they failed to do so.

Public officers who are custodians of government funds shall be liable for their failure to ensure that such funds are safely guarded against loss or damage. In the case of *Delos Santos v. COA*,⁵¹ the Court upheld what the COA correctly pointed out, that the hospital, through its officials, should have been deeply involved in the implementation of the Tony N' Tommy (TNT) Health Program (medical assistance of indigent patients), the hospital being a party to the MOA and as such, has acted as custodian and disbursing agency of a Priority Development Assistance Fund (PDAF). **It is a standing rule that public officers who are custodians of government funds shall be liable for their failure to ensure that such funds are safely guarded against loss or damage and that they are expended, utilized, disposed of, or transferred in accordance with the law and existing regulations,** and on the basis of prescribed documents and necessary records.

Procurement Rules under RA No. 11494 or *Bayanihan 2*

By virtue of the enactment of RA No. 11494 or the *Bayanihan to Recover as One Act (Bayanihan 2)* on 14 September 2020, which was a follow up of the *Bayanihan 1* in view of the unabated spread of COVID-19 and the ensuing economic disruption, the GPPB issued Resolution No. 18-2020 dated 16 September 2020⁵² and Resolution No. 19-2020 dated 21 September 2020.⁵³

Resolution No. 18-2020⁵⁴ adopted the procedures under GPPB Circular No. 01-2020 for the procurement of general support services, which includes non-personal or contractual services and related or analogous services, Infrastructure Projects, and Consulting Services covered under the *Bayanihan 2*, while Resolution No. 19-2020⁵⁵ approved the rules in the

⁴⁹ G.R. No. 115221, March 17, 2000.

⁵⁰ G.R. No. 223768, February 22, 2017.

⁵¹ G.R. No. 198457, August 13, 2013.

⁵² Published in the Philippine Star on 26 September 2020, effective immediately, which may be accessed through this link: <https://www.gppb.gov.ph/issuances/Resolutions/GPPB%20Resolution%20No.%2018-2020.pdf>

⁵³ Published in the Philippine Star last 26 September, effective immediately, which may be accessed through this link: <https://www.gppb.gov.ph/issuances/Resolutions/GPPB%20Resolution%20No.%2019-2020.pdf>

⁵⁴ Supra note 41.

⁵⁵ Supra note at 42.

conduct of Procurement for Goods with application of Domestic Preference covered under *Bayanihan 2*.

Section 4(u) of the *Bayanihan 2* exempts specific procurement projects⁵⁶ related to the COVID-19 response from the coverage of RA No. 9184. It further provides that procurement must **be in the most judicious, economical, and expeditious manner**. Moreover, the following information and documents related to the procurement shall be published in the GPPB Online Portal, the website of the PE concerned, if available, and at any conspicuous place reserved for posting purposes in the premises of the PEs within seven (7) working days from the date of acceptance of the award:

- i. Project name;
- ii. ABC;
- iii. Contract period;
- iv. Name of winning supplier, distributor, manufacturer, contractor, or consultant;
- v. Amount of contract as awarded;
- vi. NOA;
- vii. Date of award and acceptance;
- viii. Contract or PO; and
- ix. A certification stating that the procuring entity exerted all efforts to secure the most advantageous price to the government based on existing price data of the agency, the DTI, or other relevant agencies or preliminary market scanning done by the agency showing prevailing market prices and practice.

More importantly, in order to reduce the adverse impact of COVID-19 in the Philippine economy, particularly, in the business activities and livelihood of Filipinos, most especially the local manufacturers and the micro, small and medium enterprises, in various sectors, the last paragraph of Section 4(u) of the *Bayanihan 2* requires the application of domestic preference for products, materials, and supplies produced, made or manufactured in the Philippines in the procurement of COVID-19 related goods i.e., PPEs such as gloves, gowns, masks, goggles, and face shields; surgical equipment and supplies, medical supplies, tools, and consumables such as alcohol, sanitizers, tissue, thermometers, hand soap, detergent, sodium hypochlorite, cleaning materials, povidone iodine, common medicines; testing kits; and other supplies and equipment as may be determined by the DOH and other relevant agencies.

Section 4(u) of the *Bayanihan 2*:

(1) Goods, which may include PPE such as gloves, gowns, masks, goggles, and face shields; surgical equipment and supplies; laboratory equipment and its reagents; medical equipment and devices; support and maintenance for laboratory and medical equipment, surgical equipment and supplies; medical supplies, tools, and consumables such as alcohol, sanitizers, tissue, thermometers, hand soap, detergent, sodium hypochlorite, cleaning materials, povidone iodine, common medicines (e.g., paracetamol tablet and suspension, mefenamic acid, vitamins tablet and suspension, hyoscine tablet and suspension, oral rehydration solution, and cetirizine tablet and suspension); testing kits, and such other supplies or equipment as may be determined by the DOH and other relevant government agencies: Provided, That the DOH shall prioritize the allocation and distribution of the aforesaid goods, supplies and other resources to the following:

- (i) Public health facilities in the regions, provinces, or cities, that are designated as COVID-19 referral hospitals, such as, but not limited to, Philippine General Hospital (PGH), Lung Center of the Philippines (LCP), and Dr. Jose N. Rodriguez Memorial Hospital;
 - (ii) Private hospitals which have existing capacities to provide support care and treatment to COVID-19 patients; and
 - (iii) Public and private laboratories that have existing capacities to test suspected COVID-19 patients.
- (2) Goods and services for social amelioration measures in favor of affected communities;
 - (3) Lease of real property or venue for use to house health workers or serve as quarantine centers, medical relief and aid distribution locations, or temporary medical facilities;
 - (4) Establishment, construction, and operation of temporary medical facilities;
 - (5) Utilities, telecommunications, and other critical services in relation to operation of quarantine centers, medical relief and aid distribution centers and temporary medical facilities; and
 - (6) Ancillary services related to the foregoing.

Section 4 (u) of RA No. 11494 provides that domestic preference shall be applied for the procurement of the above-stated items subject to (i) competitive bidding; (ii) issuance of a certification from the DTI that the articles forming part of the bid are substantially composed of articles, materials, or supplies grown, produced, or manufactured in the Philippines; and (iii) award to the lowest calculated domestic bidder⁵⁷ by the concerned PE as long as its bid is not more than fifteen percent (15%) in excess of the lowest foreign bid.

A notable difference in the rules promulgated by the GPPB with respect to Domestic Preference under RA No. 9184 and *Bayanihan 2*, is that in the latter, the bidder with a Domestic Bidder's Certificate of Preference (DoBid Certificate) **need not match the bid of the lowest foreign bid.**

Other differences, as provided under GPPB Resolution No. 19-2020,⁵⁸ are as follows:

1. In case the PE is unable to post its opportunities in the PhilGEPS for justifiable reasons, it shall be posted on the website of the PE concerned, if available, and at any conspicuous place reserved for this purpose in the premises of the PE;
2. PEs shall dispense with the mandatory periods for each stage of the procurement for COVID-19 related items covered under the *Bayanihan 2* and determine the specific procurement timelines as may be sufficient for the PEs and bidders to properly conduct, or participate in, the procurement activity;
3. PEs shall dispense with the requirement of Single Largest Completed Contract for bidders claiming domestic preference considering that the items covered under the *Bayanihan 2* if substantially grown, produced, or manufactured in the Philippines as evidenced by a DoBid Certificate issued by the DTI, would be new product offerings of the bidders to address the shortage of supplies during the COVID-19 pandemic; and
4. PEs shall ensure the use of the revised Omnibus Sworn Statement providing additional safeguards to the government.

Finally, it must be noted that while both *Bayanihan 1* and *2* have lapsed, i.e., on 24 June 2020 and on 30 June 2021, respectively, but procurement of COVID-19 related response continues to be unhampered. This is because NP-EC under RA No. 9184 remains in place and is undertaken by PEs to properly and timely respond to this Public Health Emergency, which was extended by the President through its recent Proclamation No. 1218 dated 10 September 2021.⁵⁹

⁵⁷ Domestic Bidder refers to any person or entity offering unmanufactured articles, materials or supplies of the growth or production of the Philippines, or manufactured articles, materials, or supplies manufactured or to be manufactured in the Philippines substantially from articles, materials, or supplies of the growth, production, or manufacture, as the case may be, of the Philippines as defined under Section 5(j) of the 2016 revised IRR of RA No. 9184.

⁵⁸ Supra note 42.

⁵⁹ Uploaded on the Official Gazette on 10 September 2021, which may be accessed through this link: <https://www.officialgazette.gov.ph/2021/09/10/proclamation-no-1218-s-2021/>