

NPM No. 006 - 2020

16 October 2020

ATTY. DANTE A. GIERRAN
President and Chief Executive Officer
Philippine Health Insurance Corporation
Citystate Centre, 709 Shaw Blvd.,
1603 Pasig City

Re: Memorandum of Agreement between the Philippine Health Insurance Corporation and the Philippine Red Cross

Dear President Gierran:

This refers to your letter¹ seeking legal opinion relative to the various provisions contained in the Memorandum of Agreement (MOA)² between the Philippine Health Insurance Corporation (PhilHealth) and the Philippine Red Cross³ (PRC) covering the provision of SARS-CoV-2 testing services,⁴ particularly on the following:

1. Are the goods and services obtained by the PhilHealth from the PRC by virtue of the MOA considered as procurement subject to:
 - a. Republic Act (RA) No. 9184⁵ or Section 4(k) of RA No. 11469⁶ (*Bayanihan* Act) and subsequently, Government Procurement Policy Board (GPPB) Circular 001-2020?
 - b. Does the existence of Section 4(l) of the *Bayanihan* Act preclude the application of RA No. 9184 in any partnership with the PRC for “distribution of goods and services incidental to the fight against CoronaVirus Disease-19 (COVID-19)?”
2. Does the reimbursement structure of payments to PRC preclude the application of RA No. 9184?

At the outset, it bears stressing that **GPPB Circular No. 001-2020 was issued** by the Board as a result of the passage of RA No. 11469 or the *Bayanihan* Act and in order to avoid a vacuum in the rules to be adopted **in the procurement of COVID-19 related items under Section 4(k) of the same law**, which reads:

¹ Dated 12 October 2020 addressed to Secretary Wendel Avisado, received by this Office on 14 October 2020.

² Dated 05 May 2020, and attached as Annex A in PhilHealth’s letter dated 12 October 2020.

³ Also called Philippine National Red Cross in Republic Act No. 10072.

⁴ Paragraph 2.2 of the letter, quoted herein:

“ xxx. These tests shall include all cases directly solicited/screened by PRC and those endorsed/referred cases under PRC’s respective Agreements/arrangements with Local Government Units (LGUs), Research Institute for Tropical Medicine (RITM), Bureau of Corrections, Bureau of Jail Management and Penology (BJMP) and any other government entity or persons referred by any other government agency such as but not limited [to:] Department of Labor and Employment (DOLE), Philippine Overseas Employment Administration (POEA) and the Overseas Workers Welfare Administration (OWWA), whose circumstances warrant such testing arrangement; Provided, that testing shall also extend to and front line health workers who need periodic testing by nature of their work and the risks they face therein.”

⁵ Entitled the “Government Procurement Reform Act.”

⁶ Entitled the “Bayanihan to Heal As One Act.”

- (k) Undertake the procurement of the following as xxx as exemptions from the provisions of Republic Act No. 9184 xxx:
1. Goods, which may include personal protective equipment such as gloves, gowns, masks, goggles, 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 hydrochloride, cleaning materials, povidone iodine, common medicines (e.g., paracetamol tablet and suspension, mefenamic acid, vitamins tablet and suspension, hyoscine tablet and suspension); **testing kits**; and such other supplies or equipment as may be determined by the Department of Health and other relevant government agencies xxx xxx xxx;
 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.** (Boldface provided)

On the other hand, it was represented in your letter that **the subject MOA was undertaken on the basis of Section 4 (l) of the *Bayanihan Act***. Thus, our Office is in no position to render an opinion on matters beyond the purview of the rules issued by the GPPB. Moreover, the review of contracts entered into by government corporations, in terms of its compliance with law, such as Section 4 (l) of the *Bayanihan Act*, is well within the authority of the Office of the Government Corporate Counsel, pursuant to Section 10⁷ of Book IV, Title III, Chapter 3 of Executive Order No. 292⁸ or the Administrative Code of the Philippines.

Allow us to similarly note that **Section 4 (l) of the *Bayanihan Act* speaks of a partnership with the Philippine Red Cross** as the primary humanitarian agency in giving aid to the people, *subject to reimbursement, in the distribution of goods and services* incidental in the fight against COVID-19. Contradistinguished this with **Section 4 (k) of the same law which expressly covers the procurement of identified COVID-19 items**. Procurement, by definition pertains to the acquisition of goods, consulting services, or the contracting for infrastructure projects by the procuring entity.⁹ More importantly, such acquisition entails the use of public or government funds as payment to the goods delivered or services rendered by the selected

⁷ Section 10. Office of the Government Corporate Counsel.—The Office of the Government Corporate Counsel (OGCC) shall act as the principal law office of all government-owned or controlled corporations, their subsidiaries, other corporate offsprings and government acquired asset corporations and shall exercise control and supervision over all legal departments or divisions maintained separately and such powers and functions as are now or may hereafter be provided by law. In the exercise of such control and supervision, the Government Corporate Counsel shall promulgate rules and regulations to effectively implement the objectives of the Office.

The OGCC is authorized to receive the attorney's fees adjudged in favor of their client government-owned or controlled corporations, their subsidiaries, other corporate offsprings and government acquired asset corporations. These attorney's fees shall accrue to a special fund of the OGCC, and shall be deposited in an authorized government depository as a trust liability and shall be made available for expenditure without the need for a Cash Disbursement Ceiling, for purposes of upgrading facilities and equipment, granting of employees' incentive pay and other benefits, and defraying such other incentive expenses not provided for in the General Appropriations Act as may be determined by the Government Corporate Counsel.

⁸ Dated 25 July 25 1987.

⁹ Section 5(aa) of RA No. 9184.

supplier or service provider. In the case of Section 4 (l), the partnership arrangement referred to therein allows for a reimbursement mechanism, one that is not contemplated in RA No. 9184 nor in the *Bayanihan* Procurement rules under GPPB Circular 001-2020, as both cover payment after delivery of goods or rendition of services procured.

With respect to the query on whether the reimbursement structure of payments to PRC in the subject MOA precludes the application of RA No. 9184. It may be inferred that this relates to the provisions on **advance payment** under the Annexes of the 2016 revised Implementing Rules and Regulations (IRR) of RA No. 9184, which were adopted in GPPB Circular 001-2020. It must be emphasized that the legal authority in the provision of advance payment to suppliers of the government is found under Section 88(1) of Presidential Decree No. 1445 or the Government Auditing Code of the Philippines, to wit:

Section 88. Prohibition against advance payment on government contracts.

1. **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 rendered or for supplies and materials 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. (Emphasis ours)

Accordingly, the advance payment provisions under the 2016 revised IRR of RA No. 9184 and GPPB Circular 001-2020 were included therein only upon compliance with the presidential approval required under the Auditing Code. In the same vein, the increase in the advance payment authorized by the President, by virtue of Memorandum Order No. 48,¹⁰ for the procurement of goods and services under Section 4(k) of the *Bayanihan* Act, was made in compliance with this legal directive.

The foregoing considered, it cannot be gainsaid that the advance payment provisions under the 2016 revised IRR of RA No. 9184 and GPPB Circular 001-2020 would only apply to procurements undertaken pursuant to the said legal authorities. Hence, the representation that the subject MOA was undertaken on the basis of the partnership arrangement authorized under Section 4(l) of the *Bayanihan* Act effectively closes the door to the application of the rules on advance payment for procurements made under RA No. 9184 or Section 4(k) of the *Bayanihan* Act. Instead, accounting and auditing rules on reimbursement shall apply, which is within the purview of the Commission on Audit.

As a final note, the above discussion was made on the basis of the particular facts presented and circumstances prevailing, and may not, therefore, be applicable given a different set of facts and circumstances.

We hope to have sufficiently addressed your concerns.

Sincerely yours,

ROWENA CANDICE M. RUIZ
Executive Director V

Copy furnish:
Secretary Wendel E. Avisado
Chairperson, GPPB

¹⁰ Signed on 20 April 2020, effective immediately.