

NPM No. 039-2017

20 December 2017

ATTY. WENDEL E. AVISADO
National President
BOY SCOUTS OF THE PHILIPPINES (BSP)
181 Natividad Almeda-Lopez St. Ermita, 1000 Manila

Re: Consignment Agreements -

Dear Atty. Avisado:

This refers to the Honorable President's letter requesting our opinion on whether BSP can continue to market and sell Scout paraphernalia through consignment agreement.

It is represented that consignment agreements were entered into by the BSP, through the National Scout Shop (NSS), with its suppliers for the production of Scout paraphernalia for BSP's exclusive use in all its programs, trainings, activities, among others. BSP, as a government-owned or -controlled corporation, initiated a consignment system as part of its regular operations. These agreements were duly approved by the governing and policy making body, the National Executive Board, and the corresponding suppliers and manufacturers were duly accredited.

It was represented that the uniforms, insignias, badges, distinctive titles, words and phrases are protected under Sections 7 and 10 of Republic Act. No. 7278¹. Article X, Section 6 of the BSP National By-Laws provides for the creation of a National Scout Shop Committee which shall have the exclusive authority and responsibility for the procurement, manufacture, sale and distribution of official Scout equipment, supplies, badges, insignia, as prescribed and approved by the National Executive Board.² Further, the provision states that:

1. It shall operate a National Scout Shop as its basic objective, it shall make available nationwide good quality official Scout items priced reasonably to make them affordable to all Scouts. At the same time, it shall develop the NSS to realize its full potential as a source for the organization and the Local Councils;

¹ An Act Amending Commonwealth Act No. 111, as Amended by presidential Decree No. 460, entitled "An Act to Create a Public Corporation to be Known as the Boy Scouts of the Philippines, and to refine its Powers and Purposes," by Strengthening the Volunteer and democratic Character of the Boy Scouts of the Philippines and for other Purposes.

² G.R. No. 177131, 7 June 2011.

2. For purposes of operating the National Scout Shop and Implementing the policies and objectives of the Committee, the National Executive Board may, in proper cases, and insofar as consistent with the provisions of Republic Act 7278, resolve to incorporate a wholly-owned and controlled subsidiary corporation; and
3. It shall grant and supervise the issuance and control of licenses under which manufacturers and distributors are authorized to produce or buy or sell items or equipment using the name of the BSP under such policies as may be approved by the National Executive Board, and for such royalties and other considerations to be paid to the Boy Scouts of the Philippines.

The Commission on Audit (COA) resident auditors of BSP noted, in their series of audit observation memoranda (AOM), that the BSP has violated Republic Act (RA) No. 9184, the Government Procurement Reform Act, stating among others, that the BSP owns the products produced under the existing consignment agreements by virtue of granting the manufacturers and suppliers the authority to produce Scout paraphernalia for and on behalf of the BSP. It added that the actual consignment agreements entered into between BSP-NSS with various suppliers were actually procurement activities, not a consignment, involving a Seller-Buyer relationship, which should be subject to public bidding as required by RA 9184 and its Implementing Rules and Regulations (IRR). Thus, this request for opinion.

Without touching on the legality and validity of the method used in entering into contracts with various suppliers, we shall discuss the concepts of consignment and procurement, and provide our opinion thereafter.

Consignment Agreement -

The 2016 revised IRR of RA 9184 states that a consignment agreement is an arrangement where the following requisites are present: (a) delivery of goods by their owner (consignor), without sale, to a government agency (consignee); (b) consignee must try to sell the goods and remit the price of the sold goods to the consignor; (c) consignee accepts without any liability except for failure to reasonably protect them from damage; (d) no disbursement of government funds is involved; and (e) at terms not disadvantageous to the Government of the Philippines (GoP).³

Hence, since there is no acquisition of goods and fund expenditure on the part of government relative to a consignment agreement, such consignment arrangement is not considered a procurement transaction as defined in RA 9184 and its associated 2016 IRR. This notwithstanding, the parameters for a consignment transaction is mentioned in Section 7.3.2 of the IRR where the requirements for its adoption and implementation are clearly laid down, at least to this extent, the IRR of RA 9184 applies to consignment agreement between the consignor entity and the consignee, the relevant government agency.

Definition of Procurement -

Procurement is defined as the acquisition of goods, consulting services, and the contracting for infrastructure projects by the procuring entity.⁴ In the process of acquisition,

³ Section 7.3.2 of the 2016 IRR of RA 9184.

⁴ Section 5(aa) of RA 9184.

public funds are disbursed by the government. Hence, we consistently opine in our earlier opinions that for as long as public funds are utilized or is contemplated to be spent for any procurement activity, it shall, by force, fall within the ambit of the present procurement law.⁵ Corollarily, if the government transaction or activity does not involve use of public funds, such transaction or activity is not within the purview and coverage of RA 9184 and its IRR.⁶ Thus, there are two important elements to be considered in determining whether the activity is considered procurement within the coverage of RA 9184 and its IRR, thus:

1. The activity involves the acquisition of goods, consulting services, and the contracting for infrastructure projects; and
2. Public funds are utilized or is contemplated to be spent.

Consequently, the law and its IRR cover the acquisition by government of goods, civil works, and consulting services, which contemplates expenditure of public funds, and the regulation of which is the primary consideration for the enactment of the law. RA 9184, to reiterate, contemplates procurement of projects to be funded by public funds.⁷

Summary -

Anent all the foregoing, the arrangement between BSP and its various suppliers may fall within the coverage of RA 9184 and its 2016 IRR if there is acquisition of goods and public funds were spent for that purpose. Additionally, consignment agreements are not procurement activities within the coverage of RA 9184 and its 2016 IRR since it does not involve the acquisition of goods and public expenditure on the part of the Procuring Entity; provided, that all the elements of consignment agreement under Section 7.3.2 of the 2016 IRR of RA 9184 are present. Under the circumstances presented, it is prudent, however, for BSP to carefully review the contractual arrangements entered into with various suppliers for purposes of determining whether it is actually a consignment, which is not subject to public bidding, or procurement, in which case the procurement rules and procedures under RA 9184 and its 2016 IRR shall apply.

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.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director V

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⁵ NPM No. 141-2004 dated 5 November 2004.

⁶ NPM No. 60-2013, dated 26 June 2013.

⁷ *Department of Foreign Affairs and Banko Sentral ng Pilipinas v. Hon. Franco T. Falcon and BCA International Corporation*, G.R. No. 176657, 1 September 2010.