



Department of Budget and Management  
**GOVERNMENT PROCUREMENT POLICY BOARD**  
**TECHNICAL SUPPORT OFFICE**

**NPM No. 10-2012**

16 January 2012

**HON. CONCHITA CARPIO MORALES**

*Ombudsman*

**OFFICE OF THE OMBUDSMAN**

Ombudsman Bldg., Agham Road, Government  
North Triangle, Diliman, Quezon City

**Re: Execution of Contract and Issuance of Notice to Proceed**

Dear Ombudsman Carpio Morales:

We respond to your letter dated 4 January 2012, requesting for guidance in a construction project conducted by the Office of the Ombudsman, wherein a Notice of Award (NOA) was issued but the execution of the corresponding contract and Notice to Proceed (NTP) was deferred.

As represented, former Ombudsman Merceditas Gutierrez initiated a project for the construction of the Ombudsman Annex Building. A NOA was issued to the Joint Venture of Filipinas (Prefab Building) Systems, Inc. and F.F. Cruz & Co., Inc. as the winning bidder on 4 March 2011, but she failed to enter into contract until her resignation in early May 2011. On 18 May 2011, then Acting Ombudsman Orlando C. Casimiro issued a letter to the winning bidder deferring the execution of contract and issuance of the NTP until a new Ombudsman assumes office. The Honorable Ombudsman assumed office on 26 July 2011 and now inquires if she can proceed and complete the process in awarding the contract.

**Effect of a Communicated and Duly Received NOA**

In general, contracts undergo three distinct stages, to wit: negotiation; perfection or birth; and, consummation.<sup>1</sup> The receipt by the winning bidder of the NOA is the initial step that leads to the execution of the contract and the issuance of the NTP. The effect of an unqualified acceptance of the offer or proposal of the bidder is to perfect a contract, upon notice of the award to the bidder.<sup>2</sup> As held by the Supreme Court in *Insular Life vs. Asset Builders Corporation*<sup>3</sup>, the written NOA, which constituted the acceptance of the proposal, is

<sup>1</sup> Sargasso vs. PPA, G.R. No. 170530, 5 July 2010

<sup>2</sup> City of Cebu vs. Heirs of Rubi, G.R. No. 128579, 29 April 1999

<sup>3</sup> GR 147410, 5 February 2004

a condition *sine qua non* to the perfection of the contract. However, the due execution of documents representing a contract is one thing, and its perfection is another.

The High Court opined that being consensual, a contract is perfected by mere consent. From the meeting of the offer and acceptance upon the object and the cause that would constitute the contract, consent arises. However, "the offer must be certain" and "the acceptance seasonable and absolute; if qualified, the acceptance would merely constitute a counter-offer."<sup>4</sup> Accordingly, a duly communicated and received NOA brings about the perfection of contract through the meeting of the minds of the offeror - the bidder, and the offeree - the Procuring Entity.

### **Nature of Government Contracts**

Government contracts are regarded as special contracts due to the particular and specific requirements as to forms and solemnities that need be complied with prior to its execution. Section 37.1.4 of the Implementing Rules and Regulations (IRR) of Republic Act (RA) 9184 provides that the award of contract is subject to compliance with the conditions enumerated therein, the issuance of the NOA and its receipt by the winning bidder must be accompanied by the actual execution and signing of the contract, including the posting of the performance security, among others. Hence, even if the NOA was duly issued, communicated to and received by the winning bidder, the contract although deemed perfected, must comply with all the requirements provided for under the law and the rules for it to be legally enforceable.

### **Mandatory Nature of the Procurement Rules and Timelines**

Under RA 9184 and its IRR, the winning bidder and Procuring Entity (PE) shall enter into contract within ten (10) calendar days from receipt of the NOA. Thereafter, the PE shall issue the NTP together with a copy of the approved contract to the successful bidder within three (3) calendar days from the date of the approval of the contract by the appropriate government approving authority. The contract effectivity date, as provided in the NTP, shall not be later than seven (7) calendar days from its issuance.<sup>5</sup> Hence, the PE is provided a maximum of twenty (20) days from the issuance of the NOA to execute the actual contract and mandate its implementation.

As we have discussed in a previous opinion<sup>6</sup>, RA 9184 having been enacted for the advancement of public welfare undoubtedly contains mandatory provisions. Failure to follow such rules generally renders the proceeding to which it relates illegal and void, or the violation of which makes the decision rendered therein invalid.

Article 5 of the Civil Code of the Philippines provides that "acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity". It is implicit, however, in Section 65.1 (b)<sup>7</sup> of RA 9184 that

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<sup>4</sup> Insular Life vs. Asset Builders Corporation, GR 147410, 5 February 2004

<sup>5</sup> NPM No. 003-2010 dated 7 January 2010

<sup>6</sup> NPM No. 026-2005 dated 25 April 2005

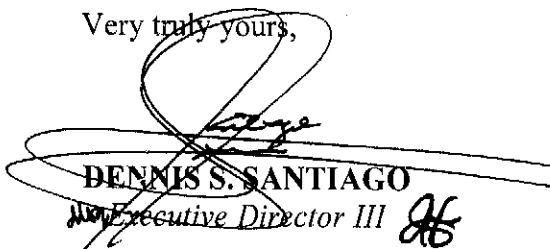

<sup>7</sup> Without prejudice to the provisions of R.A. 3019 and other penal laws, public officers who commit any of the following acts shall suffer the penalty of imprisonment of not less than six (6) years and one (1) day, but not more than fifteen (15) years:

awarding of contracts beyond the prescribed period of action may be recognized for justifiable causes. In that, although the periods of action under RA 9184 and its IRR are mandatory in character, penal sanctions or liability will not set in against the concerned public officers provided that valid, reasonable, and justifiable causes exist to warrant a delay in the contract execution. Thus, in a related opinion<sup>8</sup>, we stated that the PE may still award the contract even beyond the three-month period, provided that the failure was due to justifiable causes, and provided further, that the bid security of the bidder remains valid.

From the foregoing, we are of the view that although there is a delay in the procurement process, the Honorable Ombudsman may opt to pursue the execution of the contract by requiring the winning bidder to comply with the conditions under Section 37.1.4<sup>9</sup> of the IRR of RA 9184 after determination that the delay is due to a valid, reasonable, and justifiable cause.

We hope our advice provided sufficient guidance on the matter. Should you have further questions, please do not hesitate to contact us.

Very truly yours,

  
**DENNIS S. SANTIAGO**  
*Executive Director III* 

*Ambquilang*

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b) Delaying without justifiable cause, the screening for eligibility, opening of bids, evaluation and post evaluation of bids, and awarding of contracts beyond the prescribed periods of action provided for in this IRR.

<sup>8</sup> NPM No. 014-2008 dated 8 August 2008

<sup>9</sup> Notwithstanding the issuance of the Notice of Award, award of contract shall be subject to the following conditions:

- a) Submission of the following documents within the prescribed period:
  - i) Valid JVA, if applicable, within ten (10) calendar days from receipt by the bidder of the notice from the BAC that the bidder has the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid, as the case may be; or
  - ii) In the case of infrastructure projects, valid PCAB license and registration for the type and cost of the contract to be bid for foreign bidders, within thirty (30) calendar days from receipt by the bidder of the notice from the BAC that the bidder has the Lowest Calculated Responsive Bid, when the Treaty or International or Executive Agreement expressly allows submission of the PCAB license and registration for the type and cost of the contract to be as a precondition to the Notice of Award;
- b) Posting of performance security in accordance with Section 39 of this IRR;
- c) Signing of the contract as provided in Section 37.2 of this IRR; and
- d) Approval by higher authority, if required, as provided in Section 37.3 of this IRR.