



Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 027-2016

27 April 2016

ATTY. MARCELINO AGANA IV

Partner

AB LAW OFFICE

203 First Midland Condominium, 109 Gamboa St.,
Legazpi Village, Makati City

Re: Advance Payment

Dear Atty. Agana:

This refers to your letter requesting our opinion on the interpretation of the following provision concerning the request for Advance Payment in the procurement of goods, thus:

“Upon submission of an irrevocable letter of credit or bank guarantee issued by a Universal or Commercial Bank, advance payment not to exceed fifteen percent (15%) of the contract amount shall be allowed and *paid within sixty (60) calendar days from signing of the contract*. The irrevocable letter of credit or bank guarantee must be for an equivalent amount, shall remain valid until the goods are delivered, and accompanied by a claim for advance payment.”¹ (Emphasis supplied).

As represented, before the expiry of the sixty-day period for the release of Advance Payment, the Contractor requested for an extension of such period. However, the procuring entity did not respond to the request. The contractor, having presented a bank guarantee from a Universal Bank, is now requesting that the procuring entity grant the request for the release of the Advance Payment as mobilization fee for the project. Hence, the following queries:

1. Is the sixty-day period a mandatory requirement such that the release of the mobilization fee must be made within such period; and
2. Given the unanswered request for extension, may the procuring entity extend the sixty-day period in order to grant the request for release of mobilization fee?

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 opinions, respectively, on issues purely pertaining to the interpretation and application of procurement laws, rules and regulations. We have no authority to dictate to the procuring entity how to

¹ Section 4.5 of Annex “D” of the IRR of RA 9184.

decide or resolve issues relative to its procurement activities. Moreover, we adhere to the position that we cannot, nor any other agency, authority, or official, encroach upon or interfere with the exercise of the functions of the Head of the Procuring Entity and the Bids and Awards Committee, since these duties and responsibilities fall solely within the ambit of their authority and discretion. In this regard, we shall limit our discussion on the interpretation of relevant procurement rules and regulations pertinent to the issues presented.

Advance Payment

As a general rule, Section 88 of Presidential Decree No. 1445 or the *Government Accounting Code of the Philippines* provides for an express prohibition against Advance Payment. It requires that except with the prior approval of the President, 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.

Cognizant of a policy vacuum that may arise in the implementation of contracts for the procurement of goods arising from the absence or insufficiency of guidelines and/or rules and regulations prescribing for the conditions for permissible Advance Payments, the GPPB sought the approval of the President of the Philippines to allow Advance Payment in certain instances². Among these instances is the above-cited provision on Advance Payment not to exceed fifteen percent (15%) of the contract amount, subject to the submission of an irrevocable letter of credit or bank guarantee issued by a Universal or Commercial Bank, *which shall be allowed and paid within sixty (60) calendar days from the signing of contract.*

In a previous opinion³, we had the occasion to explain the purpose of granting an Advance Payment in the context of an infrastructure project, thus:

“Advance payment on the contract is a *form of financial assistance* that the Government extends to the contractor, upon his request, before he commences work on the project contracted for as working capital for particular infrastructure projects, whether major, urgent or otherwise, as necessitated by the complexity of present-day Government contract administration. Such financial help is calculated to encourage contractors to comply faithfully with their contractual obligations and to *forestall any delay in the accomplishment of the work* under the contract.” (Emphasis supplied)

Applying this reasoning in the procurement of goods, Advance Payment is given to suppliers and distributors as a form of financial assistance to encourage these market operators to comply faithfully with their contractual obligations and to forestall any delay in the delivery of the needed goods and services. Thus, it can be gainfully said that the inclusion of a period on the release of Advance Payment was calculated to facilitate and support a “*stick-to-schedule*” delivery of goods and rendition of services at the right time to address the needs of the procuring entity.

² GPPB Resolution No. 04-2005 dated 1 April 2005, as amended by GPPB Resolution No. 04-2010 dated 25 June 2010.

³ NPM No. 54-2004 dated 20 April 2004 citing Fernandez, Bartolome C., *A Treatise on Government Contracts under Philippine Law, 2001 Ed., p. 115.*

Further, a careful review of the Advance Payment permitted under Section 4.5, Annex "D"⁴ of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 indicates that it creates reciprocal obligations between the procuring entity and the supplier.

On the part of the supplier, to be entitled to such Advance Payment, it must submit an irrevocable letter of credit or bank guarantee issued by a Universal or Commercial Bank accompanied by a claim for Advance Payment. The submitted security must be for an equivalent amount of Advance Payment being claimed and shall remain valid until the goods are delivered. On the other hand, the procuring entity, upon timely submission by the supplier of the required documents, must grant the Advance Payment and pay it within sixty (60) calendar days from the signing of contract.

The mandatory nature of these obligations is bolstered by the use of the words "shall" in the rules, that is, it "**shall be allowed and paid within sixty (60) calendar days from the signing of contract.**" The word "**shall**" means ought to, must, obligation used to express a command or exhortation used in laws, regulations or directives to express what is mandatory.⁵ In common or ordinary parlance, the term "shall" is a word of command, one which has a compulsory meaning, and is generally imperative or mandatory, unless the contrary intent appears.⁶ Thus, the use of the word "shall" connotes the mandatory nature of the allowance and release by the procuring entity of the Advance Payment within sixty (60) calendar days from the signing of contract, couched upon a claim or request made by the winning bidder for Advance Payment, and coupled with the submission of an Irrevocable Letter of Credit or Bank Guarantee issued by a Universal or Commercial Bank in a timely manner.

All told, considering the purpose of Advance Payment of forestalling any delay in the delivery of goods and rendition of services and the use of the word "shall" which connotes command or compulsion, it is our considered view that ***it is mandatory for the procuring entity to comply with the sixty (60) calendar days from the signing of contract in allowing advance payment, provided that the required security and claim for advance payment was submitted by the supplier within the same sixty (60) day period.***

It must be emphasized that in allowing Advance Payment under Section 4.5, Annex "D" of the IRR of RA 9184, the following parameters shall be observed:

1. Advance Payment shall not exceed fifteen percent (15%) of the contract amount;
2. It shall be allowed and paid by the procuring entity within sixty (60) calendar days from the signing of contract;
3. The contractor shall submit an Irrevocable Letter of Credit or Bank Guarantee issued by a Universal or Commercial Bank accompanied by a claim for Advance Payment by the winning bidder within the same sixty (60) calendar days; and
4. The Irrevocable Letter of Credit or Bank Guarantee must be for an equivalent amount of the Advance Payment being claimed and shall remain valid until the goods are delivered.

⁴ *Contract Implementation Guidelines for the Procurement of Goods, Supplies and Materials.*

⁵ *Baranda v. Gustilo* 165 SCRA 757 (1988).

⁶ *Gonzales v. Chavez*, 205 SCRA 816 (1992).

Period for the Release of Advance Payment

To reiterate, the mandatory nature of allowing Advance Payment within the sixty (60) day period under Section 4.5, Annex "D" of the IRR of RA 9184 is premised on the submission by the supplier of an Irrevocable Letter of Credit or Bank Guarantee issued by a Universal or Commercial Bank accompanied by a claim for Advance Payment within the same sixty (60) day period. In case a supplier requests for an extension of time on the submission of the required documents, the extension of the sixty (60) day period for the release of Advance Payment necessarily depends on whether the Procuring Entity, based on its sound discretion, will also extend the period for the submission of the required documents beyond the sixty (60) day period. The Procuring Entity must show, however, that there is valid, justifiable, reasonable, sufficient and compelling ground for such extension.

The question of whether the sixty (60) day period for the release of Advance Payment may be extended by the procuring entity will rely upon its determination of the ultimate effect and consequence of such extension or non-extension insofar as the "needs" of the procuring entity are concerned; the relation of addressing such needs with existing or future requirements; the attendant price and non-price factors; and, the time for which it should be addressed or complied with *vis-à-vis* the totality of its definitive impact and outcome to the overall acquisition plan and forecast of the procuring entity.

In our previous opinions involving the procurement of consulting services⁷ and infrastructure projects⁸, we stated that Advance Payment cannot be claimed if the winning bidder has commenced with the implementation of the project under the contract, as doing so already negates the very purpose of granting such privilege to the contractor. There is cogent reason that the same opinions be also applied in the procurement of goods, that is, no claim for Advance Payment shall be granted if the supplier has already commenced the implementation of the project.

Consequently, based on its own needs, and the interrelated factors to be considered relative to such needs, it is incumbent upon the procuring entity, after a careful assessment and scrutiny of all the attending circumstances, to decide whether to allow for an extension of the period or not. In no case shall the Advance Payment be granted if the supplier has already commenced the implementation of the project.

Summary

As regards the first issue, considering the purpose of Advance Payment of forestalling any delay in the delivery of goods and rendition of services and the use of the word "shall" which connotes command or compulsion, it is our considered view that it is mandatory for the procuring entity to comply with the sixty (60) day period from the signing of contract in allowing Advance Payment, provided that the required security and claim for Advance Payment was submitted by the supplier within the same sixty (60) day period. In all instances, the conditions laid down in Section 4.5, Annex "D" of the IRR of RA 9184 shall be strictly complied with.

⁷ NPM No. 126-2012 dated 8 October 2012.

⁸ NPM No. 56-2013 dated 26 June 2013.

Relative to the second issue, based on its own needs, and the interrelated factors to be considered relative to such needs, it is incumbent upon the procuring entity, after a careful assessment and scrutiny of all the attending circumstances, to decide whether to allow for an extension of the period or not. In no case shall the Advance Payment be granted if the supplier has already commenced the implementation of the project.

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,


MELISSA A. SANTIAGO-YAN
Officer-In-Charge

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