



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

NPM No. 37-2013

10 April 2013

MR. BIENVENIDO S. BAUTISTA, FICD
President and Chief Executive Officer
PITC PHARMA, INC. (PPI)
2/F National Development Company Building,
116 Tordesillas St., Salcedo Village, Makati City

Re : Posting of Performance Security

Dear Mr. Bautista:

We write in relation to your letter dated 4 April 2013 requesting for the issuance of a resolution/legal opinion clarifying whether PPI is exempt from posting a Performance Security provided for under Section 39 of Republic Act (RA) No. 9184 when it enters into any procurement contract with other government agencies and instrumentalities.

As represented, PPI has been given express mandate to be the central/lead agency for procurement of all government agencies' requirements for drugs and medicines per RA 9502. In addition, the Government Procurement Policy Board (GPPB) confirmed that PPI may act as a servicing agency from which government agencies may directly procure imported medicines through Negotiated Procurement (Agency to Agency) under Section 53.5 of the revised Implementing Rules and Regulations (IRR) of RA 9184.¹ The present request stems from the practice of government agencies dealing with PPI of requiring the latter to post Performance Security in their procurement activities conducted through Negotiated Procurement (Agency to Agency) under Section 53.5 of the IRR.

We note that although PPI is recognized as the central/lead agency for procurement of all government agencies' requirements for drugs and medicines, RA 9502 does not exempt it from the procurement policies, rules and regulations established under RA 9184 and its IRR. Thus, we are of the view that PPI is not exempt from posting a Performance Security provided for under Section 39 of RA 9184 and its IRR when entering into a contract with other government agencies.

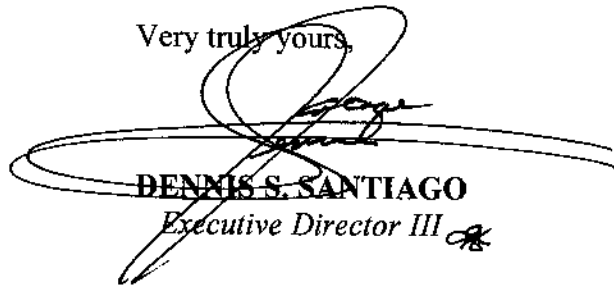
Nonetheless, we wish to inform you that the Implementing Guidelines on Agency-to-Agency Agreements (Guidelines), which prescribes the conditions when a government agency may procure from another agency without need of public bidding pursuant to Section 53.5 of the IRR of RA 9184, provides under Section 5(c) thereof that the Procuring Agency

¹ Policy Matter No. 01-2010 dated 27 August 2010.

may require the Servicing Agency to post a Performance Security under Section 39 of RA 9184. This suggests that the posting of a Performance Security is an option which the procuring agency may impose upon the servicing agency subject to the former's discretion. Accordingly, PPI may be required to post Performance Security for contracts where the procuring entity has elected to require the same from PPI.

We hope our advice provided sufficient guidance on the matter. Note that this opinion is being issued on the basis of facts and particular situation presented, and may not be applicable given a different set of facts and circumstances. Should you have other concerns, please do not hesitate to contact us.

Very truly yours,



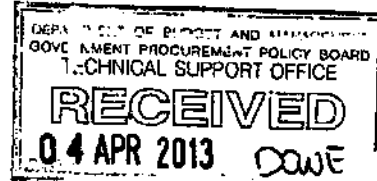
DENNIS S. SANTIAGO
Executive Director III



A Subsidiary of the Philippine International Trading Corporation

Ref. No. CEO/L 2013- 04-216

03 April 2013



ATTY. DENNIS S. SANTIAGO
Executive Director III
Government Procurement Policy Board
Technical Support Office
Unit 2506, Raffles Corporate Center
Ortigas Center, Pasig City

SUBJECT: *Exemption of PPI from Posting a Performance Security*

Dear Atty. Santiago:

Request:

This is to request from your good office for the issuance of a resolution/legal opinion clarifying whether or not PITC Pharma, Inc. is exempt from posting a performance security provided for under Section 39 of the Government Procurement Reform Act, otherwise known as Republic Act 9184.

Background:

PITC Pharma, Inc. (PPI) is a subsidiary of the Philippine International Trading Corporation (PITC) and an affiliate of the National Development Company (NDC), and an attached agency of the Department of Trade and Industry (DTI).

Meanwhile, PITC and NDC are government-owned and controlled corporations (GOCCs) organized and existing under and by virtue of Presidential Decree 1071, as amended, and Presidential Decree No. 1648, as amended, respectively.

PPI was created to serve as the corporate vehicle that will implement the Half Priced Medicines Program of the government, and to which the pharmaceutical operations of the PITC has been transferred.

PPI's mandate is further strengthened by the Implementing Rules and Regulations (IRR) of the Universally Accessible Cheaper and Quality Medicines Act of 2008, otherwise known as Republic Act 9502, wherein PPI has been

tasked to undertake direct importation for government agencies and offer the same to private parties and to establish a common facility for pooled procurement.

On 27 August 2010, the Government Procurement Policy Board (GPPB) itself confirmed that PPI may act as a servicing agency and that government agencies may directly procure imported medicines from PPI under the alternative mode of negotiated procurement (or agency-to-agency agreements). It further ruled that PPI may also act as procurement agent for government entities subject to Section 53.6 of the Revised IRR of RA 9184. To carry out this function, PPI has established its Bids and Awards Committee in accordance with Article V of RA 9184.

Furthermore, PPI is classified as GOCC under the *Social Services and Housing* sector, as listed in the **Annex A** prepared on 03 January 2013 by the Governance Commission for Government Owned and Controlled Corporations.

With the enactment of RA 9502 and its IRR, PPI has been given express mandate to be the central/lead agency for procurement of all government agencies' requirements for drugs and medicines.

Rule 58, Chapter XI of the IRR of RA 9502 categorically provides that:

"Rule 58. Authorizing the PPI. The PPI or its equivalent agency is hereby authorized to establish a common facility for pooled procurement in compliance with RA 9184." (Emphasis supplied)

Discussion:

Beginning 2010, the Department of Health (DOH), and in 2012, a number of local government units (LGUs) began to require PPI to post performance security in its procurement activities. Without knowing the reason why there is such a new requirement by these government entities, PPI nonetheless complied with the same so as not to deter PPI in pursuing its legal mandate.

Prior to 2010, PPI had not been posting nor was PPI required to post, performance security bond by DOH and other government entities.

As a concrete example, PPI posted just recently a bond in favor of DOH in the amount of Php 6,940,819.94 for its procurement project on the request for Breast Cancer and Leukemia Medicines by DOH with a total contract price of Php 138,816,398.75. For this particular transaction alone, PPI incurred and had to pay a total cost of Php 208,224.60 to cover the opening charges of a standby letter of credit with Land Bank of the Philippines (LBP). Attached herewith are copies of the DOH Notice to File Performance Security and the Computation of the Cost Incurred by PPI in Posting the Bond, marked as Annexes "A" and "B," respectively.

PPI, in another procurement activity, caused to incur and pay a total amount of Php 322,646.40 to cover bank charges for the opening of a standby letter of credit with LBP involving the recently concluded project on the request of DOH for Influenza and Pneumococcal Vaccines with a total contract price of Php 215,097,600.00 and with a bond in the amount of Php 10,754,880.00. Likewise attached herewith are copies of the DOH Notice to File Performance Security and the Computation of the Cost Incurred by PPI in Posting the Bond, marked as Annexes "C" and "D," respectively.

In the aforementioned cases, PPI is unnecessarily constrained to incur and pay bank charges for such bank accommodation just to comply with the performance security requirement of DOH.

Furthermore, the same bond requirement poses an added impediment to PPI in pursuing its legal mandate, that is, to establish a common facility for pooled procurement and act as the procurement agent for other government entities. In effect, PPI is ultimately hampered to proceed, with dispatch, in the supply of the best, most affordable and high-quality drugs and medicines to various government agencies and instrumentalities.

Thus, we are of the opinion that PPI is effectively prevented from pursuing its legal mandate under RA 9502, if PPI will be construed to still be required to post performance security whenever it enters into procurement agreement with other government agencies and instrumentalities, considering that PPI is just another servicing agency and GOCC, *and not a supplier*, likewise acting as the procurement agent for other government entities in the avilment of the best and most affordable drugs and medicines.

In view of the foregoing, we are requesting your office to clarify by way of resolution the issue on whether PPI, in light of its legal mandate, is exempt from posting performance security when it enters into any procurement contract with other government agencies and instrumentalities.

Thank you for your utmost attention on our request.

Very truly yours,



BIENVENIDO S. BAUTISTA, FICD
President and Chief Executive Officer