



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

NPM No. 59-2014

15 October 2014

MR. KENNETH C. CABANTING

Municipal Accountant

MUNICIPALITY OF LANTAPAN

Lantapan Municipal Hall

Lantapan, Bukidnon

Re: Sanctions and Remedies for Defaulting Supplier

Dear Mr. Cabanting:

This refers to your electronic mail (email) seeking our opinion on the following concerns relative to the implementation of a project through Negotiated Procurement under Section 53.1 (Two-Failed Biddings) of the revised Implementing Rules and Regulations (IRR) of Republic Act No. (RA) 9184, thus:

1. What sanctions or penalties can an LGU impose to a supplier of goods who failed to deliver all the items indicated in the Purchase Order; and
2. Whether the contract for the delivery of remaining or undelivered goods may be awarded to the bidder with the second lowest quotation.

Sanctions or Penalties

Obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith.¹ Of these obligations, timely delivery of goods is expected from supplier in a contract for supply and delivery of goods. Unless caused by force majeure or fortuitous event, delay in the delivery of goods may be regarded as breach or default in the performance of contractual obligations. Inasmuch as the supplier guarantees the timely delivery of goods, a delay not caused by force majeure or fortuitous event shall open the defaulting supplier to several sanctions or penalties as may be warranted by attending circumstances. These include the imposition of liquidated damages, termination of contract, blacklisting and forfeiture of performance security.

Imposition of Liquidated Damages

Section 68 of RA 9184 mandates that all contracts executed in accordance with RA 9184 shall contain a provision on liquidated damages which shall be payable by the contractor in case of breach. The term "**all contracts**" connotes the inclusion of all contracts whether as a result of competitive bidding or any alternative methods of procurement under

¹ Art. 1159 of the New Civil Code of the Philippines.

RA 9184 and its IRR. *Ubi lex non distinguit, nec nos distinguere debemus*. Where the law does not distinguish, we should not distinguish.

Liquidated damages partakes the nature of a penalty clause fixed by the contracting parties as a compensation or substitute for damages in case of breach of the obligation.² From the moment the ground for its imposition arises, the contractor is bound to pay the stipulated amount without need for proof of the existence and the measure of damages caused by the breach.³ In connection with this, Section 3.1 of the Contract Implementation Guidelines for the Procurement of Goods, Supplies and Materials⁴ provides that when the supplier fails to satisfactorily deliver goods under the contract within the specified delivery schedule, inclusive of duly granted time extensions, if any, the supplier shall be liable for the delay and shall pay the PE liquidated damages.

Based on the foregoing, liquidated damages may be imposed by a PE against a contractor who defaulted in the delivery of the goods. For guidance, the amount of the liquidated damages shall be at least equal to one-tenth of one percent (0.1%) of the cost of the unperformed portion for every day of delay until such goods are finally delivered and accepted by the PE concerned⁵. It also bears stressing that once the cumulative amount of the liquidated damages reached ten percent (10%) of the amount of the contract, the PE shall terminate the contract, without prejudice to other causes of action and remedies open to it⁶.

Termination of Contract

The Guidelines on the Termination of Contracts⁷ (Guidelines) provides for the policies and procedures relating to the whole or partial termination of government procurement contracts of goods, infrastructure projects, and consulting services and applies to both contracts procured through competitive bidding or alternative methods of procurement. On Section III.A.1 thereof, the grounds for termination of contract (due to default) for the procurement of goods are enumerated, thus:

1. Outside of force majeure, the Supplier fails to deliver or perform any or all of the Goods within the period(s) specified in the contract, or within any extension thereof granted by the Procuring Entity pursuant to a request made by the Supplier prior to the delay, and such failure amounts to at least ten percent (10%) of the contract price;
2. As a result of force majeure, the Supplier is unable to deliver or perform any or all of the Goods, amounting to at least ten percent (10%) of the contract price, for a period of not less than sixty (60) calendar days after receipt of the notice from the Procuring Entity stating that the circumstance of force majeure is deemed to have ceased; or

² *Philippine Charter Insurance Corporation v. Petroleum Distributors & Service Corporation*, 18 April 2012, G.R. No. 180898 citing Comments and Jurisprudence on Obligations and Contracts, Desiderio P. Jurado, Twelfth Revised Edition 2010, p.219.

³ *Ibid* citing *Titan Construction Corporation v. Uni-Field Enterprises, Inc.*, 01 March 2007, G.R. No. 153874.

⁴ Annex "D" of the IRR of RA 9184.

⁵ Section 68 of the IRR of RA 9184 and reiterated in Section 3 of the Contract Implementation Guidelines for the Procurement of Goods, Supplies and Materials.

⁶ *Ibid*.

⁷ Issued through GPPB Resolution No. 18-2004 dated 22 December 2004.

3. The Supplier fails to perform any other obligation under the Contract.

Thus, if the PE can establish that any one of these grounds is present during the execution of a contract for the procurement of goods, termination of contract may be resorted to, provided that the procedures laid down on item IV of the Guidelines is observed. Further, in relation to termination of contract due to default of the contractor, Section 6 of the Uniform Guidelines for Blacklisting of Manufacturers, Suppliers, Distributors, Contractors and Consultants⁸ (Uniform Guidelines for Blacklisting) provides that the Head of the Procuring Entity (HOPE) shall immediately issue a Blacklisting Order disqualifying the erring contractor from participating in the bidding of all government project, and thereafter forfeit the performance security of the contractor.

Blacklisting and Forfeiture of Performance Security

Blacklisting is an administrative penalty disqualifying a person or an entity from participating in any government procurement for a given period.⁹ This forms part of the system of accountability in government procurement wherein private parties that deal with the Government of the Philippines, when warranted by circumstances, shall be investigated and held liable for their actions.¹⁰ It is imposed to bidders or contractors whenever any of the grounds under the Uniform Guidelines for Blacklisting exists.

Thus, in the procurement of goods, a blacklisting order may be issued to a supplier on the ground of its unsatisfactory progress in the delivery of the goods arising from its fault or negligence and/or delivery of unsatisfactory or inferior quality of goods, as may be provided in the contract.¹¹ In addition to this penalty, the performance security posted by the contractor shall also be forfeited.¹² It must be emphasized however that under the Uniform Guidelines for Blacklisting, the existing contract must be terminated first prior to issuance of blacklisting order and forfeiture of performance security.

Take-over of Terminated Contracts

If a PE terminates a contract due to default, insolvency, or for a cause, it may enter into a Negotiated Procurement pursuant to Section 53(c) of RA 9184 and 53.3 of its IRR.¹³ Under Section 53.3 of the IRR, take-over of contracts is sanctioned where, after the contract has been terminated, immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities. Only upon the existence of these conditions can the PE resort to Negotiated Procurement under Take-over of Contracts modality.

Sections 53.3.1 to 53.3.3 of the IRR of RA 9184 provides for the procedures in conducting the negotiation, thus:

⁸ Issued through GPPB Resolution No. 09-2004 dated 20 August 2004.

⁹ Uniform Guidelines for Blacklisting of Manufacturers, Suppliers, Distributors, Contractors and Consultants, Section 3.3.

¹⁰ Section 3(d) of RA 9184.

¹¹ *Supra*, Section 4.2(d).

¹² *Ibid*, Section 4.2, last paragraph.

¹³ Item IV.8 of the Guidelines on Termination of Contracts.

1. The contract may be negotiated starting with the second lowest calculated/highest rated bidder for the project under consideration at the bidder's original bid price.
2. If negotiation fails, then negotiation shall be done with the third lowest calculated/highest rated bidder at his original price. If the negotiation fails again, a short list of at least three (3) eligible contractors shall be invited to submit their bids, and negotiation shall be made starting with the lowest calculated/highest rated bidder.
3. Authority to negotiate contracts for projects under these exceptional cases shall be subject to prior approval by the Heads of the Procuring Entities concerned, within their respective limits of approving authority.

Summary

All told, we wish to clarify the following matters relative to your concerns:

1. In case of default of supplier in the performance of its contractual obligations, the following may be undertaken:
 - a. Imposition of liquidated damages in the amount equal to one-tenth of one percent (0.1%) of the cost of the unperformed portion for every day of delay;
 - b. Termination of contracts based on the grounds and following the procedures stated in the Guidelines on Termination of Contracts; and
 - c. Issuance of blacklisting order and forfeiture of performance security in accordance with the provisions of the Uniform Guidelines on Blacklisting.
2. Supply and delivery of remaining goods after the contract has been terminated may be procured through Negotiated Procurement under Take-over of Contracts modality provided that all the conditions and requirements under Section 53.3 of the IRR of RA 9184 will be observed.

We hope 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 you have further questions, please do not hesitate to contact us.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director V

9/1/2014

Roundcube Webmail :: Re: LGU-Lantap...

Subject **Re: LGU-Lantapan Query**
From kenneth Cabanting <k19c74@yahoo.com>
To legal@gppb.gov.ph <legal@gppb.gov.ph>
Date 2014-08-30 16:54



gudday....

Sir, considering that the ABC of the Project is above 100,000.00, it was through alternative procurement after twice (2) failure of bidding...

Hoping that the above additional facts will now be sufficient for your Office to render opinion regarding the issue presented... Thank You.

On Wednesday, August 27, 2014 11:28 AM, "legal@gppb.gov.ph" <legal@gppb.gov.ph> wrote:

Dear Mr. Kenneth,

To facilitate the preparation of our legal opinion relative to your request last 11 August 2014, may we seek clarification on what mode of procurement was used in that particular procurement of goods where the supplier failed to deliver 100% of the goods per Purchase Order?

Thank you.

Legal and Research Division
Government Procurement Policy Board - Technical Support Office
Unit 2506 Raffles Corporate Center, F. Ortigas Jr. Road, Ortigas Center,
Pasig City
Tel. Nos. (02) 900-6741 to 44

11/27/14

Legal and Research Division

From: kenneth Cabanting <k19c74@yahoo.com>
Sent: Monday, August 11, 2014 3:49 PM
To: legal@gppb.gov.ph
Subject: lgu-lantapan query regarding a supplier of good's failure to deliver 100%

Sir/Madam:

The LGU Lantapan has a supplier of goods who failed to deliver 100% as per Purchase Order (PO).

Query 1. What sanctions or penalties can the LGU impose on the defaulting supplier?

Query 2. The LGU BAC is planning to award the remaining or undelivered goods to the 2nd lowest supplier but whose price quotation is above ABC but who is willing to match the price quotation of the 1st supplier (defaulting supplier). Is the BAC correct to award to the 2nd lowest supplier considering the above scenario?

Your opinion on the above queries will be of great help the LGU BAC in making decisions on the presented situation. Thank you.

Respectfully yours,

KENNETH C. CABANTING
Municipal Accountant

- 1) ^{Forfeiture} Performance Security - ✓
- 2) Termination - ✓
- 3) Liquidated Damages - ✓
- 4) Administrative Sanction - X