



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

NPM No. 79-2014

22 October 2014

MR. EDWIN O. ESTORNINOS
Member, BAC Secretariat
PHILIPPINE POSTAL CORPORATION (PHILPOST)
Liwasang Bonifacio, Manila

Re: Purposes of Corporations under the Articles of Incorporation

Dear Mr. Estorninos:

This refers to your letter sent by electronic mail dated 26 September 2014, requesting our opinion on the following issues:

- (1) Whether a bidder, engaged in a courier service, may participate in the procurement of Polyethylene Plastic Envelopes; and
- (2) Whether it is mandatory for a winning bidder under the Negotiated Procurement (two-failed biddings) to post a performance security.

As represented, a lone bidder participated in the Procurement of Various Polyethylene Plastic Envelopes of PHILPOST. However, the primary purpose of its business is to engage in the enterprise of providing courier service. The bidder contends that it may participate under its secondary purpose which states that: "to conduct and transact any and all lawful business, and to do or cause to be done any one or more of the acts and things herein set forth as its purposes, within or without the Philippines, and in any and all foreign countries, and to do everything necessary, desirable or incidental to the accomplishment of the purposes."

Purpose of Business

The best proof a corporation's purpose is embodied in its Articles of Incorporation (AI) and By-Laws. The AI must state the primary and secondary purposes of the corporation.¹ A corporation has no power except those expressly conferred on it by the Corporation Code² and those that are implied or incidental to its existence.³ *Section 36* of the Corporation Code enumerates 10 powers that a corporation enjoys in addition to the special

¹ *Gala v. Ellis Agro-Industrial Corp.* 418 SCRA 431 (2003).

² *Batas Pambansa Blg. 68.*

³ *Reynoso IV v. Court of Appeals* 345 SCRA 335 (2000).

powers that may be provided for in the purpose clause of the AI, which would also constitute express powers. Hence, there are two sources of express powers of a corporation, to wit:

- i. Those provided for in the law (Corporation Code); and
- ii. The Purpose clause of the articles of incorporation, specifically.

Section 45 of the Corporation Code recognizes also implied powers of every corporate entity emanating from its express powers, thus: “No corporation shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and except such are necessary or incidental to the exercise of the powers so conferred.”

In *Montelibano v. Bacolod Murcia Milling Co.*⁴, the Supreme Court had the occasion to pass upon the powers of a corporate entity, thus:

The rule is that in each case it is a question of the logical relation of the act to the corporate purpose expressed in the charter. If that act is one which is lawful in itself, and not otherwise, and is reasonably tributary to the promotion of those end, in a substantial, and not in a remote and fanciful sense, it may fairly be considered within charter powers. The test to be applied is whether the act in question is in direct and immediate furtherance of the corporation’s business, fairly incidental to the express powers and reasonably necessary to their exercise, if so, the corporation has the power to do it; otherwise, no.

On the other hand, one of the legal eligibility requirements under *Section 23.1* of the IRR of RA 9184 is the submission of a Mayor’s Permit issued by the city or municipality where the principal place of business of the prospective bidder is located. As discussed in an earlier opinion⁵, a Mayor’s Permit is in the nature of a business permit which authorizes the person, natural or otherwise, to engage in business or some commercial activity. Thus, a prospective bidder’s business as stated in the Mayor’s Permit should allow it to legally engage in identified business/endeavor within the City or Municipality where it has its principal place of business. In the case of *Acebedo Optical Company, Inc. v. the Court of Appeals, et al.*,⁶ the Supreme Court held that “a business permit authorizes the person, natural or otherwise, to engage in business or some form of commercial activity.”

Consequently, it is necessary for the BAC to determine whether the Mayor’s Permit issued to the company authorizes it to engage in the business of supplying/selling Various Polyethylene Plastic Envelopes, or merely confined in the courier service business.

Performance Security

As regards the posting of the Performance Security for projects procured through Negotiated Procurement (two-failed biddings), as a rule, performance and warranty securities are required except for procurement under *Sections 52* (Shopping), *53.2* (Emergency Cases),

⁴ 5 SCRA 36.

⁵ NPM No. 77-2012 dated 27 June 2012.

⁶ G.R. No. 100152, March 31, 2000.

53.5 (Agency-to- Agency), 53.9 (Small Value Procurement), 53.10 (Lease of Real Property), 53.12 (Community Participation), and 53.13 (UN Agencies).⁷

Negotiated Procurement under the two-failed bidding modality is not one of the exceptions to the requirements of posting of performance and warranty securities. Thus, it is a mandatory requirement for the winning bidder to post the required Performance Security for procurement employing the negotiated mode under two-failed biddings.

Summary

In view of the foregoing, we wish to reiterate that in determining whether a corporation may engage in a particular business activity, the same must conform with the primary and secondary purposes as expressly indicated in its Articles of Incorporation, as well as to its implied and incidental powers. The Mayor's Permit must likewise recognize and provide privilege to the bidder to conduct and engage in specific business within the City or Municipality. We likewise clarify that the posting of a Performance Security is necessary in Negotiated Procurement under the two-failed biddings.

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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⁷ Section 54.5 of the IRR of RA 9184.