

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

NPM No. 107-2014

5 November 2014

MS. MINERVA C. LACHICA

Division Chief, Administrative Division

PHILIPPINE INSTITUTE FOR DEVELOPMENT STUDIES (PIDS)

NEDA sa Makati Building, 106 Amorsolo St.,

Legaspi Village, Makati City

Re: Change of Specifications

Dear Ms. Lachica:

This refers to your electronic mails¹ (emails) requesting for an opinion whether the offer of a contractor to deliver an item with specifications different from that indicated in the bidding documents is acceptable.

Based on the representations in the email and attached documents, S1 Technologies, Inc. (S1) originally offered "Asus UX302LA" for the laptop requirements of PIDS. At the time of delivery, S1 informed PIDS that the model "Asus UX302LA" is no longer available as it has reached its 'end of life', prompting S1 to offer "Asus UX32LN" as replacement. Upon delivery and inspection, the PIDS Technical Working Group (TWG) noticed that the bundled external HDD with "Asus UX32LN" is only 250Gb SSD, which does not meet the 500Gb storage requirement set by PIDS. Due to failure to meet the requirements stated in the Bidding Documents, S1 suggested delivering to PIDS "Asus UX32LN" with 1TB external HDD in lieu of the required 500Gb storage. It is in this context that our opinion is sought.

Compliance with Technical Specifications

Project or technical specifications, addressing the identified needs of the PE, serve as the bases of bidders in submitting their offers or tenders. Bidders must comply with these specifications not only during the bidding process, but most importantly, during contract implementation stage. The principles of competitiveness and public monitoring, alongside transparency, simplicity and accountability, permeate the provisions of R.A. No. 9184 from the procurement process to the implementation of awarded contracts.² These principles mandate that all government procurement contracts be performed strictly according to its specifications. A

¹ With attached letter from S1 Technologies, Inc. dated 26 July 2014 and addressed to Mr. Gilberto M. Llanto, President of PIDS.

² *Commission on Audit (COA) v. Linkworth International, Inc.*, G.R. No. 182559, 13 March 2009.

Competitiveness guarantees interested private entities that they will compete on an equal footing for the requirements prescribed by the Procuring Entity (PE).³ An essential element of a publicly bid contract is that all bidders must be on equal footing. Not simply in terms of application of the procedural rules and regulations imposed by the relevant government agency, *but more importantly, on the contract bidden upon. Each bidder must be able to bid on the same thing.*⁴

Public bidding will cease to be competitive if PEs will be permitted to make substantial variance between the conditions under which the bids are invited and the contract executed after the award⁵, an act that is considered as a grave abuse of discretion amounting to lack or excess of jurisdiction which warrants proper judicial action.⁶ In effect, bidders will no longer bid on the basis of the prescribed terms and conditions in the bid documents but will formulate their bid in anticipation of the execution of a future contract containing new and better terms and conditions that were not previously available at the time of the bidding.⁷

Of important consideration as well is public monitoring. It covers not only the procurement process, but also the implementation of awarded contracts with the end view of guaranteeing that all these contracts are performed strictly according to specifications.⁸ Procurement contracts are considered as public contracts that require the faithful performance by both parties (government and private contracting party) of all the terms and conditions in the contract for the benefit of the general public. Impressed with public interest, strict compliance to specifications, as part of the terms and conditions of procurement contracts, must be observed. Consequently, allowing a change in the specifications of procurement contracts during contract implementation stage deviates from what have been offered, accepted, and ultimately agreed upon by the parties to the detriment of fair competition and equal opportunity to market participants.

Adherence to Contract Agreements

Section 37.2.3(c) of the revised Implementing Rules and Regulations (IRR) of RA 9184 in relation to Section 25.2(a)(iii) provides that the technical specifications and offer of the winning bidder forms part of the contract. The inclusion of these documents in the contract created an obligation on the part of the contractor to deliver the specific goods that it offered. The General Conditions of Contract (GCC) of the Philippine Bidding Documents (PBDs) for the Procurement of Goods categorically states that the goods to be provided by the contractor to the PE shall be as specified in the Schedule of Requirements and shall conform with the standards mentioned in the Technical Specifications.⁹

³ *COA v. RTC-NCRJR* G.R. No. 85285, 07 July 1989.

⁴ *Agan, Jr. v. Philippine International Air Terminals, Co., Inc.*, G.R. Nos. 155001, 155547 and 155661, 05 May 2003.

⁵ *Archbishop Fernando R. Capalla, et al. v. The Hon. Commission on Elections/Solidarity for Sovereignty, etc., et al. v. Commission on Elections/Teofisto T. Guingona, et al. v. Commission on Elections, et al./Tanggulang Demokrasya, Inc., et al. v. Commission on Elections, et al.*, G.R. Nos. 201112, 201121, 201127 and 201413, 13 June 2012.

⁶ *Ibid*, citing *Agan, Jr. v. Philippine International Air Terminals, Co., Inc.*, G.R. Nos. 155001, 155547 and 155661, 05 May 2003.

⁷ *Ibid*.

⁸ Section 3(d) of RA 9184.

⁹ Clause 6.1. and Clause 15.

The contract between the PE and the winning bidder is the law between the parties. From the moment that the contract is perfected, which is upon compliance with the specific requirements under Section 37 of the IRR of RA 9184, the parties are bound to the fulfillment of what has been expressly stated in the contract¹⁰ and to comply with it in good faith¹¹. Since the offer of the winning bidder is already part of the contract, it is duty-bound to deliver the specific items it mentioned in the offer. The winning bidder must perform this obligation in faithful compliance with the contract executed with the PE.

Bidder's Responsibility

It bears stressing that the selection of the specific item to be offered by the bidder is based solely on its own determination. While the PE sets the technical specifications of the needed item, the bidders are still at full liberty to offer any specific item, provided that it is compliant with the technical specifications. Clause 6.4 of the Instruction to Bidders (ITB) of the PBDs for the Procurement of Goods provides that it shall be the sole responsibility of the bidder to determine and to satisfy itself by such means as it considers necessary or desirable as to all matters pertaining to the contract to be bid, including the factors that may affect the cost, duration, and execution or implementation of the project.

Thus, it is the obligation of the bidder to ensure that the specific item that it will offer to the PE is readily available in the market and will remain to be available at least during the delivery period indicated in the Schedule of Requirements. Offering a specific item which may possibly be pulled-out from the market during the contract implementation stage is a risk fully assumed by the bidder, and should it actually happens, the bidder bears the responsibility.

Contract Amendment

When the subject-matter of contract is the delivery of specific goods as offered by the winning bidder, change in the specifications of goods ought to be delivered cannot be validly effected without the corresponding amendment of the contract. Relative to the modification or amendment of provisions of procurement contracts, the Supreme Court, in the consolidated case of *Capalla v. COMELEC*,¹² clarified the matter, thus:

[A] winning bidder is not precluded from modifying or amending certain provisions of the contract bidden upon. However, such changes must not constitute substantial or material amendments that would alter the basic parameters of the contract and would constitute a denial to the other bidders of the opportunity to bid on the same terms. The determination of whether or not a modification or amendment of a contract bidden out constitutes a substantial amendment rests on whether the contract, when taken as a whole, would contain substantially different terms and conditions that would have the effect of altering the technical and/or financial proposals previously submitted by the other bidders. The modifications in the contract executed between the

¹⁰ Article 1315 of the New Civil Code of the Philippines.

¹¹ Article 1159 of the New Civil Code of the Philippines.

¹² *Supra* on note 3 citing *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated*, G.R. No. 183789, August 24, 2011, 656 SCRA 214, 241; and, *Agan, Jr. v. Philippine International Air Terminals, Co., Inc.*, G.R. Nos. 155001, 155547 and 155661, 05 May 2003.

government and the winning bidder must be such as to render the executed contract to be an entirely different contract from the one bidden upon.

In his concurring opinion in the aforesaid case, the Honorable Associate Justice Lucas P. Bersamin stated that only those material amendments to competitively bid contracts are prohibited, and further declared that the concept of materiality in this context has not been satisfactorily captured in a single phrase. Considered to be of importance by the courts in determining whether an amendment is embraced in the context of materiality which tend to be subversive of the purpose of competitive bidding are as follows:

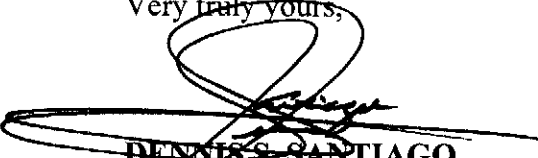
- (1) the legitimacy of the reasons for the change;
- (2) whether the reasons for the change were unforeseen at the time the contract was made;
- (3) the timing of the change;
- (4) whether the contract contains clauses authorizing modifications; and
- (5) the extent of the change, relative to the original contract¹³.

Based on the foregoing, it is incumbent upon the PE to evaluate whether a change in the specifications of goods will constitute material amendment of the contract that will defeat the purpose of competitive bidding.

In sum, it is our considered view that procurement contracts should be strictly performed according to its specifications. In case of change or modification in the specifications during contract implementation, the PE is best fit to determine the acceptability of such change taking into consideration the identified needs of the PE, the bidder's responsibility and the materiality of such proposed change, alongside the pronouncement of the Supreme Court in the *Capalla* case, in that – “[s]uch changes must not constitute substantial or material amendments that would alter the basic parameters of the contract and would constitute a denial to the other bidders of the opportunity to bid on the same terms.”

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 *ms*

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¹³ *Supra* on note 3, Concurring opinion of Justice Bersamin citing *Kenai Lumber Company, Inc. v. Le Resche*, 646 P.2d 215, 220 (1982 Alas).