



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

NPM No. 128-2012

16 October 2012

ATTY. ANTONIOUS G. COLLADO

CAVEAT LAW OFFICES

Suite 907, One Corporate Centre Condominium,
Doña Julia Vargas Ave. corner Meralco Ave.,
Ortigas Center, Pasig City

Re: Reference to Brand Names

Dear Atty. Collado:

This is in response to your letter dated 20 June 2012, seeking our opinion on whether a Procuring Entity (PE) may validly refuse to accept delivery of the procured items subject of the awarded contract because it is not the particular brand preferred by the end-user.

It is represented that the Philippine Coast Guard (PCG) posted a Request for Quotation (RFQ) in the Philippine Government Electronic Procurement System (PhilGEPS) for the procurement of one (1) set of Anode – Part No. UZX17 and one (1) set of Anode – Part No. UZX18 through Shopping. In connection therewith, PCG sent an RFQ to Berlyn Enterprises (Berlyn) requesting for the lowest quotation that it could offer for the aforementioned items. Subsequently, PCG issued a Purchase Order to Berlyn for the aforementioned items in the RFQ to be delivered within a period of seven (7) days. However, upon delivery, PCG refused to accept the Anodes claiming that they do not conform to the specification in the RFQ as the items are “not a *Cathelco Anode* but rather, a *Cathelco Type Anode* only”.¹ As represented, “**Cathelco**” is a brand name for various marine anti-fouling and such other products, including Anode - Part No. UZX17 and Anode - Part No. UZX18. It is in this context that you are seeking our opinion on whether PCG’s refusal to accept the delivered Anodes on the ground that they do not bear the preferred trade/brand name “**Cathelco**” is proper.

At the outset, we refer to the RFQ² sent to Berlyn Enterprises. It will be noted that the Procuring Entity indicated in the particulars that the basis for procuring the sets of Anodes is “for use of 56M SARV”. Particular mention of “Brand and Model: Cathelco” is also noted. In

¹ Letter of PCG to Berlyn Enterprises dated 24 April 2012, Annex “E” of Caveat Law’s letter request dated 20 June 2012.


² Annex “B” Request for Opinion, dated 20 June 2012.

this light, we wish to emphasize that Republic Act (RA) No. 9184³ and its Revised Implementing Rules and Regulations (IRR) mandate that "[s]pecifications for the procurement of goods shall be based on relevant characteristics and/or performance requirements. **Reference to brand names shall not be allowed.**"⁴

It must be noted that **the prohibition on reference to brand names under R.A. 9184 is absolute.** Hence, in specifying the goods sought to be procured, reference to brand names is strictly prohibited. Such prohibition is absolute in its terms and bars any exception which may be restrictive of competition. Thus, the PE should judiciously prepare its *technical specifications*⁵ based on relevant characteristics and/or performance requirements rather than the brand.⁶

The technical specifications stated in the bidding documents or the RFQ provide the basis in determining the responsiveness of an offer to the requirements, such that, a bidder who is found to comply with all the technical specifications and offers the lowest price is declared the lowest calculated and responsive bidder, in whose favor, award of contract may be made. It must be emphasized, however, that the specifications set forth in the RFQ *does not give occasion for the procuring entity to arbitrarily exercise its discretion and brush aside the very requirements it specified as vital components of the goods it bids out.*⁷ On the other hand, the same set of technical specifications will be utilized in determining whether the winning bidder has complied with its contractual obligations in delivering the required item.

However, it would be prudent to distinguish if the specification of *Cathelco* in the RFQ refers to the brand of the equipment for which the Anodes will be installed and used; or, the brand of Anodes sought to be procured. In the first case, if the reference to *Cathelco* is made for purposes of informing the bidders of the brand of equipment for which the Anodes will be used and upon which the evaluation on compatibility, inter-operability and functionality between the Anodes and the existing equipment will be based, reference to the *Cathelco* brand by the Procuring Entity may be allowed under the circumstances. On the other hand, if the reference to *Cathelco* is made for the purpose of identifying that the brand of Anodes to be supplied should be *Cathelco*, then such reference is absolutely proscribed under Section 18 of the revised IRR of RA 9184.

In this regard, the intention of the PE in indicating its reference to the *Cathelco* brand should be first determined. If the trademark *Cathelco* was used to refer to the Anodes sought to be procured, the same is prohibited under the procurement rules. However, if the reference was made to specify the equipment with which the Anodes will be used, then such action may be considered outside the prohibition on brand names; in which case, the Procuring Entity cannot refuse the delivery of goods on the sole ground that the end-user prefers a specific trade/brand name so long as such goods are compliant with the technical specifications, *i.e.*, Anodes Part No. UZX17 and UZX18 and for use of 56M SARV. 

³ *The Government Procurement Reform Act*, 26 January 2003.

⁴ Section 18, IRR of RA 9184.

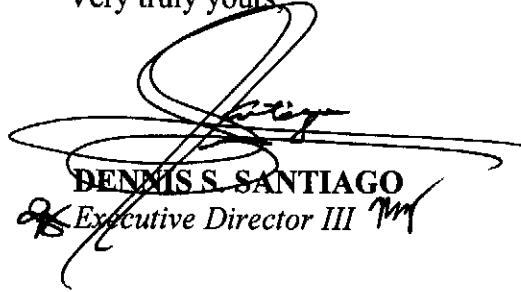
⁵ *Technical Specifications* refers to the physical description of the goods or services as well as the Procuring Entity's requirements in terms of the functional, performance, environmental interface and design standard requirements to be met by the goods to be manufactured, supplied, or the services to be rendered; *Manual of Procedures for the Procurement of Goods and Services*, Volume 2, June 2006.

⁶ NPM 41-2005 dated 20 September 2005.

⁷ *Commission on Audit vs. Link Worth International, Inc.*, G.R. No. 182559, 13 March 2009.

We hope that our advice provided sufficient guidance on the matter. Note that this opinion is being issued on the basis of the facts and particular circumstances presented, and may not be applicable to 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 III

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