

NPM No. 149-2015

27 November 2015

MS. AMELIA S. PENACERRADA

Supervising Auditor

COMMISSION ON AUDIT

– PHILIPPINE CHARITY SWEEPSTAKES OFFICE (COA – PCSO)

2nd Floor, Conservatory Building,

Shaw Blvd., Mandaluyong City

**Re : Procurement by Lot; Single Largest Completed Contract;
 Repeat Order; Mandatory Timeline**

Dear Auditor Penacerrada:

This refers to your letter dated 14 September 2015, requesting our opinion on whether the procurement of ambulance units divided into four lots, as well as the procurement of additional 172 ambulance units by the PCSO through Repeat Order modality were in accordance with Republic Act (RA) No. 9184 and its Implementing Rules and Regulations (IRR).

As represented, the PCSO conducted competitive bidding for the procurement of 700 ambulance units, which was divided into four lots with an Approved Budget for the Contract (ABC) of One Hundred Seventy Five Million Pesos (PhP 175,000,000.00) per lot. Each lot has 175 units. Three (3) bidders participated in all of the lots, where one (1) was declared ineligible. The abstract of bids is shown as follows:

	Focus Ventures Inc. and Xiamen King Long United Automotive Industry Co., Ltd.	UAAGI	Kolonwel Trading and Hubei Jiangnan Special Automobile Co., Ltd.
Lot 1: 175 units of ambulance			
Technical Requirements	Ineligible	Passed	Passed
Financial Proposal	-	PhP 151.55 Million per lot	PhP 165.90 Million per lot
Lot 2: 175 units of ambulance			
Technical Requirements	Ineligible	Passed	Passed
Financial Proposal	-	PhP 151.55 Million per lot	PhP .948 Million per unit or PhP 165.90 Million per lot
Lot 3: 175 units of ambulance			
Technical	Ineligible	Eligible	Eligible

Requirements			
Financial Proposal	-	PhP 151.55 Million per lot	PhP .948 Million per unit or PhP 165.90 Million per lot
Lot 4: 175 units of ambulance			
Technical Requirements	Ineligible	Eligible	Eligible
Financial Proposal	-	PhP 151.55 Million per lot	PhP .948 Million per unit or PhP 165.90 Million per lot

Included in the submitted technical requirements was the Statement Identifying the Single Largest Completed Contract (SLCC) within the last ten (10) years. For UAAGI, the SLCC was the contract entered into with PCSO in 2012 for the 300 units of Foton View Ambulance with a contract price of PhP 269.70 Million, while Kolonwel Trading and Hubei Jiangnan Special Automobile Co., Ltd submitted an SLCC involving 530 units of Fire Trucks with a total contract amount of One Billion Nine Hundred Twenty One Million Five Hundred Thousand Pesos (PhP1,921,000,500.00)

You also mentioned in your letter that after attending the bid opening, you immediately requested PCSO to submit documents to be able “to act accordingly as to what transpired on the conduct of the procurement activities.” Thereafter, you raised the following observations, which we summarize as follows:

1. Dividing the project into lots was resorted to circumvent the eligibility requirement as provided for in Section 23.5.1.3 of the IRR of RA 9184, and to violate Section 54.1 on splitting of contracts. .
2. If the project was not divided into lots, the SLCC submitted by the Lowest Calculated Bidder (UAAGI) is less than the required SLCC, which should be 50% of the total project cost of PhP 700 Million.
3. Procurement activities from the advertisement/posting of Invitation to Bid (IB) to the Submission and Receipt of Bids exceeded the maximum period prescribed under Annex “C” of the IRR of RA 9184.

You likewise recommended to the PCSO Management to “seek an opinion from the GPPB to resolve the issues on the splitting of the project into four lots before awarding the contracts and consider the maximum allowed period of the procurement activities in order to facilitate immediately the implementation of the projects.”

Notwithstanding the Management’s explanation on the issues raised, you claimed that “the audit team stands (by its) position that the breaking of the procurement of 700 ambulance units into four (4) lots was contrary to Sections 23.5.1.3 and 54.1 of the IRR of RA 9184”, and that “the actual procurement period exceeded the prescribed maximum period contrary to Annex “C” of the IRR of RA 9184.”

You further asserted that although UAAGI offered a price lower than Kolonwel Trading by PhP 57.40 Million, the contract may be invalid if the project is awarded to UAAGI for the whole project of 700 ambulance units in the total amount of PhP 606,200,000.00 for non-compliance with the SLCC requirement. Apart from citing COA Circular 76-41 dated July 30, 1976 as basis to determine what constitutes splitting of contracts, you have likewise cited “a celebrated administrative case wherein a ranking official was charged with and found guilty of splitting of purchases, and the

Office of the President of the Philippines was quite emphatic when it ruled that his liability is not contingent on proof of loss to the Government because of said violations of rule on procurement.”

Moreover, you claim that should there be no supplier that can comply with the requirements, the Bids and Awards Committee (BAC) should re-bid the project in accordance with Section 35 of the IRR-A of RA 9184. However, you observed that the Joint Venture of Kolonwel Trading and Hubei Jiangnan Special Automobile Co., Ltd. was able to comply with the SLCC requirement having submitted a contract with an amount more than 50% of the total ABC.

Lastly, you question the procurement of PCSO through Repeat Order which you claim to be of no basis since “the original contract could not be considered as valid transaction.”

Hence, it is in the foregoing context that our opinion is being sought relative to the foregoing issues “for a more authoritative stand.”

Authority of COA

The Commission on Audit’s power to conduct comprehensive audit has been defined by the Supreme Court in *Veloso, et al. v. COA, G.R. No. 193677, September 6, 2011*, thus:

Pursuant to its mandate as the guardian of public funds, the COA is vested with broad powers over all accounts pertaining to government revenue and expenditures and the uses of public funds and property. This includes the exclusive authority to define the scope of its audit and examination, establish the techniques and methods for such review, and promulgate accounting and auditing rules and regulations. The COA is endowed with enough latitude to determine, prevent and disallow irregular, unnecessary, excessive, extravagant or unconscionable expenditures of government funds. It is tasked to be vigilant and conscientious in safeguarding the proper use of the government’s, and ultimately the people’s property. The exercise of its general audit power is among the constitutional mechanisms that gives life to the check and balance system inherent in our form of government.

In *Caltex, Phils., Inc. v. COA, et al.*¹, the Supreme Court rejected Caltex’s argument that COA cannot make its own interpretation of the laws in the light of the determination of executive agencies which are entitled to great weight. Indeed, it is well within the jurisdiction of COA to determine whether or not the fiscal responsibility that rests directly with the head of the government agency has been properly and effectively discharged.²

Jurisdiction of the GPPB and GPPB-TSO

We wish to note that the Government Procurement Policy Board (GPPB) and its Technical Support Office (TSO) only render policy and non-policy matter opinions respectively, on issues purely relating to the interpretation and application of our procurement laws, rules and regulations. It has no jurisdiction to rule over actual controversies with regard to the conduct of the bidding since it has no quasi-judicial functions under the law. Hence, this office has consistently refrained from passing upon decisions of the Bids and Awards Committee or even by the Head of the Procuring Entity pertaining to the actual application of and compliance with RA 9184 and its IRR. In this regard, we shall limit our discussion on the relevant provisions of the procurement law, rules and regulations pertinent to the issues presented.

¹ G.R. No. 92585, May 8, 1992.

² Section 25, P.D. 1445

Procurement by Lot

Procurement of projects by lot is a recognized mechanism under existing government procurement rules. The Philippine Bidding Documents (PBD) for the Procurement of Goods, particularly Clause 1.2 of the Instructions to Bidders (ITB) and the corresponding Bid Data Sheet (BDS) provision, requires Procuring Entities (PEs) to provide the name, identification, and number of lots specific to the bidding.

On the other hand, the BDS provision for ITB Clause 28.3 of the PBD for Goods explains that **lots should be formed of similar items that are likely to attract the maximum competition**, and defines "lot" as the quantity and number of items that will be included in a single contract. It also states three options that PEs may choose from in grouping and evaluating lots, *i.e.*, (i) each item to be evaluated and compared with other bids separately and recommended for contract award separately; (ii) all items to be grouped together to form one complete lot that will be awarded to one bidder to form one complete contract; and (iii) similar items, to be grouped together to form several lots that shall be evaluated and awarded as separate contracts.

Accordingly, the PE may identify – each item to be evaluated and awarded separately under separate contracts; or, several items grouped together to form one complete lot to be awarded to a single bidder to form a singular complete contract; or, similar items to be grouped into several lots, and evaluated and awarded as separate contracts. In these wise, bids shall be evaluated by the BAC depending on the packages or lots identified in the bidding document as above-mentioned *vis-à-vis* the application of the SLCC per item, per lot, or the entire package or lot, as the case may be. Consequently, depending on the requirements provided for under Section 28.3 of the ITB alongside specific instructions contained in BDS Clause 28.3 as to the manner for which a bidder should submit its bid: i) a bidder may be awarded a contract for an item; or, ii) a contract for a lot, or contracts for several lots; or, iii) a singular contract for all of the lots.

In this case, we assume that PCSO allowed bidders to submit an offer in any of the lots, thereby allowing a bidder to be awarded only one (1) lot or all of the four (4) lots altogether. Based on the foregoing discussions, procurement by lot is recognized and allowed under the IRR of RA 9184 and the PBD for Goods, and may be adopted by PEs by specifying the details on how a bidder should prepare and submit its bid.

Single Largest Completed Contract

As clearly provided in Section 23.5.1.3 of the revised IRR, the eligibility criteria require a bidder to have completed a single contract that is similar to the contract being bid out and is at least fifty percent (50%) of its approved budget. The SLCC criterion assures the Government that the bidder has sufficient experience and reliable track record or it is not the first time that the prospective bidder will be required to accomplish such an undertaking, and therefore, provides the Government a level of security that such bidder, if awarded the contract, will be able to satisfactorily fulfill the contract requirements.³

Notably, the reference of the required minimum percentage of the amount of the SLCC to be complied with is the ABC. The reason behind such policy is that the ABC is a factor that appropriately reflects the magnitude and complexity of a contract, such that a bidder who has completed a similar contract of a reasonable percentage may be presumed capable of performing the obligations if awarded the contract. Thus, in the case of a procurement that is divided into several lots, where each awarded lot gives rise to a separate contract, the SLCC requirement shall be based on the ABC for each lot.

³ NPM No. 020-2005 dated 17 March 2005

Repeat Order

As a general rule, the procuring entity must employ competitive bidding as the primary mode of procurement. However, in order to promote efficiency and economy, the procuring entity may also resort to any of the alternative modes of procurement whenever justified by the conditions provided for under the law and the associated rules.

Since Repeat Order is one of the alternative modalities of procurement, it may be resorted to in the procurement of goods from the previous winning bidder, whenever there is a need to replenish goods procured under a contract previously awarded through Competitive Bidding if the conditions⁴ set forth in Section 51 of the IRR of RA 9184 exist.

Mandatory Nature of the Procurement Timelines

RA 9184 having been enacted for the advancement of public welfare undoubtedly contains mandatory provisions. Failure to follow such rules generally renders the proceeding to which it relates illegal and void, or the violation of which makes the decision rendered therein invalid.

The Supreme Court in the case of *Jacomille v. Abaya, et al.*⁵ held that the different periods provided by RA 9184 within which certain stages of the procurement process must be completed is not merely directory but mandatory. In the said case, the petitioner contends that the public respondents failed to comply with the periods provided by law, specifically the 3-month period from the opening of the bids up to the award of the contract under Section 38 of RA 9184. The high tribunal ruled that the said provision contains the word “shall” which is mandatory in character and non-compliance with the prescribed period will certainly affect the validity of the bidding process. Thus, it concluded that such irregularity rendered the procurement process null and void. Article 5 of the Civil Code of the Philippines provides that “acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity”.

However, it can be deduced from Section 65.1(b)⁶ of RA 9184 and its IRR that awarding of contracts beyond the prescribed period of action may be recognized for justifiable causes. Put differently, although the periods of action under RA 9184 and its IRR are mandatory in character, penal sanctions or liability may not set in against the concerned public officers provided that justifiable causes exist to warrant delay in the conduct of the procurement activities, provided further, that the bid, including the bid security of the bidder remains valid.

Summary

In sum, we wish to reiterate the following:

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- ⁴ a. Unit prices of the repeat order must be the same as or lower than those in the original contract, provided that such prices are still the most advantageous to the GOP after price verification;
 - b. The repeat order will not result in splitting of contracts, requisitions, or purchase orders, as provided for in Section 54.1 of this IRR;
 - c. Except in cases duly approved by the GPPB, the repeat order shall be availed of only within six (6) month from the contract effectivity date stated in the Notice to Proceed arising from the original contract; and
 - d. The repeat order shall not exceed twenty-five percent (25%) of the quantity of each item in the original contract.

⁵ G.R. No. 212381, 22 April 2015

⁶ Without prejudice to the provisions of R.A. 3019 and other penal laws, public officers who commit any of the following acts shall suffer the penalty of imprisonment of not less than six (6) years and one (1) day, but not more than fifteen (15) years:

- b) Delaying without justifiable cause, the screening for eligibility, opening of bids, evaluation and post evaluation of bids, and awarding of contracts beyond the prescribed periods of action provided for in this IRR.

1. Procurement by lot is recognized and allowed under the IRR of RA 9184 and the PBD for Goods, and may be adopted by PEs by specifying the details on how a bidder should prepare and submit its bid;
2. A procurement that is divided into several lots, where each awarded lot gives rise to a separate contract, the SLCC requirement shall be based on the ABC for each lot;
3. Repeat Order is one of the alternative modalities of procurement and may be resorted to whenever justified by the conditions provided for under Section 51 of the IRR of RA 9184; and
4. The periods of action under RA 9184 and its IRR are mandatory in character; however, the PE may award the contract beyond the required period, provided that the failure to award was due to justifiable causes, and the bid, including the bid security of the bidder remains valid.

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.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director V

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