



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

**NPM No. 166-2012**

28 December 2012

**F/C SUPT. SAMUEL R. PEREZ, CEO IV**  
*Officer-in-Charge / Deputy Chief for Administration*  
**BUREAU OF FIRE PROTECTION (BFP)**  
7<sup>th</sup> Floor, Bureau of Fire Protection Building  
Barangay Bagong Pag-asa, Agham Road  
Quezon City

**Re: Submission of Tax Returns under the Electronic Filing and Payment System (EFPS) and Valid Joint Venture Agreement (JVA)**

Dear F/C Supt. Perez:

We respond to your letter seeking clarification on the following concerns:

1. Interpretation of Clause 29.2(b)<sup>1</sup>, Bid Data Sheet (BDS), 4<sup>th</sup> Edition Philippine Bidding Documents (PBD) for Goods, pertaining to the option to submit manually filed tax returns filed through the EFPS.
2. Effect on the validity of the JVA in case a bidder submitted a JVA with defective notarization. Would there be a valid JVA in case the JVA is executed and notarized here in the Philippines before the actual arrival of the Joint Venture (JV) foreign partner?
3. Effect on the eligibility of the bidder when the document defectively notarized pertains to the Special Power of Attorney (SPA)/authority of the signatory from the foreign partner.

As represented, the BFP National Headquarters conducted bidding for the procurement of sixty-eight (68) fire trucks. Upon review of the documents pertinent to the bidding process, it was found out that the bidder with the Lowest Calculated Bid (LCB) filed its applicable Business Tax Returns through EFPS, but manually filed its applicable Latest Income Tax Return (ITR) for 2010. The bidder was declared "passed" by the BFP Bids and Awards Committee (BFP-BAC) in line with BDS Clause 29.2(b)<sup>2</sup> as it relates to Clause 29.2 of the Instruction to Bidders (ITB). 8

<sup>1</sup>BDS Clause 29.2(b): Specify whether the Bidders have option to submit manually filed tax returns or tax returns through the Electronic Filing and Payment System (EFPS).

NOTE: The latest income and business tax returns are those within the last six months preceding the date of bid submission.

<sup>2</sup>Id.

The BFP-BAC believes that available "option" to submit and/or accept manually or electronically filed income and business tax returns as reflected in the BDS exists, and that in the absence of any specific instructions to bidders, a manually filed income tax return becomes an acceptable submission.

### **Mandatory Filing of EFPS**

Section 4.1<sup>3</sup> of Revenue Regulation No. 3-2005<sup>4</sup> (RR 3-2005), as reiterated in Government Procurement Policy Board (GPPB) Circular No. 2-2005 (GPPB Circular 2-2005) expressly mandates the submission of tax returns through EFPS. On the other hand, Clause 29.2(b)<sup>5</sup> of the BDS provides that the procuring entity has an option to allow bidders to submit manually filed tax returns in lieu of EFPS-filed tax returns.

BDS Clause 29.2(b), however, clearly provides that the option of allowing submission of manually filed tax returns should be exercised by the procuring entity by specifying the same in the bidding documents. If the procuring entity does not exercise such option and maintains the provision of BDS Clause 29.2(b) unchanged, the general rule should apply, *i.e.*, only EFPS-filed tax returns are allowed – "A thing not being excepted, must be regarded as coming within the purview of the general rule" as expressed in the maxim *exception firmat regulam in casibus non exceptis*.<sup>6</sup> Moreover, applied analogously, "[i]t is axiomatic that the clear letter of the law (EO 398 and RR 3-2005) is controlling and cannot be amended by a mere administrative rule issued for its implementation."<sup>7</sup>

Based on the foregoing, we wish to clarify that although BDS Clause 29.2(b) provides an option to allow the submission of manually filed tax returns, the same must be exercised by the PE by indicating such option in the bidding documents. The failure of the PE to specify the manner in which the tax return should be filed will not qualify the application of said BDS Clause 29.2(b) as an exception to the general rule, which requires EFPS-filed tax returns.

### **Valid Joint Venture Agreement**

#### *Effect of Defectively Notarized JVA*

Section 23.1(b)<sup>8</sup> of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) 9184 requires the submission of a valid JVA in case an existing JV wishes to participate in the bidding process.

For a JV to be valid, it is essential that there is a contract embodying the agreement of the co-venturers and defining their rights and obligations under the agreement submitted.<sup>9</sup> For a valid contract to exist, the Civil Code of the Philippines<sup>10</sup> states that the following requisites should concur: (1) the consent of the contracting parties; (2) the object certain which is the

<sup>3</sup>Effective 1 April 2005, all prospective participants to any government procurement of goods and services are mandated to file their income and business tax returns and other required information electronically using the Electronic Filing and Payment System.

<sup>4</sup>Rules and Regulations Implementing Executive Order No. 398 (EO 398) and Requiring Timely and Complete Payments of Taxes as a Precondition for Entering Into and as Continuing Obligation in Contracts with Government.

<sup>5</sup>*Supra*, Footnote 1.

<sup>6</sup>Hodge v. Municipal Board of Iloilo, 19 SCRA 28 (1967).

<sup>7</sup>Lokin v. COMELEC, G.R. Nos. 179431-32, dated 22 June 2010.

<sup>8</sup>Valid joint venture agreement (JVA), in case the joint venture is already in existence. In the absence of a JVA, duly notarized statements from all the potential joint venture partners stating that they will enter into and abide by the provisions of the JVA in the instance that the bid is successful shall be included in the bid.

<sup>9</sup>Non-Policy Matter Opinion No. (NPM) 20-2011, dated 11 November 2011.

<sup>10</sup>Republic Act No. 386, enacted on 18 June 1949.

subject matter of the contract; and, (3) the cause of the obligation which is established.<sup>11</sup> Consent should be declared by the parties to the contract,<sup>12</sup> but such consent may also be given through a representative who is equipped with the authority to do so.<sup>13</sup> Under the assumption that the consent of a foreign JV partner was indeed given, as can be gleaned from the execution of the Special Power of Attorney (SPA) and the recitals contained therein, the defect in the notarization should not affect the validity of the JVA.

Additionally, neither a standard form is prescribed, nor specific terms and conditions should be spelled out in the JVA for it to be valid,<sup>14</sup> only the requisites of a valid contract are required to exist. It must be emphasized that notarization is not essential to the validity of the transaction,<sup>15</sup> the absence of notarization will not necessarily invalidate the agreement, for even *sans* notarization, the instrument, deed, contract or document remains valid between or among the parties. A defectively notarized joint venture agreement is, thus, still a valid joint venture provided that the requisites<sup>16</sup> of a valid contract exist. But this is not saying that notarization is an empty solemnity, as “[i]t converts a private document into a public one and renders it admissible in court without further proof of authenticity. A notarial document is by law entitled to full faith and credit upon its face...”<sup>17</sup> Thus, the officer administering the oath who caused or permitted the irregularity may be held liable under the 2004 Rules on Notarial Practice.<sup>18</sup>

Albeit the foregoing considerations, it is important to note that JVAs need be notarized in order to be binding against third persons. Thus, for purposes of complying with the provisions of RA 9184 and its IRR, the valid joint venture agreement should be notarized.<sup>19</sup>

#### *JVA Notarized Before Arrival of a Foreign JV Partner*

We wish to point out that a JVA notarized here in the Philippines before the actual arrival of the foreign joint venture partner will not affect the validity of the joint venture so long as the requisites<sup>20</sup> of a valid contract are present.

Under the 2004 Rules on Notarial Practice, a document can be notarized when acknowledged by an individual who personally appears before a notary public and represents to the notary public that he is acting in a particular representative capacity and that he has the authority to sign in such capacity.<sup>21</sup> Hence, a joint venture agreement can be notarized even in the absence of the foreign JV partner provided that a representative with sufficient authority,

<sup>11</sup>*Id.*; Article 1318.

<sup>12</sup>*Id.*; Article 1315.- Contracts are perfected by mere consent...

<sup>13</sup>*Id.*; Article 1868.- By the contract of agency a person binds himself to render some service or to do something in representation or on behalf of another, with the consent or authority of the latter.

<sup>14</sup>NPM 98-2004, dated 23 July 2004, cited in the separate concurring opinion of Justice Renato Corona in *Harry Roque, et al. v. COMELEC, et al.*, G.R. No. 188456, dated 10 September 2009.

<sup>15</sup>Tigno, et al. v. Spouses Aquino and Honorable Court of Appeals, G.R. No. 129416, dated 25 November 2004.

<sup>16</sup>*Supra*, Footnote 11.

<sup>17</sup>*Coronado v. Felongco*, A.C. No. 2611, dated 15 November 2000.

<sup>18</sup>Supreme Court of the Philippines, A.M. No. 02-8-13-SC, Promulgated on 6 July 2004.

<sup>19</sup>*Supra*, Footnote 14.

<sup>20</sup>*Supra*, Footnote 11.

<sup>21</sup>Section 1. *Acknowledgment* – “Acknowledgment” refers to an act in which an individual on a single occasion:

- (a) Appears in person before the notary public and presents an integrally complete instrument or document;
- (b) Is attested to be personally known to the notary public or identified by the notary public through competent evidence of identity as defined by these Rules; and
- (c) Represents to the notary public that the signature on the instrument or document was voluntarily affixed by him for the purposes stated in the instrument or document, declares that he has executed the instrument or document as his free and voluntary act and deed, and, if he acts in a particular representative capacity, that he has the authority to sign in that capacity. (Emphasis ours)

normally evidenced by a SPA, to execute and sign the agreement personally appears before the notary public.

### **Effect of Defectively Notarized Power of Attorney on Joint Venture Agreement**

We invite your attention again to Section 23.1(b)<sup>22</sup> of the IRR of RA 9184, which requires the submission of a valid JVA in case a JV participates as bidder. To reiterate, only a valid JVA is required to be submitted. A JVA is considered valid if all the requisites<sup>23</sup> of a valid contract are present. Among these requirements is the consent from the contracting parties which must be declared properly. Consent may be given through a representative by way of a power of attorney. The execution of a power of attorney, as a general rule, need not require the intervention of any notary public<sup>24</sup> and may either be expressed or implied.<sup>25</sup>

In fine, we are of the opinion that a defectively notarized SPA/letter of authority will not affect the validity of the JVA, because a SPA/letter of authority need not be notarized for a representative to execute a JVA. It must be emphasized, however, that this posturing is working on the assumption that "consent" was indeed given by the foreign JV partner through the SPA, the defect in the notarization as mentioned, will not invalidate the Contract of Agency between the foreign JV partner, as principal, and the local representative, as agent. The landscape will be different when the consent of the foreign JV partner is not truly given, as when there is misrepresentation on the part of the false agent, for in this situation, the defectively notarized JVA becomes glaring proof that the foreign JV partner did not give its consent; and, a scenario arises where the local JV partners entered into a JVA with the misrepresenting agent and not with the would be foreign JV partner.

### **Summary**

In sum, we wish to reiterate the following clarifications on the issues presented above:

1. Bidders are mandated, in accordance with RR 3-2005, to submit EFPS-filed tax returns, unless the PE specifies in the BDS that manually-filed tax return is allowed.
2. A defectively notarized JVA is still a valid joint venture provided that the requisites of a valid contract exist. However, for purposes of complying with the provisions of RA 9184 and its IRR, the valid JVA should be notarized since JVAs need be notarized in order to be binding against third persons. Also, the JVA can be notarized even in the absence of the foreign JV partner, provided that a representative equipped with the authority, normally a SPA, to execute and sign the agreement personally appears before the notary public.
3. A defectively notarized SPA/letter of authority will not affect the validity of the JVA, because a SPA/letter of authority need not be notarized for a representative to execute a JVA. However, it will be different if the consent of the foreign JV partner is not truly given as when there is misrepresentation on the part of the false agent, for in such situation, a scenario arises where the local JV partners

<sup>22</sup>Supra, Footnote 8.

<sup>23</sup>Supra, Footnote 11.

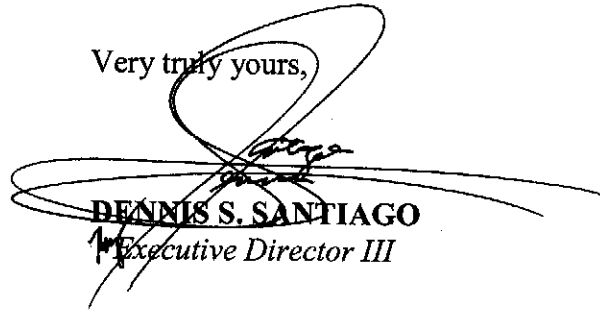
<sup>24</sup>Baretto v. Tuason, 59 Phil. 845, dated 31 March 1934, cited on p.796, Civil Code of the Philippines by Edgardo L. Paras, Book V, 16th Edition (2008).

<sup>25</sup>Supra, Footnote 10; Article 1869. - Agency may be expressed or implied from the acts of the principal, from his silence or lack of action, or his failure to repudiate the agency, knowing that another person is acting on his behalf without authority. Agency may be oral, unless the law requires a specific form.

entered into a JVA with the misrepresenting agent and not with the intended foreign JV partner.

We hope that our advice provided sufficient guidance on the matter. Note that this opinion is being issued on the basis of facts and particular 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 III*

//sd4 jrb