



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

NPM No. 170-2012

28 December 2012

MR. PETER GOCHENG
Sales Manager

MR. JOSE FRANCISCO GONZALES
General Manager
KOLONWEL TRADING
675 Sabino Padilla Street, Binondo, Manila

Re: Electronic Filing and Payment Systems (EFPS) and Submission of Eligibility Requirements

Dear Messrs. Gocheng and Gonzales:

We respond to your letters - an undated letter received by our office on 22 May 2012, and an addendum dated 30 May 2012 - requesting for our opinion on the following issues:

1. Whether the submission of the latest income and business tax returns filed manually, and not through EFPS, is compliant with the requirements under Clause 29.2(b) of the Bid Data Sheet (BDS) of the Philippine Bidding Documents (PBDs);
2. Whether it is regular and valid to require the winning bidder with the lowest calculated and responsive bid to submit additional requirements (*e.g.*, past income tax returns) which were not included in the Bidding Documents; and,
3. Whether a new Joint Venture (JV), which necessarily does not have income or business tax returns for the past years, is required to submit EFPS-filed income and business tax returns for the past years.

As represented, Kolonwel Trading participated, and was subsequently determined to be the Lowest Calculated and Responsive Bidder (LCRB), in the public bidding conducted by the Bureau of Fire Protection (BFP) on 3 November 2011 for 19 units 1,500 gallons and 49 units 1,000 gallons capacity power take-off fire trucks with an Approved Budget for the Contract (ABC) of Php 416,319,729.75. However, the BAC did not award the contract in favor of Kolonwel Trading on the ground that the tax returns were manually filed, instead of being filed through the EFPS.

Electronic Filing and Payment System

As discussed in an earlier opinion¹ issued by this office, Section 4.1² of Revenue Regulations (RR) No. 3-2005³, as reiterated in Government Procurement Policy Board (GPPB) Circular No. 02-2005, expressly mandates the submission of tax returns through the EFPS. On the other hand, Clause 29.2(b)⁴ of the BDS affords the Procuring Entity (PE) an option to allow bidders to submit manually filed tax returns in lieu of EFPS-filed tax returns.

The BDS Clause 29.2(b), however, clearly provides that the option of allowing submission of manually filed tax returns should be exercised by the PE by specifying and indicating such option in the Bidding Documents more particularly in the BDS. If the PE does not signify and exercise such option and maintains the provision of the BDS unchanged, the general rule as mandated under RR No. 3-2005 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 *exceptio firmat regulam in casibus non exceptis*.⁵ Moreover, and by way of analogy, “[i]t is axiomatic that the clear letter of the law (EO 398 and RR No. 3-2005) is controlling and cannot be amended by a mere administrative rule issued for its implementation.”⁶

Additional Eligibility Documentary Requirements

PEs are proscribed from requiring additional eligibility requirements. The list of minimum eligibility requirements under the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) 9184 has been streamlined/simplified, such that only those requirements enumerated in Sections 23.1, 24.1, and 25.1 of the IRR are necessary for purposes of determining bidders' eligibility. The rationale afforded by the GPPB for this is to allow greater participation, enhance competition among prospective bidders, and reduce transaction costs.⁷

Consequently, BACs are prohibited from imposing additional eligibility requirements as this constitutes a violation of RA 9184 and its IRR. 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.” RA 9184, having been enacted for the advancement of public welfare, undoubtedly contains mandatory provisions. The omission then to follow such rules renders the proceeding to which it relates illegal and void, or the violation of which makes the decision therein rendered invalid.⁸ Thus, prescribing additional eligibility requirements, which is prohibited by RA 9184 and its IRR, is an imposition that has no legal force and effect.

¹ NPM No. 166-2012 dated 28 December 2012.

² 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.

³ Rules and Regulations Implementing Executive Order No. 398 (EO 398) and Requiring Timely and Complete Payment of Taxes as a Precondition for Entering Into and as a Continuing Obligation in Contracts with Government.

⁴ Specify whether the Bidders have option to submit manually filed tax returns or tax returns filed through the Electronic Filing and Payment System (EFPS).

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

⁵ Hodge v. Municipal Board of Iloilo, 19 SCRA 28 (1967).

⁶ Lokin v. COMELEC, G.R. Nos. 179431-32, June 22, 2010.

⁷ NPM No. 21-2012 dated 16 February 2012.

⁸ NPM No. 026-2005 dated 25 April 2005.

Submission of Income Tax Returns (ITRs) or Business Tax Returns by a Joint Venture

For your guidance, Sections 3.2 and 3.3 of RR No. 3-2005 define what would constitute the latest ITR and business tax return,⁹ respectively. For a new establishment having no annual ITR, the latest ITR refers to the most recent quarter's ITR, while the latest business tax return of a new establishment with less than six (6) months operations refers to the monthly business tax return filed as of date of submission of bids. Thus, a new JV is not required to submit EFPS-filed income tax and business tax returns for past years, but in lieu thereof, it should submit the most recent quarterly ITR and monthly business tax returns.

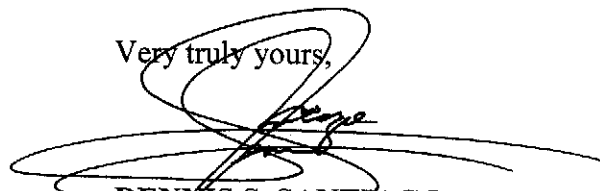
Summary

All told, we are of the view that:

1. As a rule, the submission of EFPS-filed tax returns is mandatory for all prospective bidders as provided under EO 398 and RR No. 3-2005, which have been adopted in GPPB Circular No. 2-2005. Although the PBD for Goods, through the BDS recognizes the option to accept tax returns filed either manually or through EFPS, failure by the PE/BAC to indicate and exercise such option would mean that bidders must submit EFPS tax returns.
2. PEs are prohibited from requiring additional eligibility requirements. Consequently, failure of the BAC to observe the appropriate proceedings required by law may merit a declaration of failure of bidding and the imposition of sanctions by the HOPE.
3. To comply with the latest ITR and business tax return requirements under RR No. 3-2005, pursuant to the mandate of EO 398, a new establishment (*e.g.*, new JV) may submit its most recent quarterly ITR and monthly business tax return.

We hope that our advice provided sufficient guidance on the matter. Please note that this opinion is being rendered on the basis of the facts and particular situations presented, and may not be applicable given a different set of facts and circumstances. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director III

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⁹ 3.3 Latest Business Tax Return

Refers to the Value Added Tax (VAT) or Percentage tax returns covering the previous six (6) months. ...