

NPM No. 170-2015

29 December 2015

MS. ROCHEEL LEE C. DELUTA

Administrative Officer V

INDUSTRIAL TECHNOLOGY DEVELOPMENT INSTITUTE (ITDI)

DEPARTMENT OF SCIENCE AND TECHNOLOGY (DOST)

DOST Compound, General Santos Avenue,
Bicutan, Taguig City

Re : Unsatisfactory Delivery of Goods

Dear Ms. Deluta:

This refers to your letter seeking legal advice on the actions to be undertaken by your office, relative to the Cancellation of Purchase Order, due to the unsatisfactory delivery of goods by the supplier.

As represented, Blim's General Merchandise Gravel and Sand (Blim's for brevity) delivered to your office one (1) Unit Cocoa Bean Roaster Machine (machine) in the amount of One Million Two Hundred Seventy Five Thousand (P1,275,000.00) last 26 August 2014. Upon delivery, flaws or defects were observed in the machine and that the same does not conform to the end-user unit's specifications. As a result, the inspection and acceptance report was not approved by the ITDI inspector and the end-user. In addition, the machine was "officially" not accepted due to Blim's non-compliance with the specifications and its failure to submit the documentary requirements for common government transactions required under COA Circular No. 2012-001. Hence, your request for legal advice on the following:

1. What are the actions to be undertaken by ITDI to settle the problem with Blim's?
2. What are the charges that can be filed by ITDI and other venues where ITDI can file a case against Blim's?
3. Can ITDI blacklist Blim's?
4. Can ITDI-DOST force Blim's to pull out the machine in view of the rust in its inner drum?

At the outset, we wish to clarify that the Government Procurement Policy Board (GPPB) and its Technical Support Office (GPPB-TSO) render policy and non-policy opinions respectively, on matters purely pertaining to the interpretation of the procurement law and its associated rules and regulations. We have no jurisdiction to rule over actual controversies with regard to the conduct of bidding or the eventual implementation of the resultant contract, since the office has no quasi-judicial functions or investigatory powers

under the law. Moreover, we adhere to the position that apart from courts having actual jurisdiction over the subject matter of a case, we cannot, nor any other government agency, authority, or official, encroach upon or interfere with the exercise of the functions of the BAC, since these duties and responsibilities fall solely within the ambit of its authority and discretion sanctioned by law.¹ In this wise, we shall limit our discussion on the interpretation of relevant procurement laws, rules and regulations pertinent to the issues presented as regards the supply and delivery of the machine through public competitive bidding.

Settlement of Disputes

Section 59.1 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 explicitly mandates that in case there is dispute or difference, of any kind, between the parties relative to the implementation of the contract covered by RA 9184 and its IRR, the parties are required to make every effort to resolve the dispute or difference by mutual consultation. This has been reiterated in GCC Clause 20 of the Philippine Bidding Documents (PBDs) for the Procurement of Goods, thus:

- 20.1 If any dispute or difference of any kind whatsoever shall arise between the Procuring Entity and the Supplier in connection with or arising out of this Contract, the parties shall make every effort to resolve amicably such dispute or difference by mutual consultation.
- 20.2 If after thirty (30) days, the parties have failed to resolve their dispute or difference by such mutual consultation, then either the Procuring Entity or the Supplier may give notice to the other party of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given.
- 20.3 Any dispute or difference in respect of which a notice of intention to commence arbitration has been given in accordance with this Clause shall be settled by arbitration. Arbitration may be commenced prior to or after delivery of the Goods under this Contract.
- 20.4 In the case of a dispute between the Procuring Entity and the Supplier, the dispute shall be resolved in accordance with Republic Act 9285 (“R.A. 9285”), otherwise known as the “Alternative Dispute Resolution Act of 2004.”
- 20.5 Notwithstanding any reference to arbitration herein, the parties shall continue to perform their respective obligations under the Contract unless they otherwise agree; and the Procuring Entity shall pay the Supplier any monies due the Supplier.

As such, in case of disputes or differences arising from the contract, such as the non-conformity of the Goods delivered by the Supplier with the specifications, the parties are duty-bound to settle their differences amicably and to go into arbitration in accordance with GCC Clause 27 and RA 9285. The parties are then mandated to continue to perform their respective contractual obligations unless agreed otherwise pursuant to GCC Clause 20.5.

¹ NPM No. 46-2013 dated 11 June 2013.

Contract Termination

For the Procurement of Goods, the Procuring Entity is mandated to terminate the contract in case of default by the Supplier. Thus, the PE shall terminate a contract for default following the procedures for termination of contracts when the Supplier fails to perform any other obligation under the Contract pursuant to Part III.A.1(c) of the Guidelines on Termination of Contracts² (Guidelines for brevity) and General Conditions of Contract (GCC) Clause 23.1(c) of the PBDs for the Procurement of Goods.

From the foregoing, in case the Goods delivered by the supplier did not conform to the specifications of the end-user unit as specified in the bidding documents. *i.e.* machine should be food grade, non-magnetic and not fabricated, the PE shall terminate the Contract following the procedures for termination of contracts provided in Part IV of the Guidelines and as reiterated in GCC Clause 27³ of the PBDs for the Procurement of Goods.

Blacklisting

Pursuant to Section 69(6) of RA 9184, in addition to Articles XXI on Penal Clause and XXII on Civil Liability, the Head of the Procuring Entity (HOPE), subject to the

² Issued through GPPB Resolution 018-2004, dated 22 December 2004, and published in the Official Gazette on 16 May 2005.

³ The following provisions shall govern the procedures for termination of this Contract:

- a) Upon receipt of a written report of acts or causes which may constitute ground(s) for termination as aforementioned, or upon its own initiative, the Implementing Unit shall, within a period of seven (7) calendar days, verify the existence of such ground(s) and cause the execution of a Verified Report, with all relevant evidence attached;
- b) Upon recommendation by the Implementing Unit, the Head of the Procuring Entity shall terminate this Contract only by a written notice to the Supplier conveying the termination of this Contract. The notice shall state:
 - (i) that this Contract is being terminated for any of the ground(s) afore-mentioned, and a statement of the acts that constitute the ground(s) constituting the same;
 - (ii) the extent of termination, whether in whole or in part;
 - (iii) an instruction to the Supplier to show cause as to why this Contract should not be terminated; and
 - (iv) special instructions of the Procuring Entity, if any.
- c) The Notice to Terminate shall be accompanied by a copy of the Verified Report;
- d) Within a period of seven (7) calendar days from receipt of the Notice of Termination, the Supplier shall submit to the Head of the Procuring Entity a verified position paper stating why this Contract should not be terminated. If the Supplier fails to show cause after the lapse of the seven (7) day period, either by inaction or by default, the Head of the Procuring Entity shall issue an order terminating this Contract;
- e) The Procuring Entity may, at any time before receipt of the Supplier's verified position paper described in item (d) above withdraw the Notice to Terminate if it is determined that certain items or works subject of the notice had been completed, delivered, or performed before the Supplier's receipt of the notice;
- f) Within a non-extendible period of ten (10) calendar days from receipt of the verified position paper, the Head of the Procuring Entity shall decide whether or not to terminate this Contract. It shall serve a written notice to the Supplier of its decision and, unless otherwise provided, this Contract is deemed terminated from receipt of the Supplier of the notice of decision. The termination shall only be based on the ground(s) stated in the Notice to Terminate;
- g) The Head of the Procuring Entity may create a Contract Termination Review Committee (CTRC) to assist him in the discharge of this function. All decisions recommended by the CTRC shall be subject to the approval of the Head of the Procuring Entity; and
- h) The Supplier must serve a written notice to the Procuring Entity of its intention to terminate the contract at least thirty (30) calendar days before its intended termination. The Contract is deemed terminated if it is not resumed in thirty (30) calendar days after the receipt of such notice by the Procuring Entity

authority delegated to the BAC, if any, shall impose on suppliers, contractors or consultants the administrative penalty of suspension for one (1) year for the first offense, and suspension of two (2) years for the second offense from participating in the public bidding process, **for termination of contract due to the default of the bidder**. Thus, Item 4.2(d) of the Uniform Guidelines for Blacklisting⁴ (Blacklisting Guidelines for brevity) provide for the blacklisting of the Supplier for the procurement of goods following the termination of the contract due to **unsatisfactory progress in the delivery of the goods by the manufacturer, supplier or distributor arising from his fault or negligence and/or unsatisfactory or inferior quality of goods, as may be provided in the contract**.

From the foregoing, pursuant to the procedures for blacklisting in the Blacklisting Guidelines, after the termination of contract by the PE, it shall suspend the erring Supplier for one (1) year for the first offense, and suspension of two (2) years for the second offense from participating in the public bidding process, in case the Supplier delivers goods of unsatisfactory or inferior quality as provided in the contract

Summary

All told, in case the Supplier fails to perform any obligations under the Contract, such as delivery unsatisfactory or inferior quality goods, thereby giving rise to a dispute or difference between the PE and the Supplier, the parties are mandated to settle the dispute amicably, and enter into arbitration if amicable settlement is not feasible pursuant to GCC Clause 20 and RA 9285. In case of failure to settle, the PE may terminate the contract following the procedures laid down in the Guidelines and GCC Clause 23. After contract termination, the PE shall blacklist the Supplier for 1 or 2 years, as the case may be, in accordance with the procedures provided in the Blacklisting Guidelines

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

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⁴ Issued through GPPB Resolution No. 09-2004, dated 20 August 2004, and published in the Official Gazette on 30 November 2004.

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