

NPM No. 171-2015

29 December 2015

MS. GINA C. CABALQUINTO

State Auditor IV, Team Leader

COMMISSION ON AUDIT (COA)

Corporate Government Sector Cluster 3-Public Utilities

Audit Group G-Philippine Ports Authority

Team R6-01-Port Management Office

Negros Occidental/Bacolod/Banago/Bredco, Bacolod City

**Re: Deviations from the Requirements of RA
9184 and GPPB Rules and Regulations**

Dear Ms. Cabalquinto:

This pertains to your letter referring to our Office the Philippine Ports Authority's Administrative Order (PPA AO) 04-2012, dated 1 August 2012, providing for guidelines on the provision of Roll-On/Roll-Off (RORO) services at Philippine Ports Authority (PPA) Ports as well as the list of documents to be used in the bidding process.

As represented, your office which is currently conducting the transactions of Philippine Ports Authority (PPA) has observed that the provisions of PPA AO 04-2012 which, among others, provides for guidelines on the provision of RORO services at PPA Ports deviated from the requirements of RA 9184 and GPPB rules and regulations. As such, the financial documents of El Maritimas Company Ltd. (EMCL) show that: a) EMCL is a new establishment; b) EMCL has not submitted its Statement of Completed, Ongoing, and Awarded but not yet started contracts, stating that the same is "Not Applicable"; c) the EMCL has no Audited Financial Statements (FS) for the preceding year; d) Instead of NFCC, EMCL used the Available Paid Up Capital/Owner's Equity for the Contract (APCC/OE). It in this wise that you seek clarification on the following:

1. Whether a "new establishment" with no experience and no audited FS can be awarded a government contract;
2. Whether the provisions of PPA's Administrative Order No. 04-2012 on the inclusion of new establishment and the use of APP/COE consistent with the provisions of RA 9184; and
3. Whether the Commission on Audit can use the said PPA AO 04-2012 as guidepost in the audit of procurement of RORO Service Providers in Ports under the PPA.

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, 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 issue presented.

A review of the provisions² of PPA AO 04-2012 shows that the said issuance covers transaction which is akin to a Public-Private Partnership (PPP) under RA 6957, as amended by RA 7718 or the Philippine Build Operate Transfer (BOT) Law³ or Joint Venture (JV)⁴ defined in the Revised Guidelines and Procedures for JV. Agreement Between Government and Private Entities⁵ (JV Guidelines) issued by the National Economic Development Authority (NEDA), since the government is expected to share in the revenue, in the form of a certain percentage of the gross revenue, through the monthly remittance of the winning bidder. The apparent profit/revenue sharing scheme in the said PPA guidelines implies that the government will benefit from its partnership with the winning bidder or the awarded service provider in view of the income that the government will derive from the service provider's cargo handling component for the duration of the contract. In contracts or agreements of this nature, the provisions of Republic Act (RA) No. 9184 and its revised Implementing Rules and Regulations (IRR) do not apply.

Relative thereto, in case of activities where the government entity partners with the private entity, where the former is set to earn or gain something rather than spend public funds which is commonly termed as PPP or JV, we propose for the review of the applicability of the Philippine BOT Law or JV Guidelines.⁶ Section 4.4 of the IRR states that the rules "[s]hall not apply to activities involving public-private sector infrastructure or development projects and other procurements covered by RA 6957, as amended by RA 7718, except those portions financed by the government".

Corollarily, since the provision of RORO services in PPA ports is akin to a PPP agreement and/or JV, the GPPB and its TSO is not in the position to render an opinion on the propriety of the award made to the "new establishment" as well as the acceptability of the latter's documentary submissions based on the PPA AO 04-2012 provisions.

With regard to your query on whether your Office can use the said PPA AO 04-2012 as a guide in conducting an audit in the procurement of the RORO service provider, we refer to the

¹ NPM No. 46-2013 dated 11 June 2013.

² Sections 17 and 18, PPA AO 04-2012, 1 August 2012

³ Section 12.17-REVENUE SHARING. The Agency/LGU concerned may share in the revenue from the operation of the Project Proponent in the form of either a fixed fee or a certain percentage of the gross revenue or a combination of both, provided that the same is indicated in the bidding documents and included in the contract. (22 October 2012).

⁴ 5.4. Joint Venture. A contractual arrangement whereby a private sector entity or a group of private entities on one hand, and a Government Entity or a group of Government Entities on the other hand, contribute money/capital, services, assets (including equipment, land or intellectual property), or a combination of any or all of the foregoing. Parties to a JV share risks to jointly undertake an investment activity to the private sector under competitive market conditions. It involves a community or pooling of interests in the performance of the service, function, business or activity, with each party having a right to direct and govern the policy in connection therewith, and with a view of sharing both profits and losses, subject to agreement by the parties. A JV may be a contractual JV, or a corporate JV.

⁵ Approved on 3 May 2013 and published on 11 May 2013.

⁶ NPM 129-2012, 16 October 2012

Supreme Court's definition of the Commission on Audit's power to conduct comprehensive audit 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.

Accordingly, in *Caltex, Phils., Inc. v. COA, et al.*⁷, 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.⁸

In sum, the provision of RORO services in PPA ports as can be gleaned from the relevant provision of PPA AO 04-2012 is akin to a PPP agreement and/or JV, and thus, may be considered as outside the purview of RA 9184 and its associated IRR. COA has the Constitutional 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. Hence, based on its Constitutional authority and mandate, COA may determine whether it should use PPA AO 04-2012 as guidance in the audit of the contracts or transactions involving RORO services covered by PPA AO 04-2012 alongside government auditing and accounting standards.

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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⁷ G.R. No. 92585, May 8, 1992.

⁸ Section 25, P.D. 1445