



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

NPM No. 019-2011

25 October 2011

ATTY. OSCAR G. YABES
Chief of Staff
OFFICE OF SENATOR FRANKLIN M. DRILON
SENATE OF THE PHILIPPINES
Pasay City

Re: Bidding of Infrastructure Project Despite Insufficiency of Funds

Dear Atty. Yabes:

This refers to your letter dated 18 October 2011 relative to the procurement of infrastructure contract for the construction of a Professional School Campus for the University of the Philippines – College of Law (UP Law) in the amount of Five Hundred Million Pesos (PhP 500M).

As represented, the government has appropriated One Hundred Million Pesos (PhP 100M) for the project, which is covered by a Special Allotment Release Order (SARO) that will expire on 31 December 2011. Additionally, even with funding from other sources, the total available amount for the proposed project is still insufficient to fully finance the construction. It is in this regard that the following issues are being raised:

1. Whether UP Law can bid out the entire construction project despite the insufficiency of funds.
2. Whether UP Law can bid out the construction by phase. If so, what steps should be undertaken to ensure that the phasing be not construed as “artificial phasing”?
3. Whether the winning bidder assumes the risk of not getting paid in the event UP Law may lawfully bid out the project.

Commencement of Bidding Despite Insufficient Funds

Section 7.1 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) 9184 provides that all procurement shall be within the approved budget of the procuring entity and should be meticulously and judiciously planned by the procuring entity. Consequently, no procurement shall be undertaken unless it is in accordance with the

approved Annual Procurement Plan (APP)¹ that comprises specific Project Procurement Management Plans (PPMP) for various programs, activities and projects (PAPs) of different end-user units within the procuring entity.

In addition, each project procurement must be supported by an Approved Budget for the Contract (ABC) as reflected in the APP or PPMP, duly approved by the Head of the Procuring Entity, which must at all times be consistent with the appropriations for the project authorized in the General Appropriations Act (GAA), continuing and automatic appropriations, the corporate budget and the appropriation ordinance, as the case may be.²

The ABC is likewise referred to as the amount corresponding to either the full cost of a single year or multi-year PAP under Section 4.3.1 of the Department of Budget and Management (DBM) Circular Letter No. 2010-9 dated 30 December 2011. In the case of multi-year projects (MYP),³ or projects that take more than one (1) year to complete, the ABC is the amount reflected in the corresponding Multi-Year Obligational Authority (MYOA)⁴ issued by the DBM. It must be emphasized however, that prior to the procurement of multi-year contracts for multi-year projects, the procuring agency should first secure a MYOA from DBM.⁵

Alongside the APP, the ABC is a material requisite in any procurement activity inasmuch as it identifies the source and amount of fund allocated by the procuring entity for a specific PAP from its total budget for the year. It is also the mandatory ceiling for bids, and the maximum allowable contract amount for the PAP. As such, prior to the commencement of any procurement activity, it is imperative to identify sufficient fund sources to satisfy the ABC for a PAP, through specific, lump-sum or multi-year appropriations.

Anent the foregoing discussions on the APP, ABC and the applicability of a MYOA, we are of the view that if the Professional School Campus is treated and identified as a multi-year project that requires multi-year appropriations under the APP, UP Law may initiate the procurement of the entire construction project despite limited funds provided that a MYOA has been applied for, approved and issued by the DBM prior to the commencement of the procurement activities.

Bidding Out Construction By Phase

We note that there is nothing in RA 9184 and its IRR that precludes procuring entities from adopting construction of an infrastructure project by phases. As a matter of fact, in the case of infrastructure projects, the procuring entity through the APP may “consider the appropriate timing/phasing of related project activities, such as, engineering design and acquisition of right of way, to reduce/lower project costs.”⁶ The decision to break down the

¹ Section 7.2, IRR of RA 9184.

² See: Sections 5(b) and 7.5, IRR of RA 9184.

³ Defined under Section 4.7 of DBM Circular Letter 2010-9 as budgetary PAPs which will take more than one (1) year to complete. It is classified into MYPs with appropriations available in full during the first year of implementation, MYPs which require multi-year appropriations, and annual recurring projects/activities which require multi-year appropriations.

⁴ Defined under Section 4.6 of DBM Circular Letter 2010-9.

⁵ Section 5.4 of DBM Circular Letter 2010-9.

⁶ Section 7.1, IRR of RA 9184.

construction of an infrastructure project into several phases is a management prerogative that may be validly exercised based on considerations, such as topographical environment, weather condition, feasibility, viability, economy, and/or efficiency in its construction, and acceptable industry practice.

On the other hand, although phasing is recognized, RA 9184 and its IRR prohibit the act of splitting government contracts, *i.e.*, dividing or breaking up contracts into smaller quantities and amounts, or dividing contract implementation into artificial phases or sub-contracts for the purpose of evading or circumventing the requirements of RA 9184 and its IRR, especially the need for public bidding.⁷

In a related opinion⁸ issued by this office, we expressed the view that the separation of the procurement of pipes (goods) from civil works (infra) in the implementation of a water supply project does not automatically amount to a splitting of contract since the separation of the activities does not appear to be for the purpose of circumventing the requirements of RA 9184 nor its IRR considering that both procurement activities will be conducted through public bidding.

Thus, it is our considered view that UP Law may bid out the construction of the project in phases so long as each contractual phase shall be procured through public bidding without circumventing any rules and requirements provided in RA 9184 and its IRR, specifically on splitting of contracts.

Assumption of Risk

It goes without saying that each transaction or contractual arrangement evinces a concomitant risk upon the parties. These risks include the possibility of not getting paid and the possibility of non-performance. However, the assumptions of risk do not in any way excuse parties to a contract, and allow them to renege on their contractual obligations without suffering the corresponding liability.

If it is any measure of security on the part of the winning bidder, the requirements provided in the rules in securing the necessary appropriation for a PAP and the certification that funds are indeed available therefor serve as assurance that the procuring entity has the capability to pay upon the performance by the winning bidder of its duties and obligations under the contract. On the part of the procuring entity, different securities, *i.e.* bid security and performance security; the availability of liquidated damages; and, the subsequent warranty security required by law and the rules serve as reliable fall back in the event the winning bidder fails to perform the end of his bargained-for exchange.

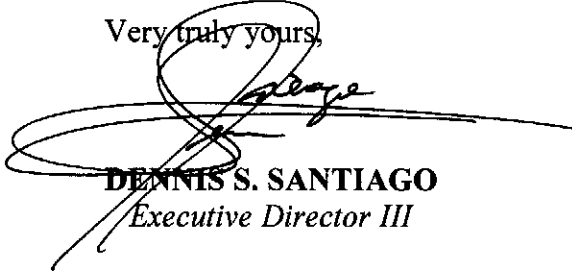
While the winning bidder may be said to have assumed the risk of not getting paid, and on the part of the procuring entity – non-performance, this does not take away the fact that the parties made their respective offer and acceptance at *arm's length* and they are duty bound to perform the contractual stipulations, covenants and agreements in *utmost good faith*.

⁷ Section 54.1, IRR of RA 9184.

⁸ Non Policy Matter No. 009-2008 dated 1 July 2008.

We trust that we have provided sufficient guidance on the matter. Should you have further concerns, please do not hesitate to contact us.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director III