Republic of the Philippines
gppb
Government Procurement Policy Board

TECHNICAL SUPPORT OFFICE

Unit 2506 Raffles Corporate Center
F. Ortigas Jr. Road, Ortigas Center
Pasig City, Philippines 1605

NPM No. 64-2009

14 December 2009

ATTY. FRANKLIN C. SUNGA
Undersecretary
Chairperson, Bids and Awards Committee I
DEPARTMENT OF EDUCATION
DepEd Complex, Meralco Ave., Pasig City

Re: Procurement of Fortified Instant Noodles

Dear Usec. Sunga:

We respond to your letter, with attachments, dated 03 December 2009, which we received on 04 December 2009, seeking our opinion on the interpretation and application of certain provisions of Republic Act No. 9184 (R.A. 9184) and its Implementing Rules and Regulations (IRR) relative to the bidding conducted by the Department of Education (DepEd) for the procurement of "fortified instant noodles" (hereinafter the "Project.").

Based on your representations and the documents submitted, the DepEd conducted the bidding for the Project on 27 February 2009 and soon thereafter, it was reported in the media that the noodles were overpriced, did not contain eggs and other specifically required nutritional contents, and there were irregularities in the bidding process. It was then subjected to Senate inquiry under the Education Committee chaired by Sen. Mar Roxas. In the meantime, or on 7 April 2009, the Notice of Award was issued to the winning bidder (i.e. Jeverps) and the contract was subsequently signed by said bidder on 24 April 2009. However, in a memorandum dated 26 May 2009, DepEd Sec. Jesli A. Lapuz decided to exercise his right under Section 41 to cancel and not execute or proceed with the contract. Jeverps then filed a Motion for Reconsideration (MR) of said decision in a letter dated 03 June 2009. A Committee Review on the Food for School Program (FSP) Procurement of Fortified Instant Noodles with Fresh Eggs and Malunggay was also undertaken.

It is further represented that the DepEd initially sought the opinion of the Department of Justice (DOJ) for resolution of the issues raised by Jeverps in its MR. However, the DOJ, on two occasions, has maintained its position that the proper authority to interpret the questioned provisions of R.A. 9184 is the Government Procurement Policy Board (GPPB). Hence, this request for opinion by DepEd.

At the outset, we would like to inform you that the GPPB is primarily an administrative body imbued with quasi-legislative or rule-making power[1] to determine policy directions in the area of public procurement. It has no jurisdiction to rule on specific issues raised by government agencies with regard to their procurement processes and activities considering that it has no *quasi-judicial*[2] functions under R.A. 9184 and its IRR. As such, it is not in a position to fully understand and be held accountable for an agency's procurement decisions.

Corrollarily, therefore, the GPPB cannot dictate to the Bids and Awards Committee or to the Head of the Procuring Entity (HOPE) which bidders should be declared as eligible, which bid should be accepted as the lowest calculated responsive bid, and to whom should the contract be awarded, or, as in the instant case, not to award the contract on any of the grounds provided for under Section 41 of R.A. 9184. We adhere to the view that the functions of the BAC and the HOPE cannot be interfered with by any government agency since these solely fall within their authority as sanctioned by law, but with the concomitant responsibility that they perform such functions with judiciousness, adhering to the principles of transparency, accountability, equity, efficiency, and economy in the procurement process that it carries out for the procuring entity.

Nonetheless, for guidance purposes, we would like to point out the following:

1. The use of Section 41 (c) of R.A. 9184 as basis for not awarding the contract is dependent on the sound determination by the HOPE that the award of contract will not redound to the benefit of the GOP, under any of the three (3) conditions stated therein;

2. The enumeration of the grounds under Section 41 (c) is meant to be restrictive so as to prevent any potential abuse on the reservation clause provision of R.A. 9184. Nonetheless, the determination of whether the ground/s relied upon by the HOPE in exercising the right to cancel or not to award a contract is/are within the purview of said Section 41 (c) requires a factual determination which this office cannot adjudicate on;

3. In cases where further approval of higher authority is required, the maximum period of twenty (20) days within which said authority should approve or disapprove the contract, as provided under Section 37 of R.A. 9184, shall be reckoned from the date when the indorsement of the contract, together with the contract, has been received by said authority; and

4. The provision under Section 38.2 of R.A. 9184 stating that *"If no action on the contract is taken by the HOPE within the period*

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[1] Rule-making power of administrative agencies refers to the power to issue rules and regulations which result from delegated legislation in the administrative level. (See Agpalo, *Philippine Administrative Law.*1999 Ed., p.137).

[2] Quasi-judicial is defined as a term applied to the actions or discretions of public administrative officers or bodies required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them; as a basis for their official action, and to exercise discretion of a judicial nature. (See Agpalo, *Philippine Administrative Law*, 1999 Ed., p. 216 citing Lupangco v. CA, 160 SCRA 848 [1988]).

specified in Section 37.4 of this IRR-A, the contract shall be deemed approved:xxx" requires positive and unequivocal proof of inaction before the same may be rendered operative. The fact that said provision is by itself clear and unambiguous does not merit its automatic application sans evidence of the inaction relied on.

We trust that this sufficiently addresses your concern. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,

Emilieu C. Piñano
for **RUBY U. ALVAREZ**
Executive Director III

CC: Hon. Jesli A. Lapuz
Secretary, Department of Education

Republic of the Philippines
gppb
Government Procurement Policy Board

TECHNICAL SUPPORT OFFICE

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NPM No. 64-2009

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ATTY. FRANKLIN C. SUNGA
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DEPARTMENT OF EDUCATION
DepEd Complex, Meralco Ave., Pasig City

Re: Procurement of Fortified Instant Noodles

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3. In cases where further approval of higher authority is required, the maximum period of twenty (20) days within which said authority should approve or disapprove the contract, as provided under Section 37 of R.A. 9184, shall be reckoned from the date when the indorsement of the contract, together with the contract, has been received by said authority; and

4. The provision under Section 38.2 of R.A. 9184 stating that *"If no action on the contract is taken by the HOPE within the period*

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specified in Section 37.4 of this IRR-A, the contract shall be deemed approved:xxx" requires positive and unequivocal proof of inaction before the same may be rendered operative. The fact that said provision is by itself clear and unambiguous does not merit its automatic application sans evidence of the inaction relied on.

We trust that this sufficiently addresses your concern. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,

Emilina C. Piñano
for **RUBY U. ALVAREZ**
Executive Director III

CC: Hon. Jesli A. Lapuz
Secretary, Department of Education

REPUBLIKA NG PILIPINAS
REPUBLIC OF THE PHILIPPINES
KAGAWARAN NG EDUKASYON
DEPARTMENT OF EDUCATION
DepEd Complex, Meralco Ave., Pasig City

DepED DEPARTMENT OF EDUCATION

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03 December 2009

HON. RUBY U. ALVAREZ
Executive Director
Government Procurement Policy Board
Unit 2506, Raffles Corporate Center, F. Ortigas, Jr. Road
Ortigas Center, Pasig

Emma,
Pls. handle. Lets prioritize.
12/4/09

Dear Director Alva

We have the honor to seek opinion from the Government Procurement Policy Board (GPPB) on the proper interpretation and application of certain provisions of Republic Act (R.A.) No. 9184 and its Implementing Rules and Regulations (IRR), relative to the bidding conducted by the Department of Education (DepEd) for the procurement of "fortified instant noodles" last February 27, 2009, the surrounding relevant factual circumstances of which may be briefly outlined as follows:

- February 7 & 8 - Posting of Invitation to Bid Phil-GEPS, Phil. Daily Inquirer and DepEd Website;
- February 27, 2009 - Submission and Opening of Bids;
- April 7, 2009 - Notice of Award to Jeverps Manufacturing Corporation (Jeverps);
- April 17, 2009 - Supplier posted Performance Security prior to issuance of Contract;
- April 24, 2009 - Contract signed by Jeverps was endorsed to the HOPE through Usec. Sangil for approval;
- May 26, 2009 - date of Memorandum (copy hereto attached as **Annex "A"**) issued by Secretary Jesli A. Lapus, invoking his "reservation rights" under Section 41 of the Implementing Rules and Regulations (IRR) of R.A. No. 9184;

- May 26, 2009 — date of letter (copy hereto attached as **Annex "B"**) of Undersecretary Teodosio C. Sangil, Jr. (Finance and Administration, DepEd) sent to the President of Jeverps, furnishing him of aforesaid Memorandum of the Secretary;
- June 3, 2009 — letter of Jeverps seeking reconsideration of the Secretary's decision (copy hereto attached as **Annex "C"**); and
- June 6, 2009 — the full Review Committee with the participation of concerned government agencies, industry experts and a representative of a big manufacturer of noodles met, deliberated, and submitted later a detailed Results of the Committee Review on the Food for School Program (FSP) Procurement of Fortified Instant Noodles with Fresh Eggs and Malunggay, finding the prices to be within reasonable levels (copy of said Results is hereto attached as **Annex "D"**).

The period from the posting of Invitation to Bid on February 7& 8, 2009 to the issuance of the said Memorandum on 26 May 2009 (**Annex "A"** hereof) was within the 120-day period mentioned under the Period of Action on Procurement Activities shown in Annex "C" of the book by Sofronio B. Ursal, entitled Government Procurement Tool Kit (R.A. No. 9184, Annotated), Philippine Copyright 2004. Likewise, the period from the opening of bids on 27 February 2009 to the issuance of said Memorandum on 26 May 2009 is within the 90-day period shown in said Annex "C" of the book by Ursal.

As part of the hunger-mitigation initiatives of the Government and to address the nutritional needs of school children in priority areas, DepEd introduced in 1998 a feeding program whereby, for a fixed number of days, pupils in said areas were fed fortified instant noodles. For the 2009 procurement, the noodles are to be fortified with vitamin A, iron, protein from fresh eggs and malunggay.

In the public biddings conducted for the procurement of the required noodles from the time of the former Secretaries Andrew Gonzales, Raul Roco, Edilberto de Jesus, Florencio Abad and Officer-in-Charge Fe Hidalgo, up to the present administration of Secretary Lapus, a local company, Jeverps, emerged as the winning bidder. During the time of said former Secretaries, however, subject procurement of noodles had not been attended by controversies. Since 1998, Jeverps supplied fortified instant noodles which had met the required specifications. In the last bidding conducted by DepEd on February 27, 2009 for the P427-Million approved budget for the contract (ABC), Jeverps again was the successful bidder.

Soon after the bidding was conducted this year, it was reported in the media that the noodles used for the program were overpriced and did not contain eggs and the other specifically required nutritional contents; and that there were irregularities in the bidding process. The source of the information was Mr. Prudencio Quido of Kolonwel Trading ("Kolonwel"). However, neither Mr. Quido nor Kolonwel substantiated the allegations of overpricing, non-compliance with specifications/requirements, and irregularities in the bidding process on subject procurement of noodles. Incidentally, Kolonwel used to bid for school furniture and books at

DepEd, but is not a noodle manufacturer or supplier. Relative to said procurement of noodles, Kolonwel bought bid documents and participated in the pre-bid conference but did not, however, participate in the actual bidding. Looking back, DepEd now Realizes that Kolonwel was in bad faith right from the start: if it was an earnest bidder interested in protecting the public welfare, why did Kolonwel "chicken out" from the bidding process and instead, waged a demolition campaign against the DepEd without any risk against itself? In short, it cried "foul," "overpricing," and "irregularity" from a position of safety of a plain kibitzer.

Reports in the media persisted and soon, the Education Committee of the Senate under the chairmanship of Sen. Mar Roxas decided to conduct an inquiry on the reported "irregularities" and "anomalies". Senior officials of the DepEd were summoned to appear in the hearings. Meanwhile, as the date of the contract signing by the DepEd in favor of Jeverps (as awardee of this year's public bidding) neared, attacks against the institutional integrity of the Department, as well as the good name of DepEd senior officials, intensified. Acting on said reported "irregularities" and "anomalies", the Secretary created a Review Committee to conduct an independent review of the charges made in the Senate and in the media, particularly the matter of "overpricing", "lack of egg content in the noodles" and "irregularity in the bidding".

Moreover, in view of the inquiry then being conducted by the Senate, coupled with the "trial by publicity" being waged in the media to the detriment of the Department and the integrity of its feeding program, the Secretary considered the situation then prevailing to further warrant the invocation of the "reservation clause" as broadly conceptualized in Sec. 41 of the IRR of R.A. No. 9184 (i.e., "*where the award of the contract will not redound to the benefit of the government*"). Had the DepEd signed the Jeverps contract in utter disregard of the inquiry then going on in the Senate, a body mandated to inquire into the operation of the Executive Branch, the public may suspect all the more that an "anomalous contract" was being railroaded. Even the Senate itself may believe that the government interest was being disregarded.

After due consideration of the foregoing facts, and on the basis of the initial review and recommendation made by Undersecretaries Ramon Bacani and Vilma Labrador, Secretary Lapus issued the earlier stated Memorandum dated 26 May 2009 (**Annex "A"** hereof), invoking his reservation rights under Section 41 (c) of the IRR of R.A. No. 9184. The said memorandum was issued in order to ensure that the interest of the Government is protected, as it also appears based on the examination of the procurement documents wherein certain market and product assumptions may no longer accurately reflect market conditions, such that to sign the contract in favor of Jeverps will not redound to the benefit of the government. Said Section 41 of the IRR of R.A. 9184 states, inter alia, as follows:

"Section 41. *Reservation Clause.*

"41.1. The procuring entity reserves the right to reject any and all bids, declare a failure of bidding, or not award the contract in the following situations:

"xxx xxx xxx.

"(c) For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the Government, as follows: (i) if the physical and economic conditions have significantly changed so as to render the project no longer economically, financially or technically feasible as determined by the head of the procuring entity; (ii) if the project is no longer necessary as determined by the head of the procuring entity; and (iii) if the source of funds for the project has been withheld or reduced through no fault of the procuring entity."

The Secretary, therefore, considered it in the interest of the government to invoke the reservation clause and to subject the whole procurement and feeding program itself to an impartial review by a Committee composed of resource persons and technical experts in the field. Incidentally, the Results of the Committee Review on the Food for School Program (FSP) Procurement of Fortified Instant Noodles with Fresh Eggs and Malunggay (**Annex "D"** hereof) shows a negative finding on the accusations. Meanwhile, Jeverps is seeking reconsideration based on its own perception of Sec. 41(c) of the Implementing Rules of R.A. No. 9184.

Accordingly, the Secretary declared in his Memorandum (**Annex "A"** hereof) that he was exercising the above-quoted provision and therefore, decided not to sign the contract in favor of Jeverps. Thereafter, then Undersecretary for Finance and Administration Teodosio C. Sangil, Jr. sent to the President of Jeverps a letter dated May 26, 2009 (**Annex "B"** hereof), furnishing the latter a copy of said memorandum.

Last June 3, 2009, the Office of the Secretary received a letter from Jeverps (**Annex "C"** hereof), seeking reconsideration of the Secretary's decision.

On June 6, 2009, the full Review Committee with the participation of concerned government agencies, industry experts and a representative of a big manufacturer of noodles met, deliberated, and submitted later a detailed Results of the Committee Review on the Food for School Program (FSP) Procurement of Fortified Instant Noodles with Fresh Eggs and Malunggay (**Annex "D"** hereof) finding the prices to be within reasonable levels, thus, negating the charges with specific data.

In the light of the foregoing premises, especially of the arguments raised by Jeverps, this Department sought the legal opinion of the Department of Justice (DOJ), through a letter dated 30 July 2009 (copy hereto attached as **Annex "E"**), on the following questions:

1. Under the factual circumstances outlined above, was the subject decision of Secretary Lapus not to sign the contract in favor of Jeverps within the purview of Section 41 (c) of the Implementing Rules and Regulations of R.A. No. 9184?

2. Is the enumeration of grounds (i to iii) in said Sec. 41(c) exhaustive, or may it admit of other grounds, such as that used by the Secretary in his Memorandum dated 26 May 2009, especially in the light of the then pending Senate inquiry and in deference to the Senate that has "authority to inquire into the operations of the executive branch", as

enunciated in the case of *Senate of the Philippines v. Ermita,* G.R. No. 169777, April 20, 2006, and companion cases?

In response to the afore-stated questions, the DOJ rendered its Opinion No. 39, s. 2009 dated 24 August 2009 (copy hereto attached as **Annex "F"**) stating, inter alia, the following:

"xxx xxx xxx.

"This Department regrets that it cannot render the desired opinion.

"The resolution of the issues raised involves the interpretation and application of the provisions of RA No. 9184 and its IRR, which falls within the mandate of the Government procurement policy Board (GPPB). Section 63(a) and (b) of RA No. 9184 granted the GPPB the power to protect national interest in all matters affecting public procurement and the power to formulate and amend, whenever necessary, the IRR. Vested with the rule-making powers, the GPPB has the competence and primary jurisdiction to apply and interpret the rules in resolving the issue, taking into account the policy repercussions of addressing the question involved.

"This rule arises not only from practical considerations, but also out of due respect and deference for the competence and expertise of the office having primary jurisdiction to resolve the matter for its familiarity with the policy repercussions of the question as well as the logical recognition of the lawful exercise of an authority conferred by law.

"xxx xxx xxx.

"**We, therefore, suggest that you directly address your request to the GPPB, the office which is in the best position to answer your queries.**" (emphasis supplied)

Subsequently, in the interest of clarifying certain points of law raised by Jeverps in subject letter of 3 June 2009 given that the afore-cited opinion did not touch on the arguments of Jeverps, and a resolution of the DOJ in this regard may guide us on how to resolve the pending request of Jeverps for reconsideration of the Secretary's decision not to sign the subject contract, the undersigned posed in his letter dated 07 October 2009 to the DOJ (copy hereto attached as **Annex "G"**) the following questions:

1. When does the maximum period of twenty (20) days to act on a procurement contract under the provisions of Section 37 of Republic Act No. 9184 (RA No. 9184) commence to run?; and

2. Assuming that DepEd did not act within the twenty (20) days provided under Section 37, may the provisions of Section 41 of the same law be still invoked by DepEd? In the alternative, is the Purchaser-Supplier Contract now deemed approved?

In response to the afore-said letter dated 07 October 2009, the DOJ rendered its Opinion No. 60, s. 2009 dated 09 November 2009 (copy hereto attached as **Annex "H"**) stating, inter alia, the following:

"xxx xxx xxx.

"We regret that we have to decline to render opinion on the issues raised.

"**At the pain of being repetitious, we would like to reiterate that the resolutions of the queries raised involves the interpretation and application of Sections 37 and 41 of R.A. No. 9184 and its IRR, which falls within the mandate of the Government Procurement Policy Board (GPPB)**. Section 63(a) and (b) of RA No. 9184 granted the GPPB the power to protect national interest in all matters affecting public procurement and the power to formulate and amend, whenever necessary, the IRR. Vested with the rule-making power, the GPBB has the competence and primary jurisdiction to apply and interpret the rules in resolving the issues, taking into account the policy repercussions of addressing the question involved.

"xxx xxx xxx."

Although in said Opinion No. 60, s. 2009 dated 09 November 2009, the DOJ declined to render an opinion on the issues raised by DepEd, nonetheless, it made the following observations:

"xxx xxx xxx.

"Be that as it may, and for your information and guidance, we would like to make the following observations:

"Section 37 of R.A. 9184 and Section 37.4 of its IRR lay down the following guidelines for the approval of contracts, viz:

"Section 37. Notice and Execution of Award. – xxx

"Within ten (10) calendar days from receipt of the Notice of Award, the winning bidder shall formally enter into contract with the Procuring Entity. When further approval of higher authority is required, **the approving authority for the contract shall be given a maximum of twenty (20) calendar days to approve or disapprove it.** xxx xxx xxx

"Section 37.4. Approval of Contract.

"When further approval of higher authority is required, the **approving authority for the contract**, or his duly authorized representative, **shall be given a maximum of twenty (20) calendar days from receipt thereof**, together with all documentary requirements, **to perfect the said contract, to approve or disapprove it**.xxx

"The use of the term "shall" in the above-quoted provisions contemplates a mandatory character, which implies that the approving authority is obliged to approve or disapprove the contract within the maximum period of twenty calendar days. Under the rule of statutory construction, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning, and it is generally imperative or mandatory. It has invariable significance to impose a duty which may be enforced particularly if the public is in favor of this meaning or when addressed to public officials, or where public interest is involved, or where the public persons have rights which ought to be exercised or enforced, unless a contrary intent appears.

"Also, the word "maximum", as used in the aforesaid provisions, acted as a modifier because it placed a limit on the period upon which the approving authority is allowed to act on the contract. This means that the said period is not subject to extension. This view finds support in Section 38.2 of the IRR which, insofar as material, reads:

"Section 38.2. **If no action on the contract is taken by the head of the procuring entity within the period specified in Section 37.4 of this IRR, the contract concerned shall be deemed approved**. xxx

"The provisions of Section 38.2, above-quoted, are clear and categorical enough that interpretation is not necessary --- only application.

"xxx xxx xxx."

Considering that DOJ declined to render an opinion on the subject issues and held the view that the GPPB has the competence and primary jurisdiction to apply and interpret the rules in resolving subject issues; and considering also that, the DOJ opined that herein issues involve the proper interpretation and application of Sections 37 and 41 of RA No. 9184 and its IRR, which according to the DOJ fall within the mandate of the GPPB, the undersigned, therefore, respectfully requests your legal opinion on all the four (4) mentioned issues which were earlier raised to the DOJ.

We wish to be guided by your authoritative legal opinion whether, under existing laws and jurisprudence, DepEd acted correctly as above outlined. Moreover, considering the request

for reconsideration by Jeverps of the Secretary's decision and the said results of the Review Committee, we wish to know whether reconsideration is legally in order.

We shall await the opinion of GPPB. In the meantime, we shall maintain the status quo until the issuance of said opinion.

Very truly yours,

ATTY. FRANKLIN C. SUÑGA
Undersecretary

cc:

Hon. Jesli A. Lapus
Secretary

Republic of the Philippines
Department of Education

DepED
Annex "A"

Tanggapan ng Kalihim
Office of the Secretary

MEMORANDUM

TO : **TEODOSIO C. SANGIL, JR.**
Undersecretary
Bids and Awards Committee I
Chairperson

FROM : **JESLI A. LAPUS**
Secretary

RE : CANCELLATION OF BIDDING FOR SUPPLY & DELIVERY OF FORTIFIED INSTANT NOODLES WITH FRESH EGGS AND MALUNGGAY

DATE : 26 May 2009

This is in connection with the request for this Office to sign the Contract for the Supply & Delivery of Fortified Instant Noodles with Fresh Eggs and Malunggay of the Health and Nutrition Center (HNC), Department of Education's Healthy Start Program and Jeverps Manufacturing, Inc.

Under Section 41 of R.A. No. 9184, the "Head of Agency reserves the right to reject any and all bids, declare a failure of bidding, or not to award the contract in the following situations:

x x x

(c) For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the government as defined in the IRR."

Section 41 (c) of the Implementing Rules and Regulations specifically provide for the justifiable and reasonable grounds and states:

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BY:

"c) For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the Government as follows: (i) if the physical and economic conditions have significantly changed so as to render the project no longer economically, financially or technically feasible as determined by the procuring entity; (ii) if the project is no longer necessary as determined by the head of the procuring entity; and (iii) if the source of funds for the project has been withheld or reduced through no fault of the procuring entity."

Based on the examination of the procurement documents, it appears that certain market and product assumptions may no longer accurately reflect market conditions such that to continue with the contract will not redound to the benefit of the government. The basis for the minimum quantity vis the Approved Budget for the Contract requires meticulous preparation. There is need to review and modify the estimated budget for the contract in accordance with market analysis to support the relevant procurement data. Further, issues on the raw materials supply sources affect the feasibility of the project.

In view of the above premises, this Office is exercising its right under Section 41 to cancel and not execute or proceed with any contract in relation to the aforementioned bidding. This is to ensure that the interest of the government is protected.

For immediate compliance and implementation.

JESUS A. LAPUS
Secretary

RECEIVED
BY: Liz Bautista

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REPUBLIKA NG PILIPINAS
REPUBLIC OF THE PHILIPPINES
KAGAWARAN NG EDUKASYON
DEPARTMENT OF EDUCATION
DepEd Complex, Meralco Avenue, Pasig City, Philippines

DepED DEPARTMENT OF EDUCATION

Teodosio C. Sangil, Jr.
Undersecretary, Finance & Administration
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May 26, 2009

Mr. Alexander L. Billan
President
Jeverps Manufacturing Corporation
No. 15 Km., 16 Severina Industrial Subd.
Parañaque, Metro Manila

Subject: **Supply and Delivery of Fortified Instant Noodles with Fresh Eggs and Malunggay**

Dear Mr. Billan:

We are furnishing you a copy of the memorandum signed by the Honorable Secretary Jesli A. Lapus, which is self-explanatory.

Very truly yours,

TEODOSIO C. SANGIL, JR.
Undersecretary

RECEIVED
BY: Wz BANTISTA

JEVERPS MANUFACTURING CORPORATION

+C - Usec Sanga
GSY / Atty Sy guia
Atty Thess

03 June 2009

DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY
RECEIVED
06/03/09
By: Time:
Doc. # OSEC-105186

HON. JESLI A. LAPUS
Secretary
Department of Education
DepEd Complex, Meralco Ave.,
Pasig City

Dear Secretary Lapus:

This will confirm receipt of your Memorandum dated 26 May 2009 on 27 May 2009. For reasons herein set forth, this will likewise seek reconsideration of the same.

At the outset, allow us to narrate, nay, recall to you the proceedings already taken, and the costs that we have incurred in regard to the Bidding for Supply & Delivery of Fortified Instant Noodles with Fresh Eggs and Malunggay which you have so hastily decided to cancel for reasons which to us appear to be at best unclear, and at worst, arbitrary and illegal.

DEPARTMENT OF EDUCATION
03 JUL 2009
18494

1. Following the issuance by the Health and Nutrition Center (HNC), through the Department of Education (DepEd) Bids and Awards Committee I, we lost no time in obtaining the required Bidding Documents at a cost of PESOS FIVE THOUSAND (Php5,000.00) – Non-refundable.

2. Thereafter, a Pre-Bid Conference was conducted wherein all eligible bidders were afforded the opportunity to clarify any and all matters regarding the proceedings being undertaken.

3. Following the conclusion of the Pre-Bid Conference, the participating bidders were required to post their respective Bid securities amounting to PESOS FOUR MILLION TWO HUNDRED SEVENTY-TWO THOUSAND ONE HUNDRED FIFTY-FOUR (Php4,272,154.00). We complied therewith by posting our Security Bid dated 18 February 2009.

15 Km. 16 Severina Industrial Subdivision, Parañaque City, Philippines
Telephone Nos.: (02) 823-2376 to 77; (02) 823-1576 Fax No.: (02) 823-1578
E-mail address: jeverps@philonline.com

4. After we were adjudged as the best bidder and, consequently were issued a Notice of Award dated 7 April 2009, we were required, to post the Performance Security equivalent to 10% of the contract price for a total sum of PESOS FORTY-TWO MILLION SEVEN HUNDRED TWENTY-ONE THOUSAND FIVE HUNDRED THIRTY-FIVE and TWENTY-TWO CENTAVOS (Php42,721,535.22). We complied therewith by submitting our Performance Security dated 15 April 2009.

5. On 21 April 2009, we received from your office copies of the Purchaser-Supplier Contract which were sent to us for our signature. On 22 April 2009, your good office received the Purchaser-Supplier Contract duly signed by our Company President.

6. More importantly, as a necessary consequence of the award given to us, we lost no time in importing the raw materials that are not locally available, and issued Purchase Orders for those that are. In both cases, we incurred expenses by way of down payments and other advanced costs which we had to defray therefore.

To our mind, the entire exercise as described above, wherein we participated every step of the way, and the expenses we incurred in the process, should amount to something and should not simply be cast aside and forgotten on account of the objections raised by the uninformed, who seem to care more about stirring controversies, rather than sincerely ferreting out the truth. As the winning bidder in whose favor a Notice of Award had already been issued by your good office, we feel very strongly that we are entitled to be accorded the basic courtesy of being informed that the contract which we painstakingly aspired for – at great sacrifice and expense – was about to be cancelled. We feel that we have at least earned the right to be afforded the opportunity to be heard on the matter before any decision was made thereon.

Truth to tell, we are still in a deep state of wonderment how things could have changed so drastically within so short a space of time. After receiving your Notice of Award dated 7 April 2009, and the reassuring letter of your Undersecretary Teodosio C. Sangil dated 11 May 2009, informing us that the signing of the procurement contract was merely being ***"deferred,"*** we were shocked to receive your Memorandum dated 26 May 2009 giving notice of your decision **"to cancel and not execute or proceed with any contract in relation to the aforementioned bidding"** without even giving us, or any party concerned, the opportunity to be heard.

Even the reasons that you invoke to justify your aforestated decision to cancel the Notice of Award issued in our favor does not in any way assuage our feeling, nay, suspicion, that the same was rendered not really because of any of the grounds cited therein but because of pressure from the public who were misled by the lies ingeniously

peddled by Kolonwel Trading, a losing bidder who seem to have lost steam at the **"end-game"** and for unknown reasons voluntarily desisted from participating in the actual bidding stage of the proceedings.

In your Memorandum dated 26 May 2009, you invoked Section 41 of RA 9184 which provides that the **"Head of Agency reserves the right to reject any and all bids, declare a failure of bidding, or not to award the contract."** You likewise cited the provisions of Section 41 (c) of the Implementing Rules and Regulations which states that:

> Section 41 (c) of the Implementing Rules and Regulations specifically provide for the justifiable and reasonable grounds and states:
>
> "(c) For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the Government as follows: (i) if the physical and economic conditions have significantly changed so as to render the project no longer economically, financially or technically feasible as determined by the procuring entity; (ii) if the project is no longer necessary as determined by the head of the procuring entity; and (iii) if the source of funds for the project has been withheld or reduced through no fault of the procuring entity."

With all due respect, we believe and so submit that you have effectively waived all your rights under Section 41 of RA 9184 and under Section 41 (c) of the Implementing Rules and Regulations by your failure to seasonably act on the Purchaser-Supplier Contract within the **maximum period of twenty (20) calendar days** allowed by Section 37 of RA 9184 and Section 37.4 of the Implementing Rules and Regulations. Your good office received the Purchaser-Supplier Contract that our Company President signed on 22 April 2009 leaving you up to 11 May 2009 to either approve or disapprove it. You did not do either on 11 May 2009. The legal implication of your inaction is that the said **contract is now deemed approved** pursuant to the clear and unambiguous provisions of Section 38 of RA 9184 and Section 38.2 of the Implementing Rules and Regulations.

We, thus, respectfully submit that it is too late in the day for you to exercise the rights given to you under the provisions of Section 41 of RA 9184. It can no longer be used to disapprove a contract which has been approved by operation of law. What is left for your good office to do under the premises and pursuant to Section 37 of RA 9184 is not to cancel the contract but to issue to us the Notice to Proceed which should have been done no later than 19 May 2009. In our opinion, the non-issuance of the Notice to Proceed amounts already to criminal nonfeasance.

Even assuming for the sake of argument that you can still invoke Section 41 of RA 9184, none of the **"justifiable and reasonable ground"** provided under Section 41 (c) exist in this case. Indeed, as already observed above, we are at a loss how within such

short space of time, **"the physical and economic conditions [could] have significantly changed so as to render the project no longer economically, financially, or technically feasible."**

Even to our very simple and unsuspecting mind, it behooves us to suspect that what have significantly changed are not the physical, and economic conditions, but, rather the adverse public opinion which was all of a sudden provoked by the consistent, and sustained intrigue sown by our detractors without however offering any concrete and substantial basis therefor. We would have been able to squarely address and traverse each and every disparaging allegations leveled against us had we been given the opportunity – BEFORE THE RIGHT FORUM - to do so. Unfortunately, the proper and opportune time to do so that we were so confident would be given to us by your good office did not come.

It is for this reason that we now come to your good office to seek succor, and reconsideration of your Memorandum dated 26 May 2009 and earnestly pray that you withdraw and void the same. In lieu thereof, we request that you issue us the Notice to Proceed pursuant to Section 37 of RA 9184 and Section 37.5 of the Implementing Rules and Regulations.

Thank you.

Respectfully yours,

ATTY. CHITO B. DIMACULANGAN
General Counsel

cc: Office of the Ombudsman

REPUBLIKA NG PILIPINAS
REPUBLIC OF THE PHILIPPINES
KAGAWARAN NG EDUKASYON
DEPARTMENT OF EDUCATION
DepEd Complex, Meralco Ave., Pasig City

DepED
DEPARTMENT OF EDUCATION

Tanggapan ng Katulong na Kalihim
Office of the Undersecretary

Direct Line: (632) 633-72-05
Telefax: (632) 633-72-59
Email: fcsunga@deped.gov.ph
Website: http://www.deped.gov

30 July 2009

OFFICE OF THE SECRETARY
RECEIVED
AUG 04 2009
DEPARTMENT OF JUSTICE

Hon. AGNES VST DEVANADERA
Acting Secretary
Department of Justice
Padre Faura, Manila

Dear Sec. DEVANADERA:

We have the honor to seek legal opinion on the proper interpretation and application of the reservation clause by the Secretary, Department of Education (DepEd), under Section 41 of Republic Act No. 9184, in the light of DepEd's bidding conducted last February 27, 2009 for the procurement of the "fortified instant noodles", the pertinent facts of which may be briefly stated as follows:

As part of the hunger-mitigation initiatives of the Government, and to address the nutritional needs of school children in priority areas, DepEd introduced in 1998 a feeding program whereby, for a fixed number of days, pupils in said areas were fed fortified instant noodles. For the 2009 procurement the noodles are to be fortified with vitamin A, iron, protein from fresh eggs and malunggay.

In the public biddings conducted for the procurement of the required noodles from the time of the former Secretaries Andrew Gonzales, Raul Roco, Edilberto de Jesus, Florencio Abad and Officer-in-Charge Fe Hidalgo to the present administration of the undersigned Secretary, a local company, Jeverps Manufacturing Corp. ("Jeverps") emerged as the winning bidder. Since 1998, Jeverps supplied fortified instant noodles meeting the required specifications, and in the last bidding conducted by DepEd on February 27, 2009, for the P427-Million approved budget for the contract (ABC), Jeverps again was the successful bidder.

Soon after the bidding was conducted this year, it was reported in the media that the noodles used for the program were overpriced and did not contain eggs and the specified nutritional contents, and that there were irregularities in the bidding process. The source of the information was Mr. Prudencio Quido of Kolonwel Trading ("Kolonwel") a trading company that bought bid documents and participated in the pre-bid conference but did not participate in the actual bidding. Kolonwel used to bid for school furniture and books at DepEd but is not a noodle manufacturer or supplier.

At any rate, the reports in the media persisted and soon, the Education Committee of the Senate under the chairmanship of Sen. Mar Roxas decided to conduct an inquiry on the reported "irregularities" and "anomalies", and senior officials of the DepEd were summoned to appear in the hearings. Meanwhile, as the date of the contract signing by the DepEd in favor of Jeverps (as awardee of this year's public bidding) neared, attacks against the institutional integrity of the Department as well as the good name of DepEd senior officials intensified. Acting on said reported "irregularities" and "anomalies" the Secretary created a Review Committee to conduct an independent review of the charges made in the Senate and in the media, particularly the matter of "overpricing", "lack of egg content in the noodles" and "irregularity in the bidding".

After due consideration of the foregoing facts and in order to ensure that the interest of the Government is protected as it appears also based on the examination of the procurement documents that certain market and product assumptions may no longer accurately reflect market conditions such that to sign the contract in favor of Jeverps will not redound to the benefit of the government and on the basis of the initial review and recommendation made by Undersecretaries Ramon Bacani and Vilma Labrador, the DepEd Secretary issued a Memorandum dated 26 May 2009, invoking his reservation rights under Sec. 41(c) of the Implementing Rules and Regulations of R.A. 9184, which states that the procuring entity may reject any and all bids, declare a failure of bidding, or not award the contract in the following situations:

x x x

> *"(c) For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the Government, as follows: (i) if the physical and economic conditions have significantly changed so as to render the project no longer economically, financially or technically feasible as determined by the head of the procuring entity; (ii) if the project is no longer necessary as determined by the head of the procuring entity; and (iii) if the source of funds for the project has been withheld or reduced through no fault of the procuring entity."*

Accordingly, the Secretary declared that he was exercising the above-quoted provision, and, therefore decided not to sign the contract in favor of Jeverps. Copy of the aforesaid Memorandum of the DepEd Secretary is hereto attached as Annex "A".

Thereafter, then Undersecretary for Finance and Administration Teodosio C. Sangil, Jr. sent to the President of Jeverps a letter dated May 26, 2009 furnishing him with a copy of said memorandum. Copy of said letter is hereto attached as Annex "B".

Last June 3, 2009, the Office of the Secretary received a letter from Jeverps, seeking reconsideration of the Secretary's decision, copy of which is hereto attached as Annex "C".

On June 6, 2009, the full Review Committee with the participation of concerned government agencies, industry experts and a representative of a big manufacturer of noodles met, deliberated, and submitted later a detailed Results of the Committee Review on the Food for School Program (FSP) Procurement of Fortified Instant Noodles with Fresh Eggs and Malunggay finding the prices to be within reasonable levels thus, negating the charges with specific data. Copy of the said results is hereto attached as Annex "D".

In the light of the foregoing, and especially of the arguments raised by Jeverps, we wish to seek opinion on the following questions:

1. Under the factual circumstances outlined above, was the aforesaid decision not to sign the contract in favor of Jeverps within the purview of Section 41 (c) of the Implementing Rules of R.A. No. 9184?
2. Is the enumeration of grounds (i to iii) in said Sec. 41(c) exhaustive, or may it admit of other grounds, such as that used by the Secretary in his Memorandum dated 26 May 2009, especially in the light of the then pending Senate inquiry and in deference to the Senate that has "authority to inquire into the operations of the executive branch", as enunciated in the case of *Senate of the Philippines v. Ermita*, G.R. No. 169777, April 20, 2006, and companion cases?

Admittedly, the two questions are interrelated. Hence, the Secretary made the decision to invoke the reservation clause under the statute, guided by existing rulings of the Supreme Court on the matter. In *Placido O. Urbanes, Jr., vs. Local Water Utilities Administration, et al.* G.R. No. 143442 August 29, 2006, quoting a well-known treatise on government contracts, thus:

> "It is a settled rule that where the invitation to bid contains a reservation for the Government to reject any or all bids, the lowest or highest bidder, as the case may be, is not entitled to an award as a matter of right for it does not become the ministerial duty of the Government to make such award. Thus, it has been held that <u>where the right to reject is so reserved, the lowest bid or any bid for that matter may be rejected on a mere technicality, that all bids may be rejected, even if arbitrarily and unwisely, or under a mistake, and that in the exercise of a sound discretion, the award may be made to another than the lowest bidder.</u> And so, where the Government as advertiser, availing itself of that right, makes its choice <u>in rejecting any or all bids, the losing bidder has no cause to complain nor right to dispute that choice, unless an unfairness or injustice is shown.</u> Accordingly, he has no ground of action to compel the

Government to award the contract in his favor, nor to compel it to accept his bid." (Underscoring supplied.)

The Supreme Court additionally observed in that case, that:

"Verily, a reservation in the advertisement for bids of the right to reject any bid generally vests in the authorities a wide discretion as to who is the best and most advantageous bidder. The exercise of such discretion involves inquiry, investigation, comparison, deliberation and decision, which are quasi-judicial functions, and when honestly performed, may not be reviewed by the courts. In such cases, there is no binding obligation to award the contract to any bidder and in the exercise of such discretion the award may be made validly to whoever among the participating bidders has submitted the most advantageous bid. (B. C. Fernandez, Jr., *A Treatise on Government Contracts under Philippine Law* 41-42 (2003)."

In *First United Constructors Corporation vs. Poro Point Management Corporation et al.* (G.R. No. 178799, January 19, 2009), the Supreme Court reiterated its earlier ruling in *JG Summit Holdings, Inc. v. Court of Appeals* (G.R. No. 124293, January 31, 2005, 450 SCRA 169, citing Bureau Veritas v. Office of the President, 205 SCRA 705, 717-719 (1992), that:

"The discretion to accept or reject a bid and award contracts is vested in the Government agencies entrusted with that function. The discretion given to the authorities on this matter is of such wide latitude that the Courts will not interfere therewith, unless it is apparent that it is used as a shield to a fraudulent award (*Jalandoni v. NARRA*, 108 Phil. 486 [1960]). x x x The exercise of this discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation. This task can best be discharged by the Government agencies concerned, not by the Courts. The role of the Courts is to ascertain whether a branch or instrumentality of the Government has transgressed its constitutional boundaries. But the Courts will not interfere with executive or legislative discretion exercised within those boundaries. Otherwise, it strays into the realm of policy decision-making.

"It is only upon a clear showing of grave abuse of discretion that the Courts will set aside the award of a contract made by a government entity. Grave abuse of discretion implies a capricious, arbitrary and whimsical exercise of power (Filinvest Credit Corp. v. Intermediate Appellate Court, No. 65935, 30 September 1988, 166 SCRA 155). The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined by law, as

to act at all in contemplation of law, where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility (Litton Mills, Inc. v. Galleon Trader, Inc., et al[.], L-40867, 26 July 1988, 163 SCRA 489)."

Moreover, with special reference to the second issue posed above, the inquiry then being conducted by the Senate, coupled with the "trial by publicity" being waged in the media to the detriment of the Department and the integrity of its feeding program, the Secretary considered the situation then prevailing to further warrant the invocation of the "reservation clause" as broadly conceptualized in Sec. 41 of R.A. No. 9184 (i.e., "*where the award of the contract will not redound to the benefit of the government*"), considering the grounds specified in the Implementing Rules. Had the DepEd signed the Jeverps contract in utter disregard of the inquiry then going on in the Senate, a body mandated to inquire into the operation of the Executive Branch, the public may suspect all the more that an "anomalous contract" was being railroaded, and even the Senate itself may believe that the government interest was being disregarded. The Secretary, therefore, considered it in the interest of the government to invoke the reservation clause and to subject the whole procurement and feeding program itself to an impartial review by a Committee composed of resource persons and technical experts in the field.

The Results of the Committee Review on the Food for School Program (FSP) Procurement of Fortified Instant Noodles with Fresh Eggs and Malunggay shows a negative finding on the accusations, and Jeverps is seeking reconsideration based on its own perception of Sec. 41(c) of the Implementing Rules of R.A. No. 9184. We, therefore wish to be guided by your authoritative legal opinion whether, under existing law and jurisprudence, DepEd acted correctly, as above outlined. Moreover, considering the motion for reconsideration by Jeverps of the Secretary's decision, and the said results of the Review Committee, we wish to know whether a reconsideration is legally in order.

We shall await your legal opinion. In the meantime we shall maintain the status quo until the issuance of your legal opinion.

Very truly yours,

ATTY. FRANKLIN C. SUNGA
Undersecretary

cc: Hon. Jesli A. Lapus
Secretary

OPINION NO. 39, S. 20

Republika ng Pilipinas
KAGAWARAN NG KATARUNGAN
Department of Justice
Manila

AUG 24 2009

Atty. Franklin C. Suñga
Undersecretary
Department of Education
DepEd Complex, Meralco Avenue
Pasig City

DEPARTMENT OF EDUCATION
OFFICE OF THE UNDERSECRETARY
RECEIVED
02 SEP 2009
By: Time:
Doc. # 10151

Sir:

This refers to your letter dated July 30, 2009, requesting for legal opinion on the proper interpretation and application of the reservation clause by the Secretary of the Department of Education (DepEd) pursuant to Section 41[1] of Republic Act (RA) No. 9184, also known as the "Government Procurement Reform Act", in the light of DepEd's bidding conducted for the procurement of the "fortified instant noodles".

You inform us that on February 27, 2009, Jeverps Manufacturing Corp. was declared by the DepEd as the winning bidder for the supply and delivery of fortified instant noodles with fresh eggs and malunggay; that soon after the bidding, it was reported in the media that the noodles used in the program were overpriced and did not contain eggs and the specified nutritional contents, and that there were irregularities in the bidding process; and that, as a consequence thereof, the Education Committee of the Senate decided to conduct an inquiry on the reported "irregularities" and "anomalies".

You also state that upon examination of procurement documents, it was shown that certain markets and product assumptions may no longer accurately reflect the market conditions such that to sign the contract in favor of Jeverps Manufacturing Corporation will not redound to the benefit of the government, hence, the DepEd Secretary issued a Memorandum dated May 26, 2009, canceling the said bidding by invoking his reservation rights under Section 41(c) of the Implementing Rules and Regulations (IRR) of RA No. 9184, to wit:

Section 41. *Reservation Clause.*

---

[1] Sec. 41. *Reservation Clause.* – The Head of the Agency reserves the right to reject any and all Bids, declare a failure of bidding, or not award the contract in the following situations:

xxx xxx xxx

(c) For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the government as defined in the IRR.

OPINION NO. 39, S. 20

41.1. The procuring entity reserves the right to reject any and all bids, declare a failure of bidding, or not award the contract in the following situations:

x x x

x x x

c) For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the Government as follows: (i) if the physical and economic conditions have significantly changed so as to render the project no longer economically, financially, or technically feasible as determined by the head of the procuring entity; (ii) if the project is no longer necessary as determined by the head of the procuring entity; and (iii) if the source of the funds for the project has been withheld or reduced through no fault of the procuring entity.

In view of the foregoing, opinion is specifically requested on the following matters:

1. Under the factual circumstances outlined above, was the aforesaid decision not to sign the contract in favor of Jeverps within the purview of Section 41(c) of the IRR of RA No. 9184?

2. Is the enumeration of grounds (i to iii) in said Section 41(c) exhaustive, or may it admit of other grounds, such as that used by the DepEd Secretary in the aforesaid Memorandum, especially in the light of the then pending Senate inquiry and in deference to the Senate that has "authority to inquire into the operations of the executive branch", as enunciated in the case of Senate of the Philippines v. Ermita, G.R. No. 169777, April 20, 2006, and companion cases?

This Department regrets that it cannot render the desired opinion.

The resolution of the issues raised involves the interpretation and application of the provisions of RA No. 9184 and its IRR, which falls within the

mandate of the Government Procurement Policy Board (GPPB).[2] Section 63(a) and (b) of RA No. 9184 granted the GPPB the power to protect national interest in all matters affecting public procurement and the power to formulate and amend, whenever necessary, the IRR. Vested with the rule-making powers, the GPPB has the competence and primary jurisdiction to apply and interpret the rules in resolving the issue, taking into account the policy repercussions of addressing the question involved.[3]

This rule arises not only from practical considerations, but also out of due respect and deference for the competence and expertise of the office having primary jurisdiction to resolve the matter for its familiarity with the policy repercussions of the question as well as the logical recognition of the lawful exercise of an authority conferred by law.[4]

Moreover, the specific issues raised in the instant request necessarily involve the substantive rights of private parties, e.g., Jeverps Manufacturing Corporation, upon whom the opinion of the Secretary of Justice has no binding effect and would, in all probability, contest the same in court if the opinion turns out to be adverse to their interest. As a matter of policy, therefore, the Secretary of Justice has consistently refrained from rendering opinion or giving legal advice on questions which are justiciable in nature or those which may be the subject of judicial controversy.[5]

We, therefore, suggest that you directly address your request to the GPPB, the office which is in the best position to answer your queries.

Very truly yours,

AGNES VST DEVANADERA
Acting Secretary

[2] Secretary of Justice Opinion No. 33, current series, citing Op. No. 39, s. 2005 and No. 15, s. 2006.
[3] Id., Op. No. 15, s. 2007.
[4] Ibid., citing previous opinions.
[5] Op. cit., Op. No. 29, current series, citing previous opinions.

Receiving copy

UDC-19619

REPUBLIKA NG PILIPINAS
REPUBLIC OF THE PHILIPPINES
KAGAWARAN NG EDUKASYON
DEPARTMENT OF EDUCATION
DepEd Complex, Meralco Ave., Pasig City

DepED DEPARTMENT OF EDUCATION

Tanggapan ng Katulong na Kalihim
Office of the Undersecretary

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07 October 2009

HON. AGNES VST DEVANADERA
Acting Secretary
Department of Justice
Manila

OFFICE OF THE SECRETARY
RECEIVED
OCT 07 2009
DEPARTMENT OF JUSTICE

Dear Secretary Devanadera:

We gratefully acknowledge receipt of your Opinion No. 39 Series of 2009 declining our request dated 30 July 2009 for you to render an opinion on the issues we raised in said request.

In the interest of clarifying certain points of law raised by Jeverps in its letter (Annex "C" to the letter-request of 30 July 2009) given that the opinion did not touch on the arguments of Jeverps and a resolution of the Department in this regard may guide us on how to resolve the pending motion for reconsideration of the Secretary's decision not to sign the contract, may we pose the following:

1. When does the maximum period of twenty (20) days to act on a procurement contract under the provisions of Section 37 of Republic Act No. 9184 commence to run?

2. Assuming that DepED did not act within the twenty (20) days under Section 37, are the provisions of Section 41 of the same law still invokable by DepED? In the alternative, is the Purchaser-Supplier Contract now deemed approved?

Thank you. We hope this merits your consideration.

DEPARTMENT OF EDUCATION
RECORDS DIVISION
RECEIVED
OCT 07 2009
BY: [illegible]

Truly yours,

Franklin C. Sunga

ATTY. FRANKLIN C. SUÑGA
Undersecretary

Copy furnished:

Secretary JESLI A. LAPUS

OPINION No. 100, S. 2009

Republika ng Pilipinas
KAGAWARAN NG KATARUNGAN
Department of Justice
Manila

November 9, 2009

DEPARTMENT OF EDUCATION
OFFICE OF THE USECRETARY
RECEIVED
24 NOV 2009
By: RAN Time: 2:23
Doc. # 20219

Atty. Franklin C. Suñga
Undersecretary
Department of Education
DepEd Complex
Meralco Ave., Pasig

S i r:

This refers to your request for the clarification of "certain points of law" raised by Jeverps Manufacturing Corporation, in its letter of July 30, 2009, addressed to Secretary Jesli A. Lapus of the Department of Education (DepEd), relating to the approval of its contract with the DepEd for the procurement of "fortified instant noodles", which was the subject of this Department's Opinion No. 39, current series.

In this light, you are posing the following questions:

1. When does the maximum period of twenty (20) days to act on a procurement contract under the provisions of Section 37 of Republic Act No. 9184 commence to run?

2. Assuming that DepEd did not act within the twenty (20) days under Section 37, are the provisions of Section 41 of the same law still invokable by DepEd? In the alternative, is the Purchaser-Supplier Contract now deemed approved?

We regret that we have to decline to render opinion on the issues raised.

At the pain of being repetitious, we would like to reiterate that the resolution of the queries raised involves the interpretation and application of Sections 37 and 41 of R.A. No. 9184 and its IRR, which falls within the mandate of the Government Procurement Policy Board (GPPB).[1] Section 63(a) and (b) of RA No. 9184 granted the GPPB the power to protect national interest in all matters affecting public procurement and the power to formulate and amend, whenever necessary, the IRR. Vested with rule-making power, the GPPB has the competence

[1] Secretary of Justice Op. No. 33, current series citing Op. No. 39, s. 2005 and No. 15, s. 2006.

and primary jurisdiction to apply and interpret the rules in resolving the issues, taking into account the policy repercussions of addressing the question involved.[2]

This rule arises not only from practical considerations, but also out of due respect and deference for the competence and expertise of the office having primary jurisdiction to resolve the matter for its familiarity with the policy repercussions of the question as well as from logical recognition of the lawful exercise of an authority conferred by law.[3]

Be that as it may, and for your information and guidance, we would like to make the following observations:

Section 37 of R.A. 9184 and Section 37.4 of its IRR lay down the following guidelines for the approval of contracts, viz:

> Section 37. *Notice and Execution of Award.* — *xxx*
>
> Within ten (10) calendar days from receipt of the Notice of Award, the winning bidder shall formally enter into contract with the Procuring Entity. When further approval of higher authority is required, **the approving authority for the contract shall be given a maximum of twenty (20) calendar days to approve or disapprove it.** *xxx*[4]
>
> xxx xxx
>
> Section 37.4. *Approval of Contract.*
>
> When further approval of higher authority is required, the **approving authority for the contract,** or his duly authorized representative, **shall be given a maximum of twenty (20) calendar days from receipt thereof,** together with all documentary requirements, **to perfect the said contract, to approve or disapprove it.** xxx[5]

The use of the term "shall" in the above-quoted provisions contemplates a mandatory character, which implies that the approving authority is obliged to approve or disapprove the contract within the maximum period of twenty calendar days. Under the rule of statutory construction, the term "shall" is a word of command , and one which has always or which must be given a compulsory meaning, and it is

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[2] Id., Op. No. 15, s. 2007.
[3] Ibid., citing previous opinions.
[4] Stress ours.
[5] Emphasis supplied.

generally imperative or mandatory.[6] It has invariable significance to impose a duty which may be enforced particularly if the public is in favor of this meaning or when addressed to public officials, or where public interest is involved, or where the public persons have rights which ought to be exercised or enforced, unless a contrary intent appears.[7]

Also, the word "maximum", as used in the aforesaid provisions, acted as a modifier because it placed a limit on the period upon which the approving authority is allowed to act on the contract. This means that the said period is not subject to extension. This view finds support in Section 38.2 of the IRR which, insofar as material, reads:

> Section 38.2. **If no action on the contract is taken by the head of the procuring entity within the period specified in Section 37. 4 of this IRR, the contract concerned shall be deemed approved.** xxx[8]

The provisions of Section 38.2, above-quoted, are clear and categorical enough that interpretation is not necessary---only application.[9]

As a final note, we wish to stress that the Heads of the Procuring Entities or their respective duly authorized officials, as the case may be, shall be responsible and accountable for ensuring that all Government contracts they approve and/or enter into are in accordance with existing laws, rules and regulations.

Very truly yours,

AGNES VST DEVANADERA
Acting Secretary

[6] Enriquez, etl al. vs. Enriquez, et al., G.R. No. 139303, August 25, 2005; citing Lacson vs. Lacson, 24 SCRA 848, August 30, 1968.
[7] Ruben A. Agpalo, Statutory Construction,Fourth Edition, 1998, at pp. 333-334.
[8] Emphasis added.
[9] Op. Nos. 17, 10 & 9,current series; Nos. 80, 64 & 57, s. 2008.

Results of the Committee Review on the Food for School Program (FSP) Procurement of Fortified Instant Noodles with Fresh Eggs and Malunggay

Introduction

In accordance with the Department's mandate to provide for the needs of malnourished students in food-poor provinces and in line with its commitment to stakeholders, a review committee composed of the following key officials of government agencies, resource persons from the civil society and industry experts in the private sector:

1. Department of Agriculture (DA) – Office of Assistant Secretary for Agri-Business and Marketing
2. Department of Agriculture (DA) - Bureau of Animal Industry (BAI);
3. Department of Agriculture (DA) - Bureau of Plant Industry (BPI);
4. Department of Agriculture (DA) - Livestock Development Council (LDC);
5. Department of Health (DOH) - Bureau of Food and Drugs (BFAD);
6. Department of Health (DOH) - National Nutrition Council (NNC);
7. Department of Science and Technology (DOST) - Food and Nutrition Research Institute (FNRI);
8. Government Watch (G-Watch), Ateneo School of Government;
9. Universal Robina Corporation (URC);
10. Air 21 Inc.; and
11. United Broilers Raisers Association (UBRA)

together with DepEd officials was convened on 06 June 2009 at the Pearl Hall, SEAMEO INNOTECH, Commonwealth Avenue, Quezon City to undertake a review of the Food for School Program (FSP) especially on the procurement of Fortified Instant Noodles with Fresh Eggs and Malunggay.

The Committee, headed by Ramon C. Bacani, Undersecretary for Regional Operations, introduced the members of the Committee and outlined the agenda for the day. He thanked everyone for their attendance and for contributing to the cause of education.

After explanation of the workshop mechanics in the morning, the members were divided into three (3) groups (Annex – Group composition) covering the basic aspects of the procurement:

Group 1 - Program Implementation / Nutritional Content
Group 2 - Costing/Price
Group 3 - Procurement Process

The plenary session was convened in the afternoon for presentation of outputs and summaries. The highlights and salient findings of which are summarized below:

Group 1: Program Implementation/Nutritional Content

On the best feeding program in terms of choice, feeding days and frequency in a day

Considering that there are different feeding programs offered by various government agencies in the country, the best choice of feeding commodity that the Department could provide as of this time is still the noodles. It suits the needs of the children in terms of vitamin/micronutrient deficiencies and because the children get not only nutrients but also satisfaction/fullness to mitigate "short term hunger". The packaging of noodles is also one of the factors considered.

Based on the reports gathered by the School Health and Nutrition Center (SHNC) during the past years of implementation, there is an improvement in student's attendance in class and in the health and nutritional status of school children. The parents showed their appreciation of the project and got involved in the project's activities.

The total nutritional value that a student needs for a day can be supplemented by 80 grams of noodles to supply 1/3 of the Required Energy Nutrient Intake (RENI) of 1,400 calories. It has been noted that 100 grams of noodles are served for two students or only 50 grams for each student.

On program design, details and implementation

DepEd is under one social cluster with the Department of Health, Department of Interior and Local Government, Department of Social Welfare and Development and Department of Agriculture. These agencies thoroughly discuss the feeding program and all discussions are documented during inter-agency or technical working group's (TWG) meetings. The TWG drafts the guidelines which are then reviewed and approved by the Department Secretaries of the different agencies involved.

The program details and process cannot be changed at will. Any change needs proper coordination and discussions with lead agencies such as DepEd, DOH specifically National Nutrition Council (NNC), Bureau of Food and Drugs (BFAD), and the Food and Nutrition Research Institute (FNRI).

On noodles as the commodity for the Food for School Program (FSP)

The group decided to recommend the continued procurement of noodles for FSP because:

a. Instant noodles has become part of the food consumption pattern of the Filipinos over the last few years, and in many poor households, noodles has replaced rice as staple, because of its accessibility, ease in preparation, acceptability to Filipino taste and affordability. Because of these characteristics, the DOH has accepted instant noodles as a viable vehicle for food fortification to address current nutritional problems particularly iron deficiency anemia (IDA). IDA is the most prevalent nutritional problem in the country affecting especially 6-11 months old infants (66.7%), 1 year-old children (53.0%), 6-12 year-old growing children (37.4%), pregnant women (43.9%), and lactating mothers (42.2%). Iron-deficiency anemia results to decreased physical development and long-term cognitive development, as well as poor growth.

b. DOH promotes public-private partnership in food fortification by encouraging processed food manufacturers to avail of the *Sangkap Pinoy* Seal which they can display on their product labels and packaging materials after a certification process awarded by its

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regulatory agency, the Bureau of Food and Drugs. The *Sangkap Pinoy* Seal is an assurance to the buying public that the processed food product meets standards of quality assurance, good manufacturing practices (GMP) and required fortification levels. (RA No. 8976, 2000)

c. To enhance the nutritional quality of instant noodles, the National Nutrition Council advises the public to add green leafy and yellow vegetables and/or egg during the cooking process, and to either add water to dilute it, or not use the entire contents of the seasoning packet to reduce its considerable sodium content.

d. The various types of noodles supplemented with squash, saluyot, etc. are collectively called veggie noodles and are good sources of Vitamin A, protein and other nutrients. Instant veggie-noodles are included as one of the food commodities for the Malusog na Simula, Yaman ng Bansa Nutrition Program in the General Appropriations Act (GAA).

It was also agreed to complement the noodles with another food commodity to provide variety in the menu.

On alternative commodities

There are different commodities that can be used as an alternative to supply the nutritional needs at a comparable cost. These include pan de sal, pan de coco, mongo, nutribun, camote, among others. It is also suggested that nutritious drinks should be included in serving the noodles to the students.

However, due to the long process that is involved in procuring a variety of different commodities, it may be difficult to have many items.

On the different options in providing noodles, fresh eggs and malunggay.

Option A:
Malunggay powder can be added to noodles at 3 grams of malunggay powder per 100 grams pack of noodles. Beyond this level, taste and color and the palatability of noodles may be affected.

Fresh eggs can be procured locally so that local egg producers will also benefit from the program. In the event that the local egg producers are unable to supply the volume of eggs required for the program, these may be procured from nearby provinces where there is abundant supply of eggs.

In this option, eggs will be served hard boiled to minimize breakage. Safeguards against salmonella infection should be in place through proper handling and cooking.

Option B:
Noodles fortified with vitamins is only a logical option. This is one way of addressing micronutrient deficiencies such as protein-energy malnutrition, Vitamin A deficiency (11%), Iron Deficiency Anemia (37%) and Iodine Deficiency Disorders (36%).

Malunggay planting can be promoted in schools through the Gulayan sa Paaralan (GPP) to serve as a ready source of malunggay powder and as an income generating project for the parents-teachers-community organizations.

Option C:
Another option is to retain the same specifications of noodles with vitamins, fresh eggs and malunggay.

Between fresh eggs and malunggay, the latter is more important to be included in the noodles because of its rich nutritional value. It is necessary to ensure that the supply of malunggay can meet the demand.

On ideal serving portion

The body needs 1,400 calories per day and the supplementary feeding program is intended to provide 1/3 of the Required Energy Nutrient Intake (RENI) of a 4-6 years old child. In serving noodles, the ideal is 80 grams which is almost equivalent to 1 cup of rice. However, the feeding program only serves 50 grams which is also within range because the students are not able to consume everything due to "noodle fatigue".

It is suggested that students eat different kinds of food but with the same nutritional value. These can be rotated on a weekly basis to avoid "noodle fatigue" or an additional commodity can be served to complete the 30 grams additional nutrient needed by the student's body.

On the number of feedings

For this program to take effect and result in an improvement on the health of the students, a minimum of ninety (90) days to a maximum of one hundred twenty (120) days are needed excluding Saturdays and Sundays.

On complying with the specifications

Manufacturers with a license to operate are required to comply with the general manufacturing practices (GMP). Different agencies have their own set of requirements to comply with. The BFAD conducts inspection and samples are being collected to determine compliance with specifications and in accordance with the production process.

On downloading of funds

Even if the funds are downloaded to the division level, Division Offices still have to undertake the procurement process. Thus, the same process will be used in procuring the noodles.

It is suggested that the noodles still be procured centrally but the additional commodities that will supplement the noodle must be procured locally by region/division since they are the ones who know what their students exactly need and what the province may best offer. Hence, there must be latitude for the Regional Directors if the additional commodities will be locally procured.

On the delivery of goods to the end-user

The district offices receive the delivered commodities through the District Supervisor. It is only at the time of delivery that they are able to get a sample of the commodity.

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The DepEd Inspection Team has its own inspection of goods but is conducted in random manner. The G-Watch is involved in the monitoring of the deliveries to the district offices and to the schools.

NUTRITIONAL CONTENT

On noodle cake

The noodle cake's nutritional content is based on the specific data in the Food Composition Table (FCT) of flour, water and binder. Flavoring has no nutritional content. However, it can be used as a vehicle for the fortification. There is a nutritional labeling of each finished product but this is not mandatory.

It is suggested to have the needed nutritional value for the noodle cake with flavoring, enhancer, egg and malunggay as the basis of the ordinary noodles' nutritional content.

On commercial noodles

SHNC conducted comparative analysis on the nutritional content of commercial noodles. These have different nutritional contents and that is the reason why the prices of commercial noodles also differ from one another.

The BFAD, FNRI and other concerned agencies can compare the nutritional contents of the different commercial noodles.

On nutritional needs of the child

The nutritional needs of the child are met with the prescribed specifications of noodles because of the presence of energy, calorie, protein and other important nutritional contents. That is the main reason why DepEd uses noodles for its feeding program.

On "cook" versus "no-cook" noodles

The best is still "no cook" because of practicality and savings in time. The process by which the noodles are being prepared is considered. "Cook"

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noodles require 10 minutes cooking, including the boiling of water for three minutes, the boiling of noodles mixed with the water for another three to five minutes and then the flavoring is added. In addition to that, time should be allotted for serving each student in their own soup bowl (considering one-time cooking of all the noodle packs of all students). The servings may not be equally distributed to the students.

In using "no-cook" noodles, lesser time is needed since noodles are placed in each student's soup bowl (and this can be done by their own mothers) and then boiled water is poured. Also, in "no-cook" noodles, nutritional contents such as vitamin A, iodine, and iron are stable compared to "cook" noodles wherein some of the nutrients are lost in the process of cooking.

On the use of eggs

Eggs are rich in protein and can serve as binder. Salmonella infection may occur if eggs are not cooked properly. The protein content is provided also by the flour aside from the egg. Flour is rich in protein (at least 12% is present) and it can become an alternative to enrich the protein in the noodles.

The only difference between fresh eggs and egg powder is the moisture content. It is still best to use fresh eggs. It has been a practice to mix fresh eggs in the noodles. The manufacturers ensure that the eggs used in the process are not contaminated.

Eggs should always be present whether fresh eggs or in powder form. The presence of eggs can be validated through analysis and inspection of production line by BFAD. DepEd can request BFAD to join the inspection team to ensure that the production is in order. Aside from inspection, regular monitoring and testing of samples safeguard the process and ensure that the nutritional specifications are being followed.

On the use of malunggay

Malunggay is rich in vitamins A, C and B complex (specifically B2-1.025mg per 5mg), Vitamin E (5.6mg per 5g), Magnesium (18.4mg per 5mg) Calcium (100mg per 5g) Potassium (66.2mg per 5g), Sulfur (43.5mg per 5g) and protein and amino acids. It is a mixture of many nutrients combined in one

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food. All these help in the growth and development of 4-6 years old children specifically in the effective working of the body and immune systems. A mixture of different food and/or vegetable items is necessary to provide the nutritional content that can be found in malunggay.

a. Dried malunggay contains
   - 10 x the Vitamin A found in carrots
   - ½ the vitamin C of oranges
   - 17 x the calcium of milk
   - 15 x the potassium of bananas
   - 25 x the iron of spinach
   - 9 x the protein of yogurt

b. Fresh malunggay contains
   - 4 x the Vitamin A found in carrots
   - 7 x the vitamin C of oranges
   - 4 x the calcium + 2 x the protein in milk
   - 3 x the potassium of bananas
   - 3/4 x the iron of spinach
   - 2 x the protein of yogurt

When cost of flour increases, the vegetable components of the noodle also promote a good supplement to flour to lower production cost of the noodles. (Source: www.mmvc@fnri.dost.gov.ph - *Veggie noodles now available in the market.*)

Secura International is one of the verifiable sources of malunggay powder. However, different places in the Philippines like Tarlac and Ilocos are among the sources of malunggay.

The price of malunggay powder in pack ranges from P1,000.00 to P1,500.00 per kilo at the Bureau of Plant Industry (BPI). The high price is due to the nutritional contents.

Information/data from other agencies

The DOST-Food and Nutrition Research Institute (FNRI), DOH-National Nutrition Council (NNC) and the DOH-Bureau of Food and Drugs (BFAD) were asked to prepare statements to refute the allegations and set the record straight as to the allegations in the Quido affidavit which were mis-quotations of the agencies statements and findings.

Group 2: Review of Price/Costing

On the advantages/disadvantages of "cook" and "no-cook" noodles

Cook	No Cook
More manpower required	15 % more expensive
More cooking paraphernalia needed	Just pour hot water
More cooking time needed	
Difficulty in getting the correct portion for the students	

The group recommended the continued use of "no-cook" noodles.

On why the industry did not participate in the procurement of the noodles

Universal Robina Corporation (URC) from the noodle manufacturing industry represented by its General Manager Mr. Edwin Canta said that they initially planned to join. However, when they learned that delivery to the remote areas is part of the requirement, they decided not to continue because of the cost involved in delivering to these areas. It did not meet their profitability threshold.

On the use of eggs and egg powder

Ms. Mildred Esquillio of the United Broilers Raisers Association (UBRA) asked for the thirteen (13) target provinces to determine if their members can supply the required quantity.

Only 2/3 or 66% of the whole egg provides the protein requirement for a typical 100 gram pack. In the 2007 procurement, the DepEd Inspection Team visited the plant during the production stage to verify that eggs were manually

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cracked and included in the manufacturing process to meet the protein requirement.

As to the use of egg powder in the noodles, Mr. Canta said that there is no egg powder manufacturer yet in the Philippines. As a cost estimate, egg powder will add an additional 5-10% to the cost. The increase in protein content for egg powder cannot as yet be measured vis-à-vis the use of fresh eggs.

On the cost of malunggay

Based on the information given by the Bureau of Plant Industry (BPI), malunggay powder is priced at P1,000.00 – P1,500 per kilogram or P1-1.50 per gram. For a 100 gram noodle pack, 3 grams of malunggay are needed to achieve the required nutritional value.

On freight

Based on the Senate Committee hearing, freight company Red Cargo allotted a price of P2.5 – 3.5 per unit on freight costs. The Procurement Service reported that the cost of freight increased by 5% in 2007 when the drop off point was at the District Office.

Mr. Emer Ilagan of Air 21, Inc. said that ideally, freight should not be measured by unit. Various factors need to be considered such as the mode of travel, i.e. by land, sea or air, distribution points and allocation of space. He said that he can help DepEd formulate the definition for these technicalities. Normally though freight ranges from 18-20% of the manufacturing cost.

On the industry standard detailed costing of the noodles

Following the approach used by Senator Mar Roxas during the Senate Committee hearing and based on industry information provided by Mr. Edwin Canta of URC, the attached computations shows that the price per pack of the bidding appears to be within reasonable levels. The approved budget for contract (ABC) for the 2009 procurement is P19.00 for the cost of commodity and P3.00 for the freight and handling or a total of P22.00. The bundled bidded price is P21.896 inclusive of freight and handling.

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The figures in tabular form are as follows:

COMPUTATION BASED ON ESTIMATES PROVIDED BY NOODLE MANUFACTURER AND FREIGHT ROWARDER

Supermarket price of cheapest 50g "cook" noodles		5.75
Less: Trader's Profit Margin (5%)	0.29	
VAT (12%)	0.66	
Manufacturer's Gross Profit Margin (35%)	1.68	2.63
Cost of goods of 50g "cook" noodles (includes cost of noodle cake, oil, flavoring and packaging)		3.12
Plus 15% for "no cook"	0.47	3.59
Multiply by 2 for cost of 100g "no-cook" noodles		**7.18**
Add: Eggs*	2.48	
Malunggay**	2.25	
Inner Wrapper***	0.10	
Vitamins	0.20	**5.03**
Gross Profit Margin (35%)	4.27	
VAT (12%)	1.98	**6.25**
		18.46
Freight to District Office (19%)		*2.32*
Total		***20.78***

*Eggs cost 3.75 each. For a 100g noodle, 2/3 of the whole egg is needed
P3.75 x 66% = P2.48

**Average cost of malunggay powder is 75 cents per gram (500-1500 per kilogram). For a 100g noodle pack, 3-5 grams are required.
P0.75 x 3 = P2.25

***Inner wrapper used to cover 40 packs in one box costs 4 pesos each.
P4.00 / 40 packs = P0.10

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According to Mr. Canta, the delivery cost of goods from the factory to the supermarket is already included in the 30% profit margin thus freight and handling cost should not be reflected in the breakdown of cost of goods. More accurate freight costs can be estimated if additional information on quantities and frequency of delivery per province are provided to the freight industry resource person. The other costs need to be broken down further for clarity.

Group 3: Procurement Process

On the technical specifications to be considered in the procurement of noodles

It was agreed that the technical specifications for the program indicated in the GAA and the nutritional content should be based on the Required Energy Nutrition Intake (RENI). The end-user should also consider the packaging requirement (whether 50 grams, 100 grams or such other grammage) as well as the availability of the ingredients (in the case of noodles, eggs, malunggay, flour, etc.) in the market.

On the technical specifications to advise/require the submission for a market survey

The body suggested that a market survey or industry study be conducted for the end user to better formulate the specifications. This is crucial to determine and validate the supply of raw materials as well as to check the quality of the goods to be procured. It was further suggested that prior to the approval of authority to procure, the technical specifications be validated by the TWG created under the Bids and Awards Committee (BAC).

On the relevant factors/cost components that should be considered in determining the Approved Budget for Contract (ABC) for the procurement of noodles

It was agreed that the relevant factors/cost components to be considered in determining the ABC are: number of beneficiaries (i.e. school children, target area, policy thrusts of the government), number of feeding days, quantity of noodles, packaging, production cost of noodles, basic technical specifications

i.e. with egg, with malunggay), profit margin, value-added tax and cost of freight and handling.

On the history of bidders/s from 1999 to present, the bidders and the winning bidder

Based on historical data from 1999 to 2009 there were other prospective bidders who bought bid documents but Jeverps Manufacturing Corp. was evaluated as the lowest/single calculated and responsive bidder. In 2000, the pre-bid meeting was cancelled bec[illegible] The committee sent letters to noodle manufacturers and another pre-bid meeting.

On the issue whether it is better to bundle supply and delivery or to unbundle the supply and delivery of noodles

Bidding for freight and handling should be a separate package from the bidding for supply of noodles so that more bidders may participate per package to be bidded. Bidders can offer more advantageous prices to the government.

On the freight companies' participation in the freight component to ensure least cost

It was suggested that the end-[illegible]rding companies. It was also suggested to have a bid per lot per area for more service providers to participate including small and medium sized players.

On the role and function of the Technical Support Division (TSD) vis the end user vis the BAC in coming up with the bid specifications/requirements

The group suggested that the end-user will have to conduct an industry study and request assistance from the Bids and Awards Committee (BAC) prior to the approval of the authority to procure. The BAC should create a Technical Working Group (TWG) in accordance with R.A. No. 9184 to assist the end-user. Likewise, the TSD shall assist the BAC.

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On the issue whether the end user and/or BAC is required to send letters of invitation to all leading manufacturers of noodles to have enough bidders

It was agreed that the end-user is not required by law to send letters of invitations to all leading manufacturers of noodles in order to have enough bidders. However, major players were informed of the procurement of the fortified noodles through publication in newspapers, Phil-GEPS, DepEd website and DepEd bulletin boards.

On packaging

Packaging can be flexible from a minimum of 50 grams and maximum of 100 grams, so that more manufacturers can join and bidders will be asked to offer the maximum number of packs within the ABC. The basis for the evaluation of the bid may be the cost per gram.

On other procurements options

Given the size of the procurement, the contract cost be broken down into zones, i.e. by province or cluster of provinces. This can be done for the separate biddings for supply and freight and handling.

On transparency

For transparency of the procurement process there should be two to three civil society groups observers at every stage of the procurement process. They may also monitor the delivery down to the drop-off points.

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