

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office
Mezzanine 125, Mabini Hall, Malacañang, Manila
Telefax Nos. (02) 735-4962; (02) 736-5758

NPM No. 088-2004

June 21, 2004

COL. CIPRIANO D. GUNDAO
Commanding Officer
Philippine Air Force Procurement Center
Col. Jesus Villamor Air Base,
Pasay City

Re : Procedures or Guidelines for Blacklisting Under Executive Order 40, Series of 2001 and Executive Order 262, Series of 2000

Dear Col. Gundao:

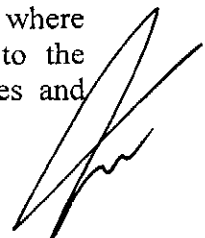
This refers to your letter dated June 2, 2004, which we received on even date, requesting for guidance on the procedures for blacklisting under Executive Order 40, Series of 2001 ("E.O. 40") and Executive Order 262, Series of 2000 ("E.O. 262").

This request is in relation to the purchase order that the Philippine Air Force Procurement Center ("PAFPC") is about to terminate due to accumulated liquidated damages of more than fifteen percent (15%) of the total contract price, which is allowed under E.O. 262. Considering that E.O.s 40 and 262 did not provide for specific procedures or guidelines for blacklisting, guidance is being sought from this office regarding its implementation.

It should be clarified that blacklisting is sanctioned by E.O. 40 and E.O. 262 in the form of administrative sanctions of suspension and disqualification for offenses provided in Section 44 and Annex "M" of its respective Implementing Rules and Regulations ("IRRs"). Sections 44.1 and 44.2 of the Implementing Rules and Regulations ("IRR") of E.O. 40 specifically provide as follows:

44.1. The head of the agency shall impose on bidders or prospective bidders, the administrative penalties of suspension from participating in any public bidding of the agency for one (1) year for the first offense and two (2) years for the second offense, as well as disqualification from further participating in the public bidding currently being undertaken by the agency concerned, where applicable, for the following acts or violations, without prejudice to the imposition of criminal and civil sanctions as provided by laws, rules and regulation:

X X X X



44.2. In addition to the above administrative penalties, the Bid Security or the Performance Security of the bidder concerned, where applicable, shall also be forfeited in favor of the Government. The authority to impose the above-mentioned administrative penalties may be delegated by the head of the agency to the BAC.

Annex "M" of the IRR of E.O. 262, on the other hand, provides a similar provision, to wit:

The following sanction shall be imposed on manufacturers/supplier/distributors for offenses/violation committed under the pertinent provisions of these IRR:

- a. Suspension for one (1) year for the first offense, disqualification to bid for two (2) years for the second offense, and perpetual disqualification for the succeeding offenses for:

X X X X

- b. Forfeiture of the bid security for the first offense, forfeiture of the bid security and suspension for one (1) year for the second offense, and forfeiture of bid security and perpetual disqualification for the succeeding offenses for:

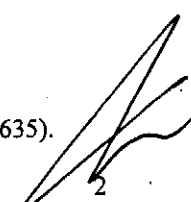
X X X X

- c. Forfeiture of performance security for the first offense, forfeiture of the performance security and suspension for one (1) year for the second offense, and forfeiture of performance security and suspension for two (2) years for succeeding offenses in case of contract termination due to manufacturer/supplier/distributor's default.

On the basis of the above-mentioned provisions, procuring entities may blacklist erring bidders through an administrative procedure that accords due process to such bidders. In view of the absence of specific guidelines and procedures for blacklisting entities for offenses committed under E.O.s 40 and 262, procuring entities may implement the relevant provisions thereof by formulating its internal procedures subject to the cardinal rights or principles in administrative proceedings provided by the Supreme Court in the case of *Ang Tibay v. CIR*¹, to wit:

(1) The first of these rights is **the right to a hearing, which includes the right of the party interested or affected to present his own case and submit evidence in support thereof.** In the language of Chief Justice Hughes, in *Morgan v. U. S.*, 304 U. S. 1, 58 S. Ct. 773, 999, 82 Law. ed. 1129, "the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play."

¹ G.R. No. 46496, February 27, 1940 (63 Phil. 635).



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(2) Not only must the party be given an opportunity to present his case and to adduce evidence tending to establish the rights which he asserts but **the tribunal must consider the evidence presented.** (Chief Justice Hughes in *Morgan v. U. S.* 298 U. S. 468, 56 S. Ct. 906, 80 Law. ed. 1288.) In the language of this Court in *Edwards vs. McCoy*, 22 Phil., 598, "the right to adduce evidence, without the corresponding duty on the part of the board to consider it, is vain. Such right is conspicuously futile if the person or persons to whom the evidence is presented can thrust it aside without notice or consideration."

(3) **While the duty to deliberate does not impose the obligation to decide right, it does imply a necessity which cannot be disregarded, namely, that of having something to support its decision.** A decision with absolutely nothing to support it is a nullity, a place when directly attached." (*Edwards vs. McCoy*, supra.) This principle emanates from the more fundamental principle that the genius of constitutional government is contrary to the vesting of unlimited power anywhere. Law is both a grant and a limitation upon power.

(4) Not only must there be some evidence to support a finding or conclusion (*City of Manila vs. Agustin*, G. R. No. 45844, promulgated November 29, 1937, XXXVI O. G. 1335), but **the evidence must be substantial.** (*Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 147, 57 S. Ct. 648, 650, 81 Law. ed. 965.) **"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."** (*Appalachian Electric Power v. National Labor Relations Board*, 4 Cir., 93 F. 2d 985, 989; *National Labor Relations Board v. Thompson Products*, 6 Cir., 97 F. 2d 13, 15; *Ballston-Stillwater Knitting Co. v. National Labor Relations Board*, 2 Cir., 98 F. 2d 758, 760.) * * * The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. (*Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44, 24 S. Ct. 563, 568, 48 Law. ed. 860; *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 93, 33 S. Ct. 185, 187, 57 Law. ed. 431; *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 288, 44 S. Ct. 565, 569, 68 Law. ed. 1016; *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 442, 50 S. Ct. 220, 225, 74 Law. ed. 624.) But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence. (*Consolidated Edison Co. v. National Labor Relations Board*, 59 S. Ct. 206, 83 Law. ed. No. 4, Adv. Op., p. 131.)"

(5) **The decision must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected.** (*Interstate Commerce Commission vs. L. & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185, 57 Law. ed. 431.) Only by confining the administrative tribunal to the evidence disclosed to the parties, can the latter be protected in their right

to know and meet the case against them. It should not, however, detract from their duty actively to see that the law is enforced, and for that purpose, to use the authorized legal methods of securing evidence and informing itself of facts material and relevant to the controversy. x x x x

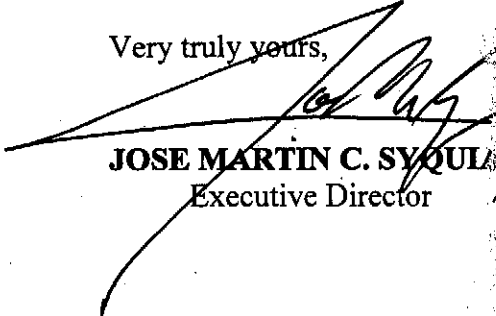
(6) The [tribunal] or any of its judges, therefore, **must act on its or his own independent consideration of the law and facts of the controversy, and not simply accept the views of a subordinate in arriving at a decision.**
x x x x

(7) The [tribunal] should, in all controversial questions, **render its decision in such a manner that the parties to the proceeding can know the various issues involved, and the reasons for the decisions rendered.** The performance of this duty is inseparable from the authority conferred upon it. (Emphasis supplied)

It is noteworthy to state that should the PAFPC formulate and implement its internal procedures for blacklisting, such procedures will be applicable to all its procurement projects until the issuance by the Government Procurement Policy Board ("GPPB") of the guidelines for blacklisting. The blacklisting decision by the PAFPC against its erring suppliers will result to its ineligibility to participate in future procurement projects of the PAFPC and other government agencies for the duration of its suspension.

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director

Post Office
MAYAGUAY
JAN 21 1987
MAIL ROOM
RECEIVED
OFFICE OF THE
DIRECTOR
PAFPC

case of inquiry
1820

RESPONSE SHEET FOR PHONE OPERATIONS

Date Received/Date Called : 06/02/04 -- 06/08/04

Requesting Agency : PAF Procurement Center

Contact Person : Sgt. Alvarado (853-5126)

Issues/Requests : Blacklisting Guidelines & Procedure under EOs 40 & 262

Response : EOs 40 & 262 does not have provisions on blacklisting. Insofar as EO 262 is concerned, administrative sanctions may be imposed upon certain suppliers as provided under Appendix "M" thereof.

As regards EO 40, the administrative penalties are those provided for in Section 44 of its IR.

The blacklisting contemplated in these rules are mere suspension by the procuring entity concerned which does not necessarily affect a particular supplier's eligibility in other government agencies.

REMARKS: Letter requested (NPM 088-2004)

Assigned to: Dennis

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June 3, 2004

COL. CIPRIANO D. GUNDAO
Commanding Officer
Philippine Air Force Procurement Center
Col. Jesus Villamor Air Base
Pasay City

Dear Col. Gundao:

This refers to your letter dated June 2, 2004, which we received on even date, addressed to Executive Director Jose Martin C. Syquia, requesting for guidance on the procedures for blacklisting as provided under Republic Act 9184 and its Implementing Rules and Regulations Part A.

We wish to inform you that we shall respond to your concerns either through phone or in writing at the earliest possible opportunity, or raise the same to the Government Procurement Policy Board for appropriate resolution should referral thereto becomes necessary.

Very truly yours,


ATTY. REYNALDO H. BICOL JR.
Procurement Management Officer V

REGISTRY RECEIPT
REGISTERED
Post Office MALACANANG POST OFFICE 1662
Letter/Package No. MANILA
PHILIPPINES 19
Posted on JUN 2 2004
Preserve this receipt for reference in case of inquiry
NO.
Postmaster/Teller