

NPM No. 01 - 2021

24 February 2021

ATTY. GARRY V. DE GUZMAN

Undersecretary

Department of Transportation

Apo Court along Sergio Osmeña Sr.

Clark Freeport Zone, Pampanga

Re: Cancelled Procurement Projects

Dear Undersecretary De Guzman:

This refers to your letter¹ requesting clarification on whether the Department of Transportation (DOTr) can proceed with the awarding of the contracts for projects funded in FY 2021 General Appropriations Act (GAA) under expenditure items For Later Release. As represented, the procurement activities for said projects were halted when funding therefor under the FY 2020 GAA was discontinued to use said funds in the country's fight against the Coronavirus Disease 2019.

Considering that the request did not indicate details on how the Procurement Projects² were halted, Section 35.6³ of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 is instructive as it allows **the Bids and Awards Committee (BAC)**, upon consultation with the end-user unit, **to cancel or terminate the conduct of procurement activities** for any justifiable reason, such as but not limited to:

- a. 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 end-user unit;
- b. the project is no longer necessary as determined by the end-user unit;
- c. **the source of funds for the project has been withheld or reduced through no fault of the procuring entity (PE); or**
- d. **brought about by the declaration of a State of Calamity, or implementation of community quarantine or similar restrictions.**

In the same vein, Section 41 of RA No. 9184 grants **the head of the procuring entity (HoPE)** the right to, among others, **declare a failure of bidding** if, for any justifiable and reasonable ground, the award of contract will not redound to the benefit of the government. Section 41(c)(iii) of the 2016 revised IRR of RA No. 9184 enumerates the justifiable and reasonable grounds in exercising this right, i.e., **if the source of funds for the project has been cancelled, withheld, or reduced through no fault of the PE.**

Accordingly, PEs are given the authority to cancel any Procurement Project if the funding therefor has been withdrawn or discontinued considering that **no contract involving**

¹ Dated 4 February 2021.

² A Procurement Project shall refer to a specific or identified procurement covering goods, infrastructure project or consulting services. A Procurement Project shall be described, detailed, and scheduled in the Project Procurement Management Plan prepared by the agency which shall be consolidated in the procuring entity's APP..

³ As amended by GPPB Resolution No. 09-2020 dated 7 May 2020 and published on 15 May 2020 in the Philippine Daily Inquirer.

the expenditure of public funds shall be entered into unless there is an appropriation for the purpose.⁴

It was also represented that funding for the same Procurement Projects were re-included in the proposed budget for the succeeding year (FY 2021). Thus, notwithstanding the cancellation or declaration of a failure of bidding under the foregoing, the affected Procurement Projects may again be submitted for bidding subject to Section 7 of RA No. 9184 and Section 7.2 of its IRR which provide that no procurement shall be undertaken unless it is in accordance with the approved Annual Procurement Plan (APP) including approved changes thereto. The APP must be consistent with the duly approved yearly budget of the PE and shall bear the approval of the HoPE.

Moreover, considering that the subject request covers priority projects, the same are best qualified for Early Procurement Activities (EPA) to ensure the timely and efficient implementation thereof pursuant to Section 7.6 of the 2016 revised IRR of RA No. 9184. EPA refers to the conduct of procurement activities, from posting of the procurement opportunity, if required, until the recommendation of the BAC to the HoPE as to the award of the contract, for goods to be delivered, infrastructure projects to be implemented, and consulting services to be rendered in the following fiscal year, pending approval of their respective funding sources.⁵ The conduct of EPA ensures the immediate award and timely implementation of Procurement Projects after the GAA, corporate budget, or appropriations ordinance, as the case may be, has been approved or enacted.

Thus, the re-inclusion of the cancelled Procurement Projects in the proposed funding for the succeeding year (FY 2021) would enable the PE to re-bid the same, short of award, in the current year (FY 2020). As this is a rebidding of projects, the same requires the advertisement, posting, and other requirements of the procurement law and its associated rules.⁶ This is in accordance with the principle that each procurement activity is distinct and separate from each other, even if the subject matter of the procurement activities are one and the same, as in the case of a second bidding after the failure of the first.⁷ Applying the foregoing, the previously cancelled Procurement Project shall be included in the APP of the year it will be re-bid with re-advertisement and/or posting as provided for in Section 21.2 of the 2016 IRR of RA No. 9184.

In fine, cancelled Procurement Projects which have been re-included in the proposed budget for the succeeding year may still be submitted for re-bidding in the same year when it was originally bid, this time under EPA, in order to be immediately awarded in the succeeding year.

Relatedly, Procurement Projects under EPA that are funded by forthcoming allotments or sub-allotments shall not be awarded until the same has been issued, secured, or released notwithstanding the approval and effectivity of the GAA, reenacted budget, appropriations ordinance, corporate budget or loan agreement, as the case may be, pursuant to Item 7.5⁸ of GPPB Circular No. 06-2019 on the Guidelines on the Implementation of EPA. PEs shall therefore ensure that any and all conditions or documents required to be met or submitted as a prerequisite for the release of funds or sub-allotment thereof shall be timely prepared to enable the award of the contract immediately after the approval of the budget.

⁴ Pursuant to Section 85 of Presidential Decree No. 1445 or the State Audit Code.

⁵ Item 3.1 of GPPB Circular No. 06-2019 dated 17 July 2019.

⁶ Non-Policy Matter Opinion No. 121-2016, dated 6 December 2016.

⁷ Non-Policy Matter Opinion No. 68-2013, dated 28 June 2013.

⁸ Item No. 7.5 Notwithstanding the approval and effectivity of the GAA, reenacted budget, appropriations ordinance, corporate budget or loan agreement, as the case may be, PEs shall not award contracts for Procurement Projects requiring Special Allotment Release Order or Sub-Allotment Release Order until the same has been issued, secured or released.

As a final note, the above discussion was made on the basis of the particular facts presented and circumstances prevailing, and may not, therefore, be applicable given a different set of facts and circumstances.

We hope to have sufficiently addressed your concerns.

Sincerely yours,



RÓWENA CANDICE M. RUIZ
Executive Director V

cc: **Secretary Wendel E. Avisado**
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