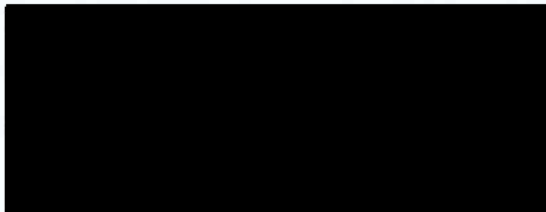


**NPM No. 41-2015**

8 October 2015



**Re: Procurement of Accident Insurance Policy; Approved Budget for the Contract; Reference to Brand Names; and Change of Specifications**

Dear 

This refers to your electronic mail (email) seeking our opinion on the following matters:

1. Whether the Bids and Awards Committee (BAC) of WVCST can apply for an accident insurance policy for the protection of its members while on travel, especially during post qualification, considering that Republic Act No. (RA) 9184 only provides for legal assistance and indemnification;
2. In the determination of Approved Budget for the Contract (ABC), how much would be the most reasonable profit the end-user may consider for the suppliers;
3. Whether the end-users can clearly identify specific brand of software or vehicle, or indicate their specifications in the minutest details; and
4. Whether a change in the specifications which involves inclusion of additional features but without change in ABC necessitates revisions of Annual Procurement Plan (APP) and Project Procurement Management Plan (PPMP), and consequently the approval by the Head of the Procuring Entity (HOPE).

#### **Accident Insurance Policy**

The legal assistance and indemnification package under Section 73 of RA 9184, its revised Implementing Rules and Regulations (IRR) and associated implementing guidelines<sup>1</sup> includes free legal assistance, liability insurance and medical assistance to BAC members and support staff. The only insurance policy expressly sanctioned under RA 9184 and its associated rules is liability insurance, though Procuring Entities (PEs) are not precluded from obtaining other insurance policies. We note, however, that apart from this liability insurance, all

<sup>1</sup> Guidelines for Legal Assistance and Indemnification of Bids and Awards Committee (BAC) Members and Its Support Staff issued through GPPB Resolution No.021-2005 dated 07 October 2005.

government officials and employees, in general, are included in the mandatory insurance coverage under RA 8291 or the Government Service Insurance System Act of 1997.

In this regard, it is incumbent upon the PE to determine whether the existing insurance coverage under RA 8291 and RA 9184 is not sufficient to address the insurance needs of the BAC members and support staff. Otherwise stated, the PE must thoroughly revisit and examine if, given all the surrounding circumstances, the application for a separate accident insurance policy is still necessary.

### **Determination of ABC**

RA 9184 and its associated rules and issuances made no mention of a specific amount or percentage that would provide the most reasonable supplier's profit. Thus, what constitutes the most reasonable supplier's profit in each and every procurement lies within the sound determination of the PE.

Within the context of competition, the PE may consider such amount that is sufficient enough to encourage and attract market participants, without prejudicing the property rights of the suppliers. The amount must not be excessive that it may put the government in a grossly disadvantageous situation<sup>2</sup> but must not also be too low that it may confiscate or take away the property right of the suppliers to profit from its business. The task then for the PE is to strike a balance between the aspect of competition and the supplier's profit.

In relation to this, it would be prudent for the PE to conduct a diligent market study to establish the supplier's profit that it may deem most reasonable, with reference to the applicable accounting and auditing rules such as the Amended Rules and Regulations on the Prevention of Irregular, Unnecessary, Excessive or Extravagant Expenditures or Uses of Funds and Property<sup>3</sup>. In general, by applying the said rules and regulations in determining the amount to be allocated for supplier's profit, such determined amount shall not result to an expenditure that will either be unreasonable because of its exorbitant price or incurred without restraints, judiciousness and economy.

### **Reference to Brand Names**

Section 18 of RA 9184 and its IRR mandates that reference to brand names shall not be allowed and thus, specifications for the procurement of goods shall be based on relevant characteristics and/or performance requirements. This mandate cannot be circumvented by setting specifications that point out to only one brand of goods or items, though without mentioning the name of the brand. *Quando aliquid prohibetur ex directo, prohibetur et per obliquum*. What is prohibited directly is prohibited indirectly.

We previously opined<sup>4</sup> that while PEs can make technical specifications in their bid documents more detailed, they cannot, however, "tailor fit" to a particular brand. We further stated that the inclusion in the bidding documents of such detailed design and technical descriptions that leave the PE no other option but to procure from a particular brand or supplier defeats the very essence and purpose of competitive bidding, and in such a case where a specific brand is necessary, indispensable and justified under the IRR, the applicable alternative modalities of procurement may likewise be utilized.

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<sup>2</sup> Section 3(g) of RA 3019 or the Anti-Graft and Corrupt Practices Act.

<sup>3</sup> Commission on Audit Circular No. 85-55-A September 8, 1985.

<sup>4</sup> NPM No. 02-2009 dated 9 January 2009.

## Revisions of APP and PPMP

The determination of whether a change in the specifications of an item to be procured necessitates revisions of Annual Procurement Plan (APP) and Project Procurement Management Plan (PPMP), and consequently the approval by the Head of the Procuring Entity (HOPE) depends on the specificity or generality of the APP and PPMP. If the APP and PPMP contain very specific details of items to be procured, including the specifications to be changed, then it is necessary to revise or update the APP and PPMP to reflect the intended changes. On the other hand, if the specifications to be changed are not indicated in the APP or PPMP, such that both contain general description of the items to be procured, then, no revision is necessary. In both instances, the PE must always ensure that the items being procured fits and is consistent with the description or specifications indicated in the APP and PPMP. This is anchored on the rule that no procurement shall be undertaken unless it is in accordance with the approved APP (and PPMP) of the PE.<sup>5</sup>

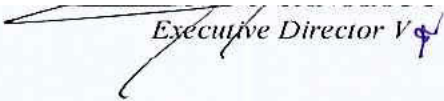
## Summary

In sum, we wish to clarify the following matters relative to your concerns:

1. It is incumbent upon the PE to determine whether the application for a separate accident insurance policy is still necessary given the existing insurance coverage under RA 8291 and RA 9184;
2. In determining the most reasonable supplier's profit, the PE may consider such amount that is sufficient to encourage and attract market participants, without prejudicing the property rights of the suppliers, and with reference to applicable accounting and auditing rules.;
3. While PEs can make technical specifications in their bid documents more detailed, they cannot, however, "tailor fit" to a particular brand because it defeats the very essence and purpose of competitive bidding; and
4. The determination of whether a change in the specifications of an item to be procured necessitates revisions of APP and PPMP depends on whether or not such specifications to be changed are particularly indicated in the APP and PPMP.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is issued on the basis of particular facts and situations presented, and may not be applicable given a different set of facts and circumstances. Should you have other concerns, please do not hesitate to contact us.

(sgd.)

  
Executive Director Vg



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<sup>5</sup> Section 7 of RA 9184 and its IRR.