

NPM No. 42-2015

8 October 2015

Re: Change of Technical Specifications during Contract Implementation Stage


Dear [REDACTED]:

This refers to your letter seeking our opinion on whether a change in the technical specifications of the goods during contract implementation is allowed under the procurement law and its associated rules.

As represented, ZCWD conducted a competitive public bidding for the procurement of brand new motorcycles, which was eventually awarded to EMCOR Inc. as the single calculated responsive bidder per Notice of Award dated 5 May 2014. However, on 23 June 2014, EMCOR Inc. informed your office that the model of motorcycles they offered was already phased out, and this was supported by a certification issued by Honda Philippines. As a result, it offered another brand/model to deliver for the same price. The BAC chairman upon the recommendation of the end-user granted the request of EMCOR to replace the brand/model of the motorcycles, as offered, for a costlier and with higher specifications but without additional cost to the procuring entity. It is in this context that you now seek our opinion as to whether or not the decision to grant the request of the supplier to replace the phased out units violates the provision of RA 9184.

Technical Specifications

We wish to reiterate our earlier opinion¹ that technical specifications, addressing the identified needs of the PE, serve as the bases of bidders in submitting their offers or tenders. Bidders must comply with these specifications not only during the bidding process, but most importantly, during contract implementation stage. Republic Act (RA) No. 9184 seeks to eliminate subjectivity in award of government contracts. The procuring entity should not allow the end-users to participate in the decision-making process and allow subjectivity to come into play. It does not give occasion for the procuring entity to arbitrarily exercise its discretion and brush aside the very requirements it specified as vital components of the goods it bids out.²

The principles of competitiveness and public monitoring, alongside transparency, simplicity and accountability, permeate the provisions of R.A. No. 9184 from the procurement process to the implementation of awarded contracts.³ These principles mandate that all government procurement contracts be performed strictly according to its specifications. 

¹ NPM 107-2014

² *Commission on Audit (COA) v. Linkworth International, Inc.*, G.R. No. 182559, 13 March 2009.

³ *Ibid.*

Competitiveness guarantees interested private entities that they will compete on an equal footing for the requirements prescribed by the Procuring Entity (PE).⁴ An essential element of a publicly bid contract is that all bidders must be on equal footing. Not simply in terms of application of the procedural rules and regulations imposed by the relevant government agency, *but more importantly, on the contract bidden upon. Each bidder must be able to bid on the same thing.*⁵

Part of public monitoring is to check that all the resulting contracts should be performed strictly in accordance with the specifications.⁶ Procurement contracts are considered as public contracts that require the faithful performance by both parties (government and private contracting party) of all the terms and conditions in the contract for the benefit of the general public. Consequently, allowing a change in the specifications of procurement contracts during contract implementation stage deviates from what have been offered, accepted, and ultimately agreed upon by the parties to the detriment of fair competition and equal opportunity to market participants

Adherence to Contract Agreements

Section 37.2.3(c) of the revised Implementing Rules and Regulations (IRR) of RA 9184 in relation to Section 25.2(a)(iii) provides that the technical specifications and offer of the winning bidder forms part of the contract. The inclusion of these documents in the contract created an obligation on the part of the contractor to deliver the specific goods that it offered. The General Conditions of Contract (GCC) of the Philippine Bidding Documents (PBDs) for the Procurement of Goods categorically states that the goods to be provided by the contractor to the PE shall be as specified in the Schedule of Requirements and shall conform with the standards mentioned in the Technical Specifications.⁷

The contract between the PE and the winning bidder is the law between the parties. From the moment that the contract is perfected, which is upon compliance with the specific requirements under Section 37 of the IRR of RA 9184, the parties are bound to the fulfillment of what has been expressly stated in the contract⁸ and to comply with it in good faith⁹. Since the offer of the winning bidder is already part of the contract, it is duty-bound to deliver the specific items it mentioned in the offer. The winning bidder must perform this obligation in faithful compliance with the contract executed with the PE.

Bidder's Responsibility

It bears stressing that the selection of the specific item to be offered by the bidder is based solely on its own determination. While the PE sets the technical specifications of the needed item, the bidders still has full liberty to offer any specific item, provided that it is compliant with the technical specifications. Clause 6.4 of the Instruction to Bidders (ITB) of the PBDs for the Procurement of Goods provides that it shall be the sole responsibility of the bidder to determine and to satisfy itself by such means as it considers necessary or desirable as to all matters pertaining to the contract to be bid, including the factors that may affect the cost, duration, and execution or implementation of the project.

⁴ *COA v. RTC-NCRJR* G.R. No. 85285, 07 July 1989.

⁵ *Agan, Jr. v. Philippine International Air Terminals, Co., Inc.*, G.R. Nos. 155001, 155547 and 155661, 05 May 2003.

⁶ Section 3(d) of RA 9184.

⁷ Clause 6.1. and Clause 15.

⁸ Article 1315 of the New Civil Code of the Philippines.

⁹ Article 1159 of the New Civil Code of the Philippines.

Thus, it is the obligation of the bidder to ensure that the specific item that it will offer to the PE is readily available in the market and will remain to be available at least during the delivery period indicated in the Schedule of Requirements. Offering a specific item which may possibly be pulled-out from the market during the contract implementation stage is a risk fully assumed by the bidder, and should it actually happens, the bidder bears the responsibility.

Contract Amendment

When the subject-matter of contract is the delivery of specific goods as offered by the winning bidder, change in the specifications of goods ought to be delivered cannot be validly effected without the corresponding amendment of the contract. Relative to the modification or amendment of the provisions of procurement contracts, the Supreme Court, in the consolidated case of *Capalla v. COMELEC*,¹⁰ clarified the matter, thus:

[A] winning bidder is not precluded from modifying or amending certain provisions of the contract bid upon. However, such changes must not constitute substantial or material amendments that would alter the basic parameters of the contract and would constitute a denial to the other bidders of the opportunity to bid on the same terms. The determination of whether or not a modification or amendment of a contract bid out constitutes a substantial amendment rests on whether the contract, when taken as a whole, would contain substantially different terms and conditions that would have the effect of altering the technical and/or financial proposals previously submitted by the other bidders. The modifications in the contract executed between the government and the winning bidder must be such as to render the executed contract to be an entirely different contract from the one bid upon.

In view of the foregoing, it is our considered view that procurement contracts should be strictly performed according to its specifications. In case of change or modification in the specifications during contract implementation, the PE is best fit to determine the acceptability of such change taking into consideration the identified needs of the PE, the bidder's responsibility and the materiality of such proposed change, alongside the pronouncement of the Supreme Court in the *Capalla* case, in that – “[s]uch changes must not constitute substantial or material amendments that would alter the basic parameters of the contract and would constitute a denial to other bidders of the opportunity to bid on the same terms.”

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.)


DENNIS S. SANTIAGO
Executive Director V



¹⁰ *Supra* on note 3 citing *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated*, G.R. No. 183789, August 24, 2011, 656 SCRA 214, 241; and, *Agan, Jr. v. Philippine International Air Terminals, Co., Inc.*, G.R. Nos. 155001, 155547 and 155661, 05 May 2003.