Legal Aspects of Procurement

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General Counsel
Outline

- Overview of the Procurement Process
- Legal Remedies of BSP in case of Breach Committed by the Contractor
- Legal Remedies of the Bidder
Laws on Government Procurement

- Republic Act No. 9184 and its IRR Civil Code (Contracts and Sales)
- BSP Charter (RA No. 7653)
- COA Law, Rules and Regulations
Other Laws affecting Government Procurement

- Administrative Laws (EO 292, as amended) and other issuances.
- NIRC
- Labor Code
- BSP Charter (RA 7653)
- Ethics in Government (RA 6713)
- Corporation Code
- Customs and Tariff Code
Commission on Audit
Principal Duties

• Examine, audit and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property owned or held in trust by, or pertaining to, the government.

• Promulgate accounting and auditing rules and regulations including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant or unconscionable expenditures, or uses of government funds and properties.
Contracts in violation of law is VOID

(Article 1409, Civil Code)
Overview of the Procurement Process

Preparation of Bidding Documents → Pre-Procurement Conference

Pre-Procurement Conference → Invitation to Bid

Pre-Bid Conference → Invitation to Bid
Overview of the Procurement Process

- Receipt and Opening of Bids
- Bid Evaluation
- Failure of Bidding
- Post Qualification
Overview of the Procurement Process

- Notice and Execution of Award
- Issuance of Notice of Award
- Contract Implementation and Termination
- Reservation Clause
- Performance Security

BANGKO SENTRAL NG PILIPINAS
3 stages of a Contract

- Negotiation – when the parties complied with the procedural requirements of RA No. 9184 and its RIRR
- Perfection – when the parties agreed and accepted the object and cause of the contract as well as the terms and conditions that would govern the contract
Perfection of Contract

3 stages of a Contract

✓ Consummation (Contract Implementation) – when the winning bidders delivered the goods/performed the services required of them under the contract
Perfection of Contract

- **Consent** of the parties perfected upon meeting of the offer and acceptance of the object and upon the cause that would constitute the contract

- Upon issuance of Notice of Award (NOA) by the Procurement Office; and

- Acceptance and Conformity to such award by the bidders as evidenced by their signatures in the NOA.
Perfection of Contract

- Contract only commences upon Perfection
- Generally prospective
- Generally non-retroactive
Obligations of the Bidder/Supplier

- Compliance with the specifications
- Timely
- Warranties
- Compliance with other terms and conditions of the contract
Obligations of BSP

- Payment
- Accept delivery
- Comply with the terms of the contract
Remedies of BSP (in case of breach)

- Liquidated Damages
- Termination of Contract
- Arbitration
- Forfeiture of performance bond
- Blacklisting
- Other legal actions (criminal and administrative)
LIQUIDATED DAMAGES

- those agreed upon by the parties to a contract, to be paid in case of breach thereof (Article 2226, Civil Code)

- intended to ensure the performance of the principal obligation
Section 68, Revised Implementing Rules and Regulations (RIRR)

Amount (for the procurement of goods, infrastructure projects and consulting services) – 0.001 of the cost of the unperformed portion for every day of delay
Section 68, RIRR

Once the cumulative amount of the liquidated damages reaches 10% of the amount of the contract, the Procuring Entity (PE) shall rescind the contract, without prejudice to other courses of action and remedies.
Remedies
Termination of Contract

TERMINATION OF CONTRACT
Appendix 4, RIRR
Remedies
Termination of Contract

Grounds

✓ Termination for Default

1. In contracts for goods –
   a. Outside of force majeure – the Supplier fails to deliver any or all of the goods within the period(s) specified in the contract, or within any extension thereof granted by the PE pursuant to a request made by the Supplier prior to the delay, and such failure amounts to at least 10% of the contract price;

BANGKO SENTRAL NG PILIPINAS
b. As a result of force majeure – the Supplier is unable to deliver or perform any or all of the goods, amounting to at least 10% of the contract price, for a period of not less than 60 calendar days after receipt of the notice from the PE stating that the circumstance of force majeure is deemed to have ceased; or

c. The Supplier fails to perform any other obligation under the Contract.
Remedies
Termination of Contract

Grounds

✓ Termination for Default

2. In contracts for infrastructure projects –
   a. Due to the Contractor’s fault and while the project is on-going, it has incurred negative slippage of 15%;
   b. Due to the Contractor’s fault and after the contract time has expired, it has incurred a negative slippage of 10% or more in the completion of the work; or
c. The Contractor:

*abandons the contract works, refuses or fails to comply with a valid instruction of the PE or fails to proceed expeditiously and without delay despite a written notice by the PE;
*does not actually have on the project site the minimum essential equipment listed on the Bid necessary to prosecute the works in accordance with the approved work plan and equipment deployment schedule as required for the project;
c. The Contractor:

*does not execute the works in accordance with the contract or persistently or flagrantly neglects to carry out its obligations under the contract;

*neglects or refuses to remove materials or to perform a new work that has been rejected as defective or unsuitable; or

*sub-lets any part of the contract works without approval by the PE.
Remedies
Termination of Contract

Grounds

✓ Termination for Default

3. In contracts for consulting services –
   a. Outside of *force majeure* – the Consultant fails to deliver or perform the Outputs and Deliverables within the period(s) specified in the contract, or within any extension thereof granted by the PE pursuant to a request made by the Consultant prior to the delay;
b. As a result of *force majeure* – the Consultant is unable to deliver or perform a material portion of the Outputs or Deliverables for a period of not less than 60 calendar days after the Consultant’s receipt of the notice from the PE stating that the circumstance of *force majeure* is deemed to have ceased; or

c. The Consultant fails to perform any other obligation under the Contract.
Remedies
Termination of Contract

Grounds

**Termination for Convenience** – the HOPE may terminate the contract for the convenience of the govt. if he has determined the existence of conditions that make Project Implementation economically, financially or technically impractical and/or unnecessary, such as, but not limited to, fortuitous event/s or changes in law and national government policies.

BANGKO SENTRAL NG PILIPINAS
Remedies
Termination of Contract

- **Grounds**

- **Termination for Insolvency** – the PE shall terminate the contract if the Supplier/Contractor/Consultant (S/C/C) is declared bankrupt or insolvent as determined with finality by a court of competent jurisdiction. In this event, termination will be without compensation to the S/C/C, provided that such termination will not prejudice or affect any right of action or remedy which has accrued or will accrue thereafter to the PE and/or the S/C/C.
Remedies
Termination of Contract

Grounds

✓ Termination for Unlawful Acts – the PE may terminate the contract in case it is determined *prima facie* that the S/C/C has engaged, before or during the implementation of the contract, in unlawful deeds and behaviors relative to contract acquisition and implementation. **Unlawful acts**, include, but are not limited to, the following:
a. Corrupt, fraudulent, collusive and coercive practices;
b. Drawing up or using forged documents;
c. Using adulterated materials, means or methods, or engaging in production contrary to rules of science or the trade; and
d. any other act analogous to the foregoing.
Remedies
Termination of Contract

- Grounds

✓ Termination by Contractor/Consultant

1. In contracts for infrastructure projects – the Contractor may terminate its contract with the PE if the works are completely stopped for a continuous period of 60 calendar days through no fault of its own, due to any of the following reasons:
a. Failure of the PE to deliver, within a reasonable time, supplies, materials, right-of-way, or other items it is obligated to furnish under the terms of the contract; or

b. The prosecution of the work is disrupted by the adverse peace and order situation, as certified by the Armed Forces of the Philippines Provincial Commander and approved by the Secretary of National Defense.
Grounds

Termination by Contractor/Consultant

2. In contracts for consulting services – if the PE is in material breach of its obligations pursuant to the contract and has not remedied the same within 60 calendar days following its receipt of the Consultant’s notice specifying such breach.
Judicial Remedy

- The law prescribes arbitration as the mode of settling dispute in contract implementation.
- Jurisdictional, failure to comply can result in the dismissal of the case filed in court.
- Judicial action only in limited cases of questioning the actions of the BAC/HOPE.
Remedies
Arbitration

ARBITRATION
Section 59, RIRR

BANGKO SENTRAL NG PILIPINAS
If any dispute or difference of any kind whatsoever shall arise between the parties in connection with the contract covered by the law and the Revised Implementing Rules and Regulations, the parties shall make every effort to resolve amicably such dispute or difference by mutual consultation.
Disputes – shall be submitted to arbitration in the Philippines according to the provisions of RA No. 876 (Arbitration Law) and RA 9285 (ADR Act of 2004).

Failure/refusal to arbitrate (depends on the rules) – usual provision is that the refusing party shall be considered in default and arbitration proceedings shall continue.
Construction Industry Arbitration Commission (CIAC) – tasked to provide the industry with the necessary ADR facilities for the speedy and equitable settlement of claims and disputes arising from, or connected with, construction contracts in the Philippines.
The parties, by mutual agreement, may agree in writing to resort to other alternative modes of dispute resolution.

Arbitral Award/Decision – appealable by way of a Petition for Review to the Court of Appeals. The petition shall raise pure questions of law and shall be governed by the Rules of Court.
Remedies
Blacklisting

BLACKLISTING
Appendix 3, RIRR
An administrative penalty disqualifying a person or an entity from participating in any government procurement for a given period.
Effects:

- Person/entity – shall not be allowed to participate in the bidding of all government projects during the period of disqualification unless it is delisted.
Effects:

Joint Venture/Consortium which is blacklisted or which has blacklisted member/s and/or partner/s as well as person/entity who is a member of a blacklisted joint venture or consortium – shall not be allowed to participate in any government procurement during the period of disqualification.
Effects:

- Corporations – single stockholder with his/her relatives up to the 3rd degree of consanguinity or affinity, and their assignees, holding at least 20% of the shares, its chairman and president – shall be blacklisted after they have been determined to hold the same controlling interest in a previously blacklisted corporation or in 2 corporations which have been blacklisted; the corporations of which they are part shall also be blacklisted.
Grounds

- Competitive Bidding Stage
  1. Submission of eligibility requirements containing false information or falsified documents;
  2. Submission of Bids that contain false information or falsified documents, or the concealment of such information in the Bids in order to influence the outcome of eligibility screening or any other stage of the public bidding;
3. Allowing the use of one’s name, or using the name of the name of another for purpose of public bidding;
4. Withdrawal of a bid, or refusal to accept an award, or enter into contract with the government without justifiable cause, after he had been adjudged as having submitted the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid;
5. Refusal or failure to post the required performance security within the prescribed time;
Remedies
Blacklisting

6. Refusal to clarify or validate in writing its Bid during post qualification within a period of 7 calendar days from receipt of the request for clarification;

7. Any documented unsolicited attempt by a bidder to unduly influence the outcome of the bidding in his favor;

8. All other acts that tend to defeat the purpose of the competitive bidding, such as habitually withdrawing from bidding or submitting late bids or patently insufficient bids, for at least 3 time within a year, except for valid reasons;
Competitive Bidding Stage

Penalties:

*first offense – suspension of 1 year from participating in the public bidding process

*second offense – suspension of 2 years from participating in the public bidding process

*bid security posted shall also be forfeited
✓ Competitive Bidding Stage

*the foregoing penalties shall be without prejudice to the imposition of additional administrative sanctions as the internal rules of the agency may provide and/or further criminal prosecution, as provided by applicable laws
Grounds

✓ Contract Implementation Stage

1. Failure of the contractor, due solely to his fault or negligence, to mobilize and start work or performance within the specified period in the Notice to Proceed;
2. Failure by the contractor to fully and faithfully comply with its contractual obligations without valid cause or failure by the contractor to comply with any written lawful instruction of the PE or its representatives pursuant to the implementation of the contract;
3. Assignment and subcontracting of the contract or any part thereof or substitution of key personnel named in the proposal without prior written approval by the PE;

4. For the procurement of goods, unsatisfactory progress in the delivery of the goods by the manufacturer, supplier or distributor arising from his fault or negligence and/or satisfactory or inferior quality of goods, as may be provided in the contract;
5. For the procurement of consulting services, poor performance by the consultant of his services arising from fault or negligence;

6. For the procurement of infrastructure projects, poor performance by the contractor or unsatisfactory quality and/or progress work arising from his fault or negligence as reflected in the Contractor’s Performance Evaluation System (CPES) rating sheet. In the absence of the CPES rating sheet, the existing performance monitoring system of the PE shall be applied;
7. Willful or deliberate abandonment or non-performance of the project or contract by the contractor resulting to substantial breach thereof without lawful and/or just cause;
Remedies
Blacklisting

✔ Contract Implementation Stage

Penalties:

*first offense – suspension of 1 year from participating in the public bidding process

*second offense – suspension of 2 years from participating in the public bidding process

*performance security posted shall also be forfeited
✓ Contract Implementation Stage

*the foregoing penalties shall be without prejudice to the imposition of additional administrative sanctions as the internal rules of the agency may provide and/or further criminal prosecution, as provided by applicable laws
Remedies
Blacklisting

- Status of Blacklisted Person/Entity

  ✓ Before Issuance of Blacklisting Order

  *the erring contractor may participate in the procurement of any government project except in the agency where he is suspended

  *if the Blacklisting Order is issued prior to the date of the Notice of Award, the blacklisted person/entity shall not be qualified for award and such project/contract shall be awarded to another bidder
Status of Blacklisted Person/Entity

- Blacklisting Order issued after the award
  *the awarded project/contract shall not be prejudiced by the said order
  *provided that the offense committed by the blacklisted person/entity is not connected with the awarded project/contract
Forfeiture of the security bond
Remedies of the Bidder

- Motion for Reconsideration
- Protest with the Monetary Board
- Resort to Regular Courts
- Motion for Reconsideration (MR)

  ✓ Decisions of the BAC at any stage of the procurement process may be questioned by filing a request for reconsideration within 3 calendar days upon receipt of written notice or upon verbal notification.
Protest

In the event that the MR is denied, decisions of the BAC may be protested in writing with the Monetary Board/HOPE.
Remedies
Protest

- Protest
  - Must be filed within 7 calendar days from receipt of the BAC resolution denying the MR.
  - Verified Position Paper
Protest

Payment of non-refundable protest fee

<table>
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<tr>
<th>ABC Range</th>
<th>Protest Fee</th>
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<tr>
<td>50 million pesos and below</td>
<td>0.75% of the ABC</td>
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<tr>
<td>More than 50 million pesos to 100 million pesos</td>
<td>Php500,000.00</td>
</tr>
<tr>
<td>More than 100 million pesos to 500 million pesos</td>
<td>0.5% of the ABC</td>
</tr>
<tr>
<td>More than 500 million pesos to 1 billion pesos</td>
<td>Php2,500,000.00</td>
</tr>
<tr>
<td>More than 1 billion pesos to 2 billion pesos</td>
<td>0.25% of the ABC</td>
</tr>
<tr>
<td>More than 2 billion pesos to 5 billion pesos</td>
<td>Php5,000,000.00</td>
</tr>
<tr>
<td>More than 5 billion pesos</td>
<td>0.1% of the ABC</td>
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</tbody>
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Remedies
Courts - Certiorari

✓ May be resorted to only after the protests have been completed
✓ Regional Trial Court (RTC) – jurisdiction over final decisions of the Monetary Board/HOPE
✓ Rule 65 of the Rules of Court (Certiorari)
Thank you!