

**MALACAÑANG
MANILA
BY THE PRESIDENT**

EXECUTIVE ORDER NO. 40

CONSOLIDATING PROCUREMENT RULES AND PROCEDURES FOR ALL NATIONAL GOVERNMENT AGENCIES, GOVERNMENT-OWNED OR -CONTROLLED CORPORATIONS AND GOVERNMENT FINANCIAL INSTITUTIONS, AND REQUIRING THE USE OF THE GOVERNMENT ELECTRONIC PROCUREMENT SYSTEM

WHEREAS, the government is committed to good governance;

WHEREAS, the principles of good governance call for transparency, accountability, equity, efficiency and economy in the government procurement process, and the eradication of malpractices, particularly graft and corruption;

WHEREAS, there is an urgent need to consolidate existing administrative orders, issuances, rules and regulations on the procurement of goods, civil works and consulting services and to develop a single set of rules that embodies a streamlined procurement process uniformly applicable to all government procurement;

WHEREAS, it is imperative that the procurement process be made adaptable to, and utilize advances, in modern technology;

WHEREAS, in the pursuit of good governance, the government shall adopt an electronic procurement process that will uniformly apply to all government procurement; and

WHEREAS, to enhance transparency in government procurement, the government shall encourage the public to monitor the procurement process and the awarding of contracts with the end in view of guaranteeing that these contracts are awarded pursuant to law.

NOW, THEREFORE, I, GLORIA MACAPAGAL ARROYO, President of the Republic of the Philippines, by virtue of the powers vested in me by law, do hereby order:

GENERAL PROVISIONS

Section 1. *Scope and Application.* This Executive Order shall apply to the procurement of: (a) goods, supplies, materials and related services; (b) civil works; and (c) consulting services, by all National Government agencies, including State Universities and Colleges (SUCs), Government-Owned or – Controlled Corporations (GOCCs) and Government Financial Institutions (GFIs), hereby referred to as “Agencies.” This Executive Order shall cover the procurement process from the pre-procurement conference up to award of contract

Nothing in this Order shall negate any existing and future government commitments with respect to the bidding and award of contracts financed partly or wholly with funds from international financing institutions as well as from bilateral and other similar foreign sources.

Section 2. *Statement of Policy.* It is the policy of the government that procurement shall be competitive and transparent and therefore shall be through public bidding, except as otherwise provided in this Executive Order.

Section 3. *General Guidelines.* Government procurement shall be guided by the following reform principles:

- a) Simplification of pre-qualification through the use of an eligibility check, and strengthening of post-qualification;
- b) Use of the Lowest Calculated and Responsive Bid as the criterion of award in the case of procurement of goods, supplies, materials and related services; and civil works;
- c) Use of the approved budget for the contract as the ceiling for the bid price and the award; and
- d) Use of transparent, objective and non-discretionary criteria which are included in the bid documents, in undertaking the eligibility check, evaluating bids and determining the winning bidder through post-qualification.

Section 4. *Procurement Management Plan.* Each agency shall judiciously prepare, maintain and update its Agency Procurement Management Plan (APMP) for all its procurement. The APMP shall include a Project Procurement Management Plan (PPMP) for each project.

Section 5. *Procurement of Common-use Supplies, Materials and Equipment.* Agencies shall procure common-use supplies, materials and equipment from the Procurement Service (PS) attached to the Department of Budget and Management (DBM), in accordance with Letter of Instructions No. 755, Executive Order Nos. 289 series of 1987, 359 series of 1989, and 322 series of 2000, using the Electronic Procurement System (EPS) referred to in Section 37 of this Executive Order. Agencies without internet access may avail of the EPS Public Access Terminals which shall be installed at DBM designated locations in the provinces and in Metro Manila: Provided, however, That agencies shall comply with Section 38 of this Executive Order. Small volume purchases by agencies, as defined in the implementing rules and regulations (IRR) of this Executive Order, through the electronic catalogue of non common-use goods, supplies and materials are allowed without need of public bidding.

Section 6. *Manuals, Standard Bidding Documents and Training.* The Procurement Policy Board (PPB), created under Executive Order No. 359 series of 1989, and the Committee on Infrastructure (Infracom) of the National Economic and Development Authority Board shall pursue the development of a generic procurement manual and standard bidding documents, and shall establish a sustainable training program for developing the capacity of the BACs, Secretariats and Technical Working Groups of the agencies.

BIDS AND AWARDS COMMITTEE

Section 7. *The BAC and its Composition.* Each agency shall establish a single Bids and Awards Committee (BAC) for its procurement. The BAC shall be chaired by at least a third ranking officer of the procuring entity, and its composition shall be specified in the IRR. Alternatively, as may be deemed fit by the agency head, there may be separate BACs where the number and complexity of the items to be procured shall so warrant. Similar BACs for decentralized and lower level offices may be formed when deemed necessary by the head of the agency.

Section 8. *Functions of the BAC.* The BAC shall, among others, determine the eligibility of prospective bidders, receive and open bids, conduct the evaluation of bids, undertake postqualification proceedings, and recommend the award of contract. The scope of the BAC activities is from the pre-procurement conference up to the recommendation of award. All members of the BAC shall be on "jury duty" type of assignment until the notice of award is issued by the agency head.

Section 9. *Observers.* To enhance the transparency of the procurement process, the BAC shall invite, in addition to the representative of the Commission on Audit, at least two (2) observers from

the relevant sectors to sit in and monitor the proceedings.

Section 10. *Checks and Balances.* The BAC chairperson and the official who shall approve the ensuing contract for the agency shall not be the same person.

Section 11. *BAC Secretariat.* The agency shall have a Secretariat or a designated organic office as the main support unit of the BAC(s). It shall be separately designated by the head of agency or the appropriate designating authority, and shall be under the supervision of the BAC(s). Similarly, a Secretariat may also be formed in decentralized and lower level offices to support the local BAC(s) that may be established.

Section 12. *Technical Working Group.* For each specific procurement, the BAC may create a Technical Working Group from a pool of technical, financial and/or legal experts to assist in the evaluation of bids.

STANDARDIZED PROCEDURES FOR PUBLIC BIDDING

Section 13. *Pre-Procurement Conference.* Prior to the issuance of the invitation to bid, the BAC shall call a pre-procurement conference for each procurement, except for small procurement.

The pre-procurement conference shall assess the readiness of the procurement in terms of confirming the certification of availability of funds, as well as reviewing all relevant documents in relation to their adherence to law. This shall be attended by the BAC, the unit or officials who prepared the bidding documents and the draft invitation to bid, including consultants hired by the agency concerned, as well as representatives of the end-user.

Section 14. *Invitation to Bid.* The invitation to bid shall contain, among others: a brief description of the items to be procured; the eligibility requirements; the place, date and time of the deadlines for receipt of eligibility requirements and bids; the approved budget for the contract to be bid; the time and place of the opening of bids; and the contract duration or delivery schedule.

The invitation to bid shall be advertised in such manner and for such period of time as to ensure the widest possible dissemination, the details of which shall be provided in the IRR.

Section 15. *Pre-Bid Conference.* The BAC shall convene a pre-bid conference for contracts costing P1,000,000 or more to explain any of the requirements, terms and conditions, and specifications stipulated in the bid documents. For contracts below P1,000,000, the pre-bid conference is optional, at the discretion of the BAC.

Section 16. *Eligibility Check of Prospective Bidders for the Procurement of: (a) Goods, Supplies, Materials and Related Services; and (b) Civil Works.* The BAC or its duly designated organic office shall determine the eligibility of prospective bidders for the procurement of: (a) goods, supplies, materials and related services; and (b) civil works, based on submission of the eligibility requirements provided in the bidding documents. The documents submitted in satisfaction of the eligibility requirements shall be made under oath by the prospective bidder or by his duly authorized representative certifying to the correctness of the statements and authenticity of the said documents.

Section 17. *Eligibility Check and Short Listing of Prospective Bidders for Consulting Services.* The BAC or its duly designated organic office shall determine the eligibility of prospective bidders for the procurement of consulting services using numerical ratings on the basis of the eligibility requirements provided in the bidding documents, to determine the short list of bidders whose bids shall be considered for evaluation. The short list shall consist of the highest ranked eligible bidders from three (3) to seven (7) in number, as predetermined by the BAC and as indicated in the invitation to bid. The documents submitted in satisfaction of the eligibility requirements shall be made under oath by the prospective bidder or by his duly authorized representative certifying to

the correctness of the statements and authenticity of the said documents.

Section 18. *Submission and Receipt of Bids.* A bid shall have two components, namely the technical and financial components which should be in separate sealed envelopes, which shall be submitted simultaneously. The bids shall be received by the BAC on such date, time and place specified in the invitation to bid. The deadline for the receipt of bids shall be fixed by the BAC, giving it sufficient time to complete the bidding process and giving the prospective bidders sufficient time to study and prepare their bids. The deadline shall also consider the urgency of the procurement involved.

Section 19. *Bid Security.* Except for the procurement of consulting services, each bid shall be accompanied by a bid security which shall serve as a guarantee that, after receipt of the notice of award, the winning bidder shall enter into contract with the agency within the stipulated time and shall furnish the required performance security. The amount and allowable forms of the bid security, as well as the manner by which it may be returned to the bidders, shall be provided for in the IRR, notwithstanding Sections 32 and 44 herein.

Section 20. *Modification and Withdrawal of Bids.* A bidder may modify his bid, provided that this is done at least five (5) calendar days before the deadline for the receipt of bids. The modification shall be submitted before the deadline for receipt of bids in a sealed envelope duly identified as a modification of the original bid and stamped received by the BAC. A bidder may also withdraw his bid or express his intention not to participate in the bidding before the deadline for the receipt of bids.

Section 21. *Single Calculated/Rated and Responsive Bid Submission.* A single calculated/rated and responsive bid shall be considered under any of the following exceptional circumstances, notwithstanding the provisions of Section 17:

- a) If after advertisement, only one prospective bidder applies for eligibility check and he meets the eligibility check requirements, after which his bid is found to be responsive;
- b) If after advertisement, more than one prospective bidder applies for eligibility check but only one meets the eligibility check requirements, after which his bid is found to be responsive;
or
- c) If after the eligibility check of more than one bidder, only one bid is submitted and found to be responsive.

Section 22. *Bid Opening and Examination.* For the procurement of: (a) goods, supplies, materials and relevant services; and (b) civil works, the BAC shall examine first the technical components of the bids using "pass/fail" criteria to determine whether all required documents are present. Only bids that are determined to contain all the bid requirements of the technical component shall be considered for opening and evaluation of its financial component.

Section 23. *Bid Evaluation.* The BAC shall evaluate the financial component of the bids and correct it for minor deviations, such as computational errors, omissions and discounts, in accordance with the bidding documents to enable proper comparison of all eligible bids. Any adjustment to correct minor deviations shall be calculated in monetary terms to determine the calculated prices. The bids shall be ranked from lowest to highest in terms of their corresponding calculated prices. For the procurement of: (a) goods, supplies, materials and related services; and (b) civil works, the bid with the lowest calculated price shall be referred to as the "LOWEST CALCULATED BID."

Section 24. *Bid Evaluation of Short Listed Bidders for Consulting Services.* For the procurement of consulting services, the BAC shall evaluate bids of the short listed bidders and rank them using numerical ratings in accordance with the evaluation criteria stated in the bid documents. The bids shall be ranked from highest to lowest in terms of their corresponding calculated ratings. The bid with the highest calculated rating shall be referred to as the "HIGHEST RATED BID."

Section 25. *Ceiling for Bid Price.* The approved budget for the contract shall be the upper limit or ceiling for the bid price. Bid prices which exceed this ceiling shall be disqualified outright from further participating in the bidding. There shall be no lower limit to the amount of the award. For this purpose, the approved budget for the contract shall be that approved by the head of the agency.

Section 26. *Major Deviation.* The BAC shall automatically disqualify a bid that contains a major deviation. A major deviation is a deviation in a bid that, if allowed, would not fulfill the purpose for which the bid was requested, or would prevent a fair comparison with bids that comply with the bidding documents, as defined in the IRR.

Section 27. *Postqualification.* The BAC shall undertake postqualification which involves the verification and validation of all documents submitted by the bidder with the Lowest Calculated Bid or the Highest Rated Bid, as the case may be, and all information or statements contained therein, to determine whether he satisfies all the requirements and conditions as specified in the bidding documents, in which case his bid shall be considered the "LOWEST CALCULATED AND RESPONSIVE BID" in the case of goods, supplies, materials, related services and civil works, or the "HIGHEST RATED AND RESPONSIVE BID" in the case of consulting services.

Section 28. *Procurement Outsourcing.* In order to hasten project implementation, agencies which may not have the proficiency or capability to undertake a particular procurement, as determined by their heads, may request other agencies to undertake such procurement for them, or at their option, recruit and hire consultants or procurement agents to assist them directly and/or train their staff in the management of the procurement function.

Section 29. *Reservation Clause.* The government reserves the right to reject any and all bids, or declare a failure of bidding, or not award the contract for any justifiable reason including among others, if there is evidence of collusion between relevant public officers or employees of the agency or the BAC and any of the bidders, or among the bidders, or between bidders and third parties, including any act which restricts, suppresses or nullifies competition, or if the BAC is found to have failed to follow the prescribed bidding procedures.

AWARD OF CONTRACT

Section 30. *Award of Contract and Notice to Proceed.* The head of the agency or his duly authorized agency representative shall award and issue the corresponding notice to proceed, when applicable, to the bidder with the Lowest Calculated and Responsive Bid or the Highest Rated and Responsive Bid, as the case may be, in accordance with deadlines specified in the IRR.

Section 31. *Performance Security* – Except for the procurement of consulting services, prior to contract signing, the winning bidder shall post a performance security in the form and amount specified in the bidding documents in accordance with the IRR, to guarantee the faithful performance of and compliance with his obligations under the contract in accordance with the bidding documents.

Section 32. *Failure to Enter into Contract and Post Performance Security* – If the bidder with the Lowest Calculated and Responsive Bid or the Highest Rated and Responsive Bid, as the case may be, fails, refuses or is unable to make good his bid by entering into contract with the agency or, in the case of goods, supplies, materials, related services and civil works, post the required performance security within the period stipulated in the bidding documents, the bid security shall be forfeited where so applicable, and the appropriate administrative sanctions shall be imposed except where such failure, refusal or inability is through no fault of his. Thereupon, the BAC shall disqualify the said bidder and shall postqualify the next ranked Lowest Calculated Bid or Highest Rated Bid, as the case may be. This procedure shall be repeated until an award is made. However, if no award is made, the contract shall be re-bid.

Section 33. Price Adjustment. Price adjustments may be allowed under extraordinary circumstances, as defined in the IRR, and upon prior approval of the PPB.

Section 34. Period for Action on Procurement Activities. The procurement process from the opening of bids up to the award of contract shall not exceed three (3) months, or a shorter period to be determined by the agency concerned. The different procurement activities shall be completed within reasonable periods to be specified in the IRR. In addition, the agency head shall take action on the recommendation of award of the BAC, and shall act on the notice of award, as well as the approval of contract within fifteen (15) calendar days from receipt thereof. In the case of GOCCs and GFIs, the concerned board shall take action on the said recommendation within thirty (30) calendar days from receipt thereof.

ALTERNATIVE METHODS OF PROCUREMENT

Section 35. Alternative Methods. When justified by extraordinary conditions as provided in this Executive Order and its IRR, and subject to the prior approval of the head of the agency in the interest of economy and efficiency, the agency head, upon the recommendation of the BAC, may adopt alternative methods of procurement.

Such alternative methods of procurement can take the following forms:

- a) Limited Source Bidding, otherwise known as Selective Bidding;
- b) Direct Contracting, otherwise known as Single Source procurement;
- c) Repeat Order;
- d) Shopping; or
- e) Negotiated Procurement.

PROCUREMENT OF INFORMATION AND COMMUNICATIONS TECHNOLOGY PROJECTS

Section 36. Information and Communications Technology Projects. The procurement of information and communications technology (ICT) projects shall be governed by the following rules, subject to additional guidelines that may be prescribed by the Information Technology and E-Commerce Council (ITECC):

- a) The procurement of ICT equipment and/or software only shall be considered as procurement of goods, supplies, materials and related services.
- b) The procurement of ICT projects involving the establishment of physical networks only shall be considered as procurement of civil works.
- c) The procurement of ICT projects involving development of software or systems only shall be considered as procurement of consulting services.
- d) In the case of ICT projects involving at least two of the foregoing, the procurement shall be considered as either one for: (a) goods, supplies materials and related services; (b) civil works; or (c) consulting services, whichever component has the greater or greatest cost.

THE GOVERNMENT E-PROCUREMENT SYSTEM

Section 37. *The Electronic Procurement System.* Pursuant to Republic Act (R.A.) No. 8792, the "Electronic Commerce Act," the government shall establish a single and centralized electronic portal for the procurement of: (a) goods, supplies, materials and related services; (b) civil works; and (c) consulting services, to be used by agencies, herein referred to as the EPS to enhance transparency, accountability, equity, efficiency and economy in government procurement. The PS under the supervision of PPB shall be responsible for the establishment, management, operation and maintenance of the EPS.

Section 38. *Use of the EPS.* All agencies are hereby mandated to fully use the EPS in accordance with the policies, rules, regulations and procedures adopted by PPB. In connection thereto and in accordance with R.A. No. 8792, the above-mentioned agencies shall undertake measures to ensure that they shall have an access to an on-line network to facilitate the open, speedy and efficient on-line transmission, conveyance and use of electronic data messages or electronic documents, and recognize the EPS as the primary source of information on government procurement of: (a) goods, supplies, materials and related services; (b) civil works; and (c) consulting services. All notices and certifications to be issued by the BAC with respect to a procurement shall be done through the EPS.

Section 39. *Features of the EPS.* The EPS includes the following features:

- a) *Electronic Bulletin Board.* A centralized electronic bulletin board for advertising procurement opportunities, notices, awards and reasons for award.
- b) *Suppliers' Contractors' and Consultants' Registry.* A centralized electronic registry of all authorized suppliers, consultants and contractors, as defined in the IRR.
- c) *Electronic Catalogue.* A centralized electronic price list consisting of two categories, in particular: (i) Common-use goods, supplies, materials and related services in the stores of PS shall be carried in the PS Electronic Catalogue; and (ii) for non common-use goods, supplies, materials and related services, as well as for civil works and consulting services, the EPS- registered and accredited suppliers, consultants and contractors thereof shall have their respective electronic catalogues which shall be hosted by, or linked to, the EPS website.
- d) *Additional Features.* The Virtual Store, electronic bid submission, on-line payment, and such other features that may be developed in the future.

Section 40. *Security, Integrity and Confidentiality.* The EPS shall ensure the security, integrity and confidentiality of documents submitted through the system. It shall include a feature that provides for an audit trail for on-line transactions and allows the Commission on Audit to verify the security and integrity of the system at any time.

Section 41. *Observers.* The EPS shall allow observers authorized by the BAC to monitor the procurement proceedings on-line: *Provided, however,* That such observers do not have any direct or indirect interest in the contract to be bid out.

PROCUREMENT MONITORING

Section 42. *Procurement Monitoring.* The head of the BAC Secretariat shall have the responsibility for monitoring the performance against standards set forth by this Executive Order, its IRR, and existing rules and regulations. The head of the Secretariat shall prepare a procurement monitoring report that shall be approved and submitted by the head of the procuring agency on a quarterly basis. The contents and coverage of this report shall be provided for in the IRR.

INCENTIVES AND SANCTIONS

Section 43. *Incentives and Sanctions.* In consultation with agencies and the Civil Service Commission, the PPB and Infracom shall establish:

- a) an equitable indemnification package for officials/staff providing services in the BAC, Secretariat and the Technical Working Group, which may be in the form of free legal assistance, liability insurance, and other forms of indemnification and protection; and
- b) a set of sanctions for violations of this Executive Order and its IRR committed by officials/staff providing services in the BAC, Secretariat and the Technical Working Group.

Section 44. *Administrative Penalties for Bidders and Prospective Bidders.* 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 violations, without prejudice to the imposition of criminal and civil sanctions as provided by laws, rules and regulations:

- a) Submission of eligibility requirements containing false information or falsified documents.
- b) Submission of bids that contain false information or falsified documents or the concealment of such information in the bids.
- c) Allowing the use of one's name, or using the name of another, for purposes of public bidding.
- d) Withdrawal of a bid or refusal to accept an award or enter into contract with the government without just cause, after it shall have been determined to have submitted the Lowest Calculated and Responsive Bid or the Highest Rated and Responsive Bid, as the case may be.
- e) Refusal or failure to post the required performance security within the prescribed time.
- f) Termination of the contract due to the default of the bidder.
- g) Any documented unsolicited attempt by a bidder to unduly influence the outcome of the bidding in his favor.
- h) All other acts that tend to defeat the purpose of the public bidding.

In addition to the above administrative penalties, the bid security or the performance security of the bidder concerned, where so applicable, shall also be forfeited.

The authority to impose the above-mentioned administrative penalties may be delegated by the head of the agency to the BAC.

FINAL PROVISIONS

Section 45. *Local Government Units.* All procurement of local government units funded by the national government shall be governed by the provisions of this Executive Order and its IRR. Furthermore, local government units are encouraged to apply the rules and procedures provided in this Executive Order for procurement funded from local government funds.

Section 46. Appeals. Decisions of the BAC in all stages of procurement may be appealed to the head of the agency in writing. Appeals shall be made by filing a verified position paper and paying a non-refundable protest fee. The amount of the protest fee and the periods during which the appeals may be filed and resolved shall be specified in the IRRs.

Section 47. Implementing Rules and Regulations (IRR). Within sixty (60) calendar days from the issuance of this Executive Order, the PPB and the Infracom shall jointly issue the policies, rules, regulations and procedures to implement this Executive Order, leading to a more transparent and efficient procurement system for the government. These IRR may be amended jointly by the PPB and the Infracom as the need arises.

Section 48. Repealing Clause. All executive issuances, orders, rules and regulations or parts thereof inconsistent with this Executive Order are hereby repealed, amended and/or modified accordingly.

Section 49. Separability Clause. If any provision of this Executive Order is declared invalid or unconstitutional, the other provisions not affected thereby shall remain valid and subsisting.

Section 50. Effectivity Clause. This Executive Order shall take effect fifteen (15) days after its publication in the Official Gazette or in a newspaper of general circulation.

DONE in the City of Manila, this 8th day of October in the year of Our Lord, Two Thousand and One.

By the President:

(Sgd.)
ALBERTO G. ROMULO
Executive Secretary