

NPM No. 007-2018

5 February 2018

HON. THELMA C. BAHIA
Deputy Court Administrator
SUPREME COURT OF THE PHILIPPINES
Manila

Re: SEC Registration of Foreign Bidders and Inclusion of Ordering Agreements in the Statement of All Ongoing Contracts -

Dear Deputy Court Administrator. Bahia:

This refers to the Honorable Deputy Court Administrator letters requesting for clarification on the following:

1. Whether an ordering agreement is required to be included in the Statement of All Ongoing Contracts; and
2. Whether the requirement of Securities and Exchange Commission (SEC) Registration for foreign consulting firms applies to goods procurement in terms of foreign suppliers.

SEC Registration of Foreign Firms -

It is represented that in one of its public biddings, the Supreme Court (SC) had a joint venture bidder, wherein two (2) of the three (3) joint venture partners are foreign corporations based in India. These foreign firms were required by the SC to submit their licenses to transact business in the Philippines on the basis of Section 123 of the Corporation Code. It also cited Section 37.1.4(a)(iv) of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, which requires, in the case of consulting services, the SEC Certificate of Registration of the consulting firm, and/or the authorization or license issued by the appropriate GoP professional regulatory body. Thus, the Honorable Deputy Court Administrator wishes to clarify if this provision is also applicable to goods procurement.

We wish to clarify that although the registration requirement in the SEC by foreign firms is only expressly provided in the procurement of consulting services, it would still apply to foreign suppliers and contractors in the procurement of goods and services, and infrastructure projects, respectively.

In the case of *Hutchison Ports Philippines Limited v. Subic Bay Metropolitan Authority*¹, the Supreme Court held that:

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¹ G.R. No. 131367, August 31, 2000.

Participating in the bidding process constitutes doing business because it shows the foreign corporation's intention to engage in business here. The bidding for the concession contract is but an exercise of the corporation's reason for creation or existence. Thus, it has been held that a foreign company invited to bid for IBRD and ADB international projects in the Philippines will be considered as doing business in the Philippines for which a license is required. In this regard, it is the performance by a foreign corporation of the acts for which it was created, regardless of volume of business, that determines whether a foreign corporation needs a license or not.

Thus, even though 2016 IRR of RA 9184 does not expressly provide for this requirement, for the procurement of goods, foreign bidders are still required to register with the SEC as mandated by the Corporation Code² and jurisprudence. This license shall be required as a post-qualification requirement under Section 34.2 of the IRR where the bidder is mandated to submit **“other appropriate licenses and permits required by law and stated in the Bidding Documents”**.

Ordering Agreement Inclusion in the Statement of All Ongoing Contracts -

It is further represented that in another bidding of the SC, it found that a bidder failed to include its Ordering Agreement with another government agency in its Statement of All Ongoing Contracts. Hence, inquiry is made if it is indeed required to be declared in the Statement of ongoing contracts, considering its nature as an option contract.

The Ordering Agreements is a written agreement in the nature of an option contract between the procuring entity and the Lowest Calculated and Responsive Bidder granting the procuring entity the option to either place an order for any of the goods identified in the Order Agreement List or not buy at all, within a given period of time.

The 2016 IRR is silent on whether an Ordering Agreement is required to be declared in the Statement of the prospective bidder of all its ongoing government and private contracts under Section 23.1(a)(iv), granting its nature as an option contract. However, it is our considered view that existing Ordering Agreements, being mere option contracts between bidders and Procuring Entities, need not be declared in the said Statement because the contracts contemplated in Section 23.1(a)(iv) refers to procurement contracts involving actual sale of goods and services.

On the other hand, it is the Delivery Order Contract that triggers the exercise by the procuring entity of the option to purchase, it shall constitute the actual purchase by the PE, and there already exists an effective contract of sale to speak of, and thus, can be considered an ongoing contract once issued until the goods or equipment are fully delivered.

Consequently, it may be noted that in Sec. 8.5 of the “Revised Guidelines on the Use of Ordering Agreement”³, it provides that “for purposes of participation in other public bidding activities, the aggregate of the Delivery Order Contracts for a particular item satisfactorily completed by the supplier/service provider shall be considered as one (1) contract with the cumulative amount thereof as the total contract amount.” Accordingly, the Delivery Order Contracts, once completed, can be considered actual contracts that can be

² Batas Pambansa Bilang 68.

³ Issued through GPPB Resolution 01-2012, dated 27 January 2012, and published in The Daily Tribune on 20 August 2012.

used by bidders to participate in other bidding activities reflecting its experience to support the single largest completed contract requirement.

Dual Purpose of the Statement of All Ongoing Contracts -

In Non-Policy Matter (NPM) Opinion No. 6-2018, dated 6 February 2018, we have opined that:

[T]he requirement on Statement of all ongoing contracts has dual purpose, as discussed below.

It is relevant in relation to the computation of the NFCC because in the NFCC formula, the value of all outstanding or uncompleted portions of ongoing contracts will be deducted from the product of the "*current assets minus current liabilities multiplied by 15.*" Hence, for the Procuring Entity to determine the correct computation of the NFCC, the bidder shall declare all of its ongoing government and private contracts, including contracts awarded but not yet started, if any, whether similar or not similar in nature and complexity to the contract to be bid.

In addition, the Statement of all its ongoing government and private contracts still has its significance in relation to the verification on the bidder's performance in its ongoing contracts during post-qualification process.

Section 34.3 of the 2016 Revised IRR of RA 9184 provides, *to wit*:

The post-qualification shall verify, validate, and ascertain all statements made and documents submitted by the bidder with the Lowest Calculated Bid/Highest Rated Bid, using non-discretionary criteria, as stated in the Bidding Documents. These criteria shall consider, but shall not be limited to, the following:

...

ii. Verification of availability and commitment, and/or inspection and testing for the required capacities and operating conditions, of equipment units to be owned/leased/under purchase by the bidder for use in the contract under bidding, **as well as checking the performance of the bidder in its ongoing government and private contracts, if any of these ongoing contracts shows:**

- a. Negative slippage of at least fifteen percent (15%) in any one project or a negative slippage of at least ten percent (10%) in each of two (2) or more contracts;
- b. Failure of the contractor to commence repair works on ongoing contracts within seven (7) calendar days and to complete them within thirty (30) calendar days after receipt of the Procuring Entity's notice of defects and deficiencies;
- c. Failure of the contractor to commence repair works on contracts with pending certificates of acceptance within thirty (30) calendar days and complete them within ninety (90) days after receipt of the Procuring Entity's notice of defects and failures; or
- d. Substandard quality of work as per contract plans and specifications, or unsatisfactory performance of the contractor's

obligations as per contract terms and conditions, at the time of inspection.

If the BAC verifies any of these deficiencies to be due to the contractor's fault or negligence, the agency shall disqualify the contractor from the award, for the procurement of Infrastructure Projects. (Emphasis supplied)

- i) Verification and/or inspection and testing of the goods/product, after-sales and/or maintenance capabilities, in applicable cases, **as well as checking the following:**
 - a. **Delay in the partial delivery of goods amounting to ten percent (10%) of the contract price in its ongoing government and private contracts;**
 - b. If any of these contracts shows the bidder's failure to deliver or perform any or all of the goods or services within the period(s) specified in the contract or within any extension thereof granted by the Procuring Entity pursuant to a request made by the supplier prior to the delay, and such failure amounts to at least ten percent (10%) of the contract price; or
 - c. Unsatisfactory performance of the supplier's obligations as per contract terms and conditions at the time of inspection.

If the BAC verifies any of these deficiencies to be due to the bidder's fault or negligence, the BAC shall disqualify the bidder from the award, for the procurement of Goods. (Emphasis supplied)

Thus, it is important for the bidder to submit the Statement of all ongoing contracts, even if the ongoing contract does not affect the NFCC, because one of the responsibilities of the Procuring Entity during the post-qualification stage is to check the performance of the bidder in all of its ongoing contracts identified in the said Statement of all ongoing contracts.

Accordingly, to harmonize the dual purpose of the Statement of all ongoing contracts, which may include determining the bidders' performance in their option contracts entered into by prospective bidders with government agencies and private entities, the Procuring Entity may require in the Bidding Documents or in its supplemental/bid bulletin, the disclosure of option contracts in the Statement of all ongoing contracts, for purposes of transparency, as one of the governing principles on government procurement. However, considering the required information to be disclosed in the Statement of all ongoing contracts refer to details of procurement contracts involving sale of goods and services, prospective bidders should declare its nature as an Option Contract and need not fill-out those information that are not applicable (*e.g.* amount of contracts, among others).


Summary -

In sum, foreign corporations shall be required to register with the SEC, as required by other laws and jurisprudence. In addition, although silent under the 2016 IRR and in the Revised Guidelines on the Use of Ordering Agreement, Ordering Agreements, as option contracts, entered into by bidders with GoP agencies need not be included in the Statement of

all ongoing contracts. However, the Procuring Entity may require in the Bidding Documents or supplemental/bid bulletin, the disclosure of Option Contracts in the Statement of all ongoing contracts, for purposes of transparency, as one of the governing principles on government procurement.

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 there be other concerns, please do not hesitate to contact us.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director V

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