

**NPM No. 091-2016**

15 November 2016

**MR. JOLAN V. WEDINGCO**  
*Chairperson, Bids and Awards Committee*  
**PEA TOLLWAY CORPORATION (PEATC)**  
Manila-Cavite Expressway,  
Parañaque, 1700 Metro Manila

**Re: Two-Failed Biddings; Foreign Bidders**

Dear Mr. Wedingco:

This refers to your letter requesting our opinion relative to the available procurement option after a second failed bidding, as well as procurement from foreign suppliers.

As represented, PEATC is on the process of procuring a “Speed Gun” with night vision capability, video recording, time and date, and ability to capture plate number of speeding cars, among its features. The bidding for the project held last 4 July 2016 was declared a failure due to lack of bidders. As you intend to schedule a second bidding for the project, you are seeking our opinion on the possible procurement option available to PEATC should the second bidding also fail. It is your assumption that the procurement is most likely from suppliers abroad.

### **Competitive Bidding as Default Method of Procurement**

Section 10 of Republic Act (RA) No. 9184 enunciates the general policy that all procurement shall be done through competitive bidding. As such, competitive bidding may not be dispensed with nor circumvented, and that alternative methods of procurement may only be resorted to in the instances provided for by law.<sup>1</sup> Accordingly, alternative methods of procurement may be resorted to only upon prior approval of the Head of the Procuring Entity (HOPE), in order to promote economy and efficiency, and whenever justified by the conditions for each alternative method of procurement specified in Sections 49 to 53 of the 2016 Revised IRR of RA 9184.<sup>2</sup>

Being the default method of procurement, a procuring entity may still conduct competitive bidding after the occurrence of a second failure of bidding. This notwithstanding, RA 9184 and its 2016 Revised Implementing Rules and Regulations (IRR) recognizes

<sup>1</sup> *Manila International Airport Authority, et al v. Olongapo Maintenance Services Inc., et al; Antonio P. Gana, et al. v. Triple Crown, etc.; Triple Crown etc. v. Manila International Airport Authority, et al., G.R. Nos. 146184-85/ G.R. No. 161117/ G.R. No. 167827, January 31, 2008.*

<sup>2</sup> 2016 Revised IRR of RA 9184, Section 48.1.

alternative methods of procurement that procuring entities may resort to, provided that the conditions warranting their use are present.

### **Negotiated Procurement; Two-Failed Biddings Modality**

Under Section 53.1 of the 2016 Revised IRR of RA 9184, where there has been failure of competitive bidding or Limited Source Bidding for the second time as provided in Section 35 of RA 9184 and its IRR, a procuring entity may directly negotiate a contract with a technically, legally and financially capable supplier. For the Two-Failed Biddings modality to apply, the highly exceptional condition is the declaration of two (2) failures of bidding by the Bids and Awards Committee (BAC) under Section 35 of RA 9184 and its IRR, thus:

1. No bids are received;
2. All prospective bidders are declared ineligible;
3. All bids fail to comply with all the bid requirements or fail post-qualification, or, in the case of consulting services, there is no successful negotiation; or
4. The bidder with the Lowest/Single Calculated Responsive Bid or Highest/Single Rated Responsive Bid refuses, without justifiable cause, to accept the award of contract, and no award is made in accordance with Section 40 of RA 9184 and its IRR.

As represented, the first bidding for the project failed due to lack of bidders, a ground which squarely falls within the first ground for the failure of bidding under Section 35 of RA 9184 and its IRR. In this regard, should there occur a second failure of bidding due to any of the grounds under Section 35 of RA 9184 and its IRR, the BAC may resort to Two-Failed Biddings Negotiated Procurement modality under Section 53.1 of the 2016 Revised IRR of RA 9184 upon prior approval of the HOPE, in order to promote economy and efficiency. For guidance, Section V.D.1.b Annex "H" of the 2016 Revised IRR of RA 9184 or the *Consolidated Guidelines for the Alternative Methods of Procurement* provides for the procedural requirements in resorting to Two-Failed Biddings Negotiated Procurement modality.

### **Foreign Suppliers**

Consistent with the economic policies enunciated in the 1987 Philippine Constitution, particularly on the promotion of Filipino labor, domestic materials, and locally produced goods<sup>3</sup>, and in consonance with RA 5183<sup>4</sup>, RA 9184 and its IRR mandates that only Filipino citizens, Philippine cooperatives, and corporations, partnerships and joint ventures that are 60% Filipino-owned are eligible to participate in the bidding for the supply of goods.<sup>5</sup> However, in light of the principles of economic exchange and expansion of trade and exports with other countries on the basis of equality and reciprocity, with due regard to the government's initiatives in the prohibition and/or regulation of monopolies and other

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<sup>3</sup> Article XII, Section 12 of the 1987 Philippine Constitution

<sup>4</sup> No contract either through a public bidding or negotiated contract for the supply to, or procurement by, any government-owned or controlled corporation, company, agency or municipal corporation of materials, equipment, goods and commodities shall be awarded to any contractor or bidder who is not a citizen of the Philippines or which is not a corporation or association at least sixty percent of the capital of which is owned by Filipino citizens, except, as to a citizen, corporation or association of a country the laws or regulations of which grant similar rights or privileges to citizens of the Philippines.

<sup>5</sup> *Supra* on Note 2, Section 23.4.1.1.

situations that restrain trade and fair competition, qualified foreign nationals may be eligible to participate in the public procurement of goods, infrastructure projects and consultancy services; provided, however, that provisions on domestic preference, Most-Favored Nation (MFN) status and non-discrimination treatments under applicable laws and treaties are complied with.<sup>6</sup>

Accordingly, Section 23.4.1.2 of the 2016 Revised IRR of RA 9184 provides that foreign bidders may be eligible to participate in the procurement of goods under any of the following circumstances in accordance with the guidelines issued by the GPPB:

1. When provided for under any Treaty or International or Executive Agreement as provided in Section 4 of the Act and this IRR;
2. When the foreign supplier is a citizen, corporation or association of a country, the laws or regulations of which grant reciprocal rights or privileges to citizens, corporations or associations of the Philippines;
3. When the goods sought to be procured are not available from local suppliers; or
4. When there is a need to prevent situations that defeat competition or restrain trade

Based on your representation, procurement for the project is most likely from suppliers abroad. Applying the foregoing discussion, a procuring entity may only consider local suppliers for award of procurement contract, whether through Competitive Bidding or any alternative method of procurement, unless any of the conditions under Section 23.4.1.2 of the 2016 Revised IRR of RA 9184 is present, where foreign bidders can participate in the procurement of goods. In the latter case, the procuring entity shall be guided by the provisions of the *Guidelines in the Determination of Eligibility of Foreign Suppliers, Contractors, and Consultants to Participate in Government Procurement Projects*.<sup>7</sup>

### Summary

In sum, we wish to clarify the following matters:

1. Being the default method of procurement, a procuring entity may still conduct competitive bidding after the occurrence of a second failure of bidding. However, should there occur two (2) failures of bidding due to any of the grounds under Section 35 of RA 9184 and its IRR, the BAC may resort to Two-Failed Biddings Negotiated Procurement modality under Section 53.1 of the 2016 Revised IRR of RA 9184 upon prior approval of the HOPE, in order to promote economy and efficiency, subject to the provisions of the *Consolidated Guidelines for the Alternative Methods of Procurement*; and
2. In the procurement of goods, a procuring entity may only consider local suppliers for award of procurement contract, whether through Competitive Bidding or any alternative method of procurement. As an exception, foreign bidders can participate in the procurement of goods when any of the conditions under Section

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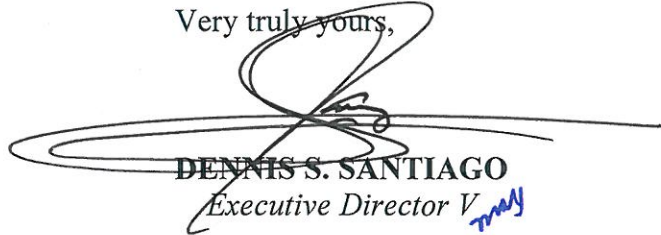
<sup>6</sup> General Policy, 2<sup>nd</sup> Paragraph of the *Guidelines in the Determination of Eligibility of Foreign Suppliers, Contractors, and Consultants to Participate in Government Procurement Projects*.

<sup>7</sup> Issued through GPPB Resolution 18-2005, dated 12 September 2005.

23.4.1.2 of the 2016 Revised IRR of RA 9184, subject to the provisions of the *Guidelines in the Determination of Eligibility of Foreign Suppliers, Contractors, and Consultants to Participate in Government Procurement Projects*.

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*

11/17/23