



REPUBLIC OF THE PHILIPPINES
Department of Budget and Management
Malacañang, Manila

GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

TSO NPM No. 05-2003

March 18, 2003

MS. ELISA L. DAYAO

Manager
Corporate Fuel Management Department
National Power Corporation (NAPOCOR)
Cor. Quezon Avenue & Agham Road,
Diliman, Quezon City

Re : Additional Oil-Based Fuel Requirement of NPC its IPPs and SPUG
Power Barges for CY 2003

Dear Ms. Dayao:

We reply to your letter dated February 21, 2003, which we received on March, 5, 2003, requesting for an opinion as to the course of action the National Power Corporation ("NAPOCOR") should undertake in the event that the lone prospective bidder for its 'additional oil-based fuel requirements' cannot comply with the Net Financial Contracting Capacity ("NFCC") requirement in the Implementing Rules and Regulations ("IRR") of Executive Order No. 40, Series of 2001 ("E.O. 40"). In this regard, the issue to be resolved is:

Whether or not an Agency may waive the NFCC requirement as provided for under the IRR of E.O. 40.

NFCC Requirement

For the procurement of goods, submission of the NFCC is an eligibility criteria/requirement under Section 16.2.1 of the IRR of E.O. 40, thus:

3. The prospective bidder's Net Financial Contracting Capacity (NFCC), based on his net working capital (i.e. current assets less current liabilities), must be at least equal to the approved budget for the contract to be bid, calculated as follows: xxx xxx xxx

and sufficiency thereof is a condition *sine qua non* for a prospective bidder to be declared eligible. Non-submission of the NFCC or the insufficiency thereof will render the prospective bidder ineligible to participate in the bidding. Section 16.2.3 of the IRR of E.O. 40 thus, provides that:

16.2.3. Only an eligible bidder as defined and determined in accordance with these IRR may participate in the bidding and subsequently be awarded the contract being bid out if its bid is found to be responsive in accordance with these IRR.

It should be noted further that E.O. 40 and its IRR adopt a non-discretionary criteria for the eligibility requirements. As such, at this stage the Bids and Awards Committee ("BAC") would merely have to check the presence or absence, as well as the completeness, of each of the requirements, and an absent or incomplete requirement would have to be rated as failed in that regard. Any bidder with a failed mark would have to be declared as ineligible to participate in the bidding. In particular, Section 16.4 of the IRR of E.O. 40 provides:

16.4. In relation to Section 18 on submission of bids, and subject to the provisions of Section 14.6 of these IRR, **the BAC shall determine if each prospective bidder is eligible to participate in the bidding by examining the completeness of each prospective bidder's eligibility requirements or statements against a checklist of requirements, using a non-discretionary "pass/fail" criteria, as stated in the Invitation to Apply for Eligibility and to Bid, and shall be determined as either "eligible" or "ineligible."** If a prospective bidder is rated "passed" for all the eligibility requirements, it shall be considered eligible to participate in the bidding, and the BAC shall mark the set of eligibility documents of the prospective bidder concerned as "eligible." If a prospective bidder is rated "failed" in any of the eligibility requirements, it shall be considered ineligible to participate in the bidding, and the BAC shall mark the set of eligibility documents of the prospective bidder concerned as "ineligible." xxx xxx xxx (Emphasis supplied)

Moreover, since the submission and completeness of the NFCC is imperative and vital for the prospective bidder's eligibility, it cannot be waived without violating the above-quoted provisions of the IRR of E.O. 40.

However, in the interest of public service, economy and efficiency, an agency may adopt the alternative methods of procurement provided in Section 35 of the IRR of E.O. 40, whenever justified by the extraordinary circumstances provided therefor. One of these

alternative methods of procurement is that provided in Section 35.1.5 which allows negotiated procurement for goods under any of the following cases, to wit:

35.1.5. *Negotiated Procurement for Goods* may be employed by agencies only in the following cases:

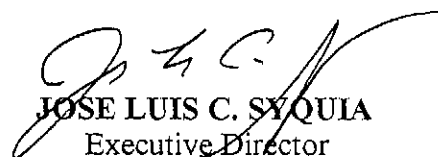
- a) Where there has been failure of public bidding for the second time as provided under the relevant provisions of these IRR;
- b) Where the existing contract has been terminated in accordance with the pertinent provisions of these IRR and existing laws, rules and regulations;
- c) Whenever the goods are to be used in connection with a project or activity which cannot be delayed without causing detriment to public service; and
- d) Whenever the purchase is to be made from another agency of the Government.

It should be noted also that the use of any of the alternative methods of procurement should be duly approved by the Head of the Procuring Agency or his duly authorized representative upon the recommendation of the BAC.

In this regard, in view of the prevailing circumstances in the procurement of 'additional oil-based fuel requirements' of NAPOCOR which, as stated in your letter, sees a critical fuel inventory, NAPOCOR may consider studying the possibility of adopting negotiation as an alternative method of procurement, particularly under the case where a project or activity cannot be delayed without causing detriment to public service. We stress, however, that NAPOCOR must be able to justify and prove the existence of the extraordinary circumstance that would be relied upon. At any rate, an agency would have to cautiously consider negotiation as an alternative method of procurement, especially if it is based primarily upon a mere expectation of a possible result for a public bidding and/or the unilateral assertions of a prospective bidder. In other words, in the absence of an actual imminent danger or detriment to public service, it is always safe to conduct a public bidding, because it is the generally accepted method of procurement under the law.

We trust that this clarifies matters.

Very truly yours,


JOSE LUIS C. SYQUIA
Executive Director