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Department of Budget and Management
Malacañang, Manila

GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

TSO NPM No. 06-2003

March 20, 2003

ATTY. DANIEL M. CLETO
Deputy Administrator, Corporate Services Branch
and PBAC Chairman
Philippine Coconut Authority (PHILCOA)
Elliptical Road, Diliman, Quezon City

Re : Advertisement Requirement Under Executive Order No. 40, series of
2001 and its Implementing Rules and Regulations

Dear Atty. Cleto:

This refers to your letter dated February 24, 2003, which we actually received on March 10, 2003, requesting for an opinion regarding the publication of the Invitation to Bid made by the Pre-qualification Bids and Awards Committee ("PBAC"), of the Philippine Coconut Authority ("PHILCOA").

Upon a careful review of your letter-request, we identified the following issues for resolution, to wit:

1. *Whether or not, under current procurement laws, rules and regulations, the PBAC still exists; and*
2. *Whether or not publication of the Invitation to Bid in two (2) newspapers of general circulation on three (3) different dates constitutes substantial compliance with the requirements of Executive Order No. 40, series of 2001 ("E.O. 40"), and its Implementing Rules and Regulations ("IRR").*

Abolition of the PBAC

E.O. 40, entitled "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" took effect on **October 27, 2001**, its IRR, on the other hand, took effect on **April 4, 2002**. E.O. 40 and its IRR consolidated all rules, regulations and procedures relating to the procurement of goods, civil works and consulting services. As such, so far as procurement rules, regulations and procedures are concerned, the governing and applicable law at present is E.O. 40 and its IRR, without prejudice to the eventual promulgation of the IRR of Republic Act No. 9184 ("R.A. 9184"), otherwise known as the Government Procurement Reform Act, as well as the self-executing provisions of R.A. 9184. At this point, we would like to inform your agency that, upon the full effectivity of R.A. 9184 and its IRR, E.O. 40 shall be repealed thereby.

An innovation introduced by E.O. 40 and its IRR, in consonance with the principle of "simplified eligibility check" and "strengthened post-qualification," both of which substituted pre-qualification, is the abolition of the **PBAC** and the creation of the **Bids and Awards Committee ("BAC")**. In particular, Section 7 of E.O. 40 provides:

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. (Emphasis supplied)

Moreover, Section 7.1. and 7.2. of the IRR of E.O. 40 provides:

7.1. BAC Structure

Each agency shall establish in its head office a single Bids and Awards Committee ("BAC") for the procurement of goods, supplies, materials and related services; civil works; and consulting services. However, to expedite the procurement process for practical intents and purposes, the agency head may create separate BACs where the number and complexity of the items to be procured shall so warrant. xxx xxx xxx

7.2. BAC Composition

The BAC shall be a five-member team composed of the chairperson and four members designated by the head of the agency. Three of these shall consist of the regular members of the BAC; the other two (2) being provisional members. xxx xxx xxx

From the above-cited provisions, it is clear that, for national government agencies like PHILCOA, the PBAC was substituted by the BAC under E.O. 40 and its IRR. For this reason, we suggest that PHILCOA reconstitute its PBAC to comply with the afore-cited provisions of E.O. 40 and its IRR. We also take this opportunity to inform your agency that the existence of the BAC, in lieu of the PBAC, has been maintained in R.A. 9184.

Advertisement and Posting Requirements Under E.O. 40 and its IRR

As stated in your letter, the Invitation to Apply for Eligibility and to Bid was advertised in TODAY on January 4, 8 & 11, 2003, and MALAYA on January 5, 9 & 13, 2003. Mention must be made, however, that Section 14.2.1(a) of the IRR of E.O. 40, provides for the following advertising requirements for public biddings involving goods costing more than two million pesos (Php. 2,000,000.00):

14.2.1. Except as otherwise provided in Sections 14.2.2 and 14.2.3 of these IRR, the Invitation to Apply for Eligibility and to Bid shall be:

- a) Advertised at least twice within a minimum period of two (2) consecutive weeks, with a period of seven (7) calendar days between publications, in at least two (2) newspapers of general nationwide circulation which have been regularly published for at least two (2) years before the date of issue.

Under the assumption that the approved budget for the procurement concerned is more than Two Million Pesos (P 2,000,000.00), PHILCOA would have to strictly follow the advertisement requirement above-cited. In this regard, although the Invitation to Bid was posted three (3) times in two (2) newspapers of general nationwide circulation, or more than the minimum number required under the law, we note, however, that the postings in TODAY are one day short of the mandatory seven (7) calendar day period in between newspaper publications, as specified in the above-cited Sec.14.2.1(a) of the IRR of E.O. 40. But, considering that the one-day difference appears to be offset by the additional two (2) newspaper publications done by PHILCOA; considering, further, that PHILCOA applied in good faith the provisions of the Commission on Audit Manual on Public Bidding, even though the same would have to be updated; and considering, finally, that the rationale behind the advertising requirement is that of transparency in the public procurement process; we believe that that the postings by PHILCOA substantially comply with the relevant provisions of the IRR of E.O. 40, as well as with the policy that procurement shall be competitive and transparent, under Section 2 thereof.

However, it was not mentioned in your letter whether the Invitation to Apply for Eligibility and to Bid was posted at the website of PHILCOA, if any, or the Electronic Procurement System ("EPS"), and at conspicuous places in the premises of PHILCOA. As such, if PHILCOA failed to comply with these requirements, such failure would constitute a violation of the provisions of Section 14.2.1. (b) and (c) of the IRR of E.O. 40, which we quote as follows:

14.2.1. Except as otherwise provided in Sections 14.2.2. and 14.2.3. of these IRR, the Invitation to Apply for Eligibility and to Bid shall be:

- a) xxx xxx xxx;
- b) Posted continuously in the website of the agency concerned, if available, the website of the agency's service provider for its electronic bidding system ("EBS"), if any, as provided in Section 38.5.4 of these IRR, and the EPS during the two-week period stated above;
- c) Posted at any conspicuous place reserved for this purpose in the premises of the agency concerned, as certified by the head of the BAC Secretariat of the agency concerned; and
xxx xxx xxx

It is clear from the above-quoted provision, that, aside from the newspaper advertisement requirement for public biddings involving goods costing more than two million pesos (Php. 2,000,000.00), there is a need to post the Invitation to Apply for Eligibility and to Bid at the website of the concerned agency, if any, the EPS, and at conspicuous places in the premises of the said agency.


Conclusion

In view of the foregoing, we conclude as follows:

1. Under E.O. 40 and its IRR, PHILCOA would have to reconstitute all existing PBACs into BACs; and
2. Although the posting by PHILCOA of its Invitation to Bid in TODAY and MALAYA may be considered as substantially complying with the relevant provisions of E.O. 40 and its IRR, the posting requirement in the PHILCOA website, if any, and the EPS, would have to be complied with. With respect to the latter, your agency may call the EPS Office at 687-4855.

We trust that this clarifies matters.

Very truly yours,


JOSE LUIS C. SYQUIA
Executive Director