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**Re : Request for Clarification on Sec. 23.4.1 & Sec. 30.4 of the IRR of
E.O. 40**

Dear Mr. Galang:

This refers to your letter dated March 25, 2003, which we received on March 28, 2003, requesting for clarifications regarding Sections 23.4.1 and 30.4 of the Implementing Rules and Regulations ("IRR") of Executive Order No. 40, Series of 2001 ("E.O. 40").

As provided for, in your letter, the following queries need to be resolved/clarified, to wit:

1. Section 23.4.1 of the IRR of E.O. 40:

- a) If Section 23.4.1 of the IRR of E.O. 40 shall use the non-discretionary criteria, why is there a need to include consideration provisions (a) to (d)?
- b) How do we qualify minor from major deviations? Are the two (2) phrases (non-discretionary criteria and consideration provisions) contrary to each other when the latter is already subjective?

2. Section 30.4 of the IRR of E.O. 40:

- a) Is the approval of the contract by the head of the agency still necessary when the two (2) parties already signed the contract and perfected the same?
- b) Who shall approve the contract? How is it approved?

Use of Non-Discretionary Criteria in Section 23.4.1 of the IRR of E.O. 40

Pursuant to Section 23.4.1 of the IRR of E.O. 40, the Bids and Awards Committee ("BAC") shall use a "non-discretionary criteria" in the conduct of the detailed evaluation of bids for the procurement of goods and civil works so as to effectively determine the Lowest Calculated Bid ("LCB"). Section 23.4.1 provides:

Section 23.4.1. To determine the Lowest Calculated Bid for the procurement of goods and civil works, after the preliminary examination of bids, the BAC shall immediately conduct a detailed evaluation of all bids rated "passed" using a non-discretionary criteria, as stated in the Invitation to Apply for Eligibility and to Bid and the Instructions to Bidders, which shall include the following:

- a) The bid must be complete. Unless the Instruction to Bidders specifically allow partial bids, bids not addressing or providing all of the required items in the bidding documents shall be considered non-responsive and, thus, automatically disqualified.
- b) The Bid Security must conform to the requirements of the Instructions to Bidders, as to type, amount, form and working, and validity period.
- c) Identification of minor/major deviations and terms and conditions as described in the Instructions to Bidders.
- d) Corrections 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. For the procurement of goods, the BAC of the concerned agency may employ any of the specific price equalization procedures provided under Annex "C" that it deems appropriate for the requirement of a particular contract and shall be so indicated in the bidding documents. The use of any such procedure shall be subject to the prior approval of the head of the agency concerned.

The rationale behind the use of the "non-discretionary criteria" under E.O. 40 and its IRR is to totally remove, if not, significantly lessen the opportunity for erring BAC members to abuse their discretion in the course of the procurement process, with the intention to give the bidders a fair and equal chance to the award of the contract. For this reason, the "non-discretionary criteria" is used in all stages of the procurement process, that is, during eligibility checking, preliminary examination, bid evaluation and post-qualification.

The term "non-discretionary criteria" during eligibility check and preliminary examination involves the determination by the BAC of the eligibility and qualification of a bidder on the basis of the submission of the requirements provided for in the bidding documents, so much so that when the specific requirement is duly submitted, the bidder shall be marked as "passed" in so far as that requirement is concerned. On the other hand, if a bidder fails to submit any of the requirements, he shall be marked as "failed" and declared ineligible or disqualified, as the case maybe. For this purpose, the use of the merit point system has already been removed, except for the procurement of consulting services.

In essence, therefore, the “non-discretionary criteria” during these stages entails the presence or absence of a requirement provided for by law or in the bidding documents, such that a complete submission means the eligibility or qualification of the bidder, and the absence of any of the requirements shall mean the automatic declaration of ineligibility or disqualification of the bidder, as the case maybe.

Emphasis must be made that subsections (a), (b), (c) and (d) of Section 23.4.1 are the minimum points or factors to consider in the conduct of the detailed evaluation of bids that have passed the eligibility check and preliminary examination. As such, the agency may require additional points or factors to be considered during the detailed evaluation of bids, for purposes of determining the LCB for the procurement of goods and civil works. However, these additional points of consideration shall be stated in the bidding documents so as to give the bidders an equal opportunity to complete their bids. Otherwise stated, Section 23.4.1 merely enumerates the minimum criteria to be used in evaluating bids, and it further requires that the evaluation should be conducted in a “non-discretionary” manner, so that if a bid does not meet any of the set criteria, the BAC would not be allowed to rate it as “passed” in that regard.

Minor and Major Deviations in Relation to Section 23.4.1

Minor deviations are those specified in Subsection (d) of Section 23.4.1, of the IRR of E.O. 40, thus:

xxx xxx xxx

- d) Corrections 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. xxx (Emphasis supplied)

Thus, minor deviations are those which will not vary or change the conditions, requirements and specifications of the project to be bid out, it is a mere correction for computational errors, omissions and discounts. Accordingly, only corrections which do not affect the conditions, requirements and specifications of the project to be bid are considered minor deviations, all other deviations are considered “major.” Section 26 of the IRR of E.O. 40 provides for the examples of major deviations, to wit:

Section 26. The BAC shall automatically disqualify a bid that contains a major deviation. Examples of major deviations are the following:

1. Failing to respond to the contract plans and specifications, by offering a different design or work item;
2. Stipulating a price adjustment;
3. Subcontracting beyond allowable limits;
4. Taking exception to critical provisions or setting conditions to the bidders, such as applicable laws, taxes and duties, and dispute resolution procedures.

In view of the foregoing, we do not agree that there exists any contradiction in Section 23.4.1 of the IRR of E.O. 40.

Approval of Contract

Section 30.4.1 of the IRR of E.O. 40 provides:

Section 30.4.1. The contract shall be approved in accordance with existing laws, rules and regulations, as soon as possible, but not later than fifteen (15) calendar days from the date the winning bidder or its duly authorized representative shall have signed the contract with the agency concerned and submitted all documentary requirements to perfect the contract.

This Section contemplates a situation where the contract approving authority of the head of a particular office is still subject to a higher level of approval. This specific situation takes place when a law, Administrative Order, Circular, Executive Order or even a Department Order provides for it.

Thus, for example, by provision of existing laws, there are certain government contracts that have to be acted upon and/or approved by the President, before it can be considered binding to the government. In this regard, Executive Order No. 109, Series of 2002 ("E.O. 109"), entitled "Streamlining the Rules and Procedures on the Review and Approval of All Contracts of Departments, Bureaus, Offices and Agencies of the Government, Including Government-Owned or Controlled Corporations and their Subsidiaries," provides for specific rules on contract approvals.

Section 1 of E.O. 109, provides that:

[I]t is the policy of the Administration that all Government Contracts shall be awarded through open and competitive public bidding, save in exceptional cases provided by law and applicable rules and regulations, as described in Section 2 of this Executive Order.

Except for contracts required by law to be acted upon and/or approved by the President, Department Secretaries shall have full authority to give final approval and/or enter into all Government Contracts of their respective departments and of bureaus, offices, and agencies, government-owned or controlled corporations and their subsidiaries attached or under the control and/or supervisions of the Department Secretary, awarded through public bidding, regardless of the amount involved.

xxx xxx xxx (Emphasis supplied)

On the other hand, Section 8 of E.O. 109 provides that:

[A]ll Government Contracts shall require the approval of the Department Secretary after the Government Contract has been signed and/or approved by the Head of a bureau, office or agency or by the Head and/or governing board of the government-owned or controlled corporation or its subsidiary, before the Government Contract shall be considered approved in accordance with law and binding on the government.

Except for contracts required by law to be acted upon and/or approved by the President, the Department Secretary possesses the full authority to approve and/or enter into a Government Contract binding on the government. However, a Department Secretary may delegate in writing to appropriate officials, subject to appropriate ceilings, this authority to approve a Government Contract involving and amount below Three Hundred Million Pesos (P 300 Million), whether publicly bidded or excepted from public bidding, as he sees fit under the circumstances.

For Government Contracts signed by the Head of a bureau, office, and agency of the government, and by the Head and/or governing board of a government-owned or controlled corporation and its subsidiary attached to or under the Office of the President, the Executive Secretary shall approve the Government Contract in accordance herewith.

xxx xxx xxx (Emphasis supplied)

As provided for under Section 1 of E.O. 109, except for contracts required by law to be acted upon or approved by the President, Department Secretaries have the power and authority to give final approval and/or enter into all Government Contracts of their department and of bureaus, offices, and agencies, government-owned or controlled corporations ("GOCC") and their subsidiaries attached or under the control and/or supervision of the Department Secretary, which were awarded through **public bidding, irrespective of the amount involved** or the ABC.

As to the binding effect, by virtue of the expressed provision of Section 8, E.O. 109, Government Contracts as approved by the head of a bureau, office or agency or by the head and/or governing board of the GOCC or its subsidiary, the ABC of which is below Three Hundred Million (₱ 300,000,000.00), shall bear the approval of the Department Secretary to which such bureau, agency or GOCC is attached. Absent such approval, the contract shall not be binding to the government.

It must be noted, however, that the power of the Department Secretary to approve contracts under Section 8 of E.O. 109 may be delegated in writing to the appropriate bureau or agency head or to the boards of the respective GOCCs, subject to appropriate ceilings. This being so, under E.O. 109, any government contract, the ABC of which is within the delegated ceiling of approval by the bureau or agency head or the board of a specific GOCC, no longer requires the approval of the Department Secretary. On the contrary, any government contract, the ABC of which is beyond the delegated ceiling, still requires the approval of the Department Secretary in order to be binding upon the government.

However with the passage of R.A. 9184, it appears that the contract approval process embodied in E.O. 109, in so far as GOCCs are concerned, such as Landbank, may have been implicitly repealed.

In particular, Section 7 of E.O. 109 requires that "[A]ll government contracts shall be:

- a. Processed completely by the concerned department, bureau, office and agency of the government, including a government-owned or controlled corporation and its subsidiary;

- b. Signed and/or approved by the Head of the bureau, office and agency of the government, the Head and/or governing board of the government-owned or controlled corporation and its subsidiary and the Department Secretary; and
- c. Accompanied by the certificates issued by (i) the concerned Department Secretary; (ii) the Head of the bureau, office or agency, and (iii) the Head of the governing board of the government-owned or -controlled corporation or its subsidiary, that the contract is in accordance with all existing laws, rules and regulations.”

This provision is covered by Article XI of R.A. 9184 entitled “Award, Implementation and Termination of the Contract.” In particular, Section 37 provides as follows:

Section 37. Notice and Execution of Award. – Within a period not exceeding fifteen (15) calendar days from the determination and declaration by the BAC of the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid, and the recommendation of the award, the Head of the Procuring Entity or his duly authorized representative shall approve or disapprove the said recommendation. In case of approval, the Head of the Procuring Entity or his duly authorized representative shall immediately issue the Notice of Award to the bidder with the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid.

Within ten (10) calendar days from receipt of the Notice of Award, the winning bidder shall formally enter into contract with the Procuring Entity. When further approval of higher authority is required, the approving authority for the contract shall be given a maximum of twenty (20) calendar days to approve or disapprove it.

In the case of government owned and/or controlled corporations, the concerned board shall take action on the said recommendation within thirty (30) calendar days from receipt thereof.

The Procuring Entity shall issue the Notice to Proceed to the winning bidder not later than seven (7) calendar days from the date of approval of the contract by the appropriate authority. All notices called for by the terms of the contract shall be effective only at the time of receipt thereof by the contractor.

It is interesting to point out that, with respect to GOCCs, Section 7 (b) of E.O. 109, which conjunctively requires approval of the **Department Secretary**, directly conflicts with the above-quoted third paragraph of Section 37 of R.A. 9184, which only requires **board approval**.

In relation to this, Section 8 of E.O. 109 also provides that “[A]ll Government contracts shall require the approval of the Department Secretary after the Government Contract has been signed and/or approved by the... Head and/or governing board of the government-owned or -controlled corporation or its subsidiary, before the Government Contract shall be considered approved in accordance with the law and binding on the government.” Although the same section grants the Department Secretary authority to delegate the approval of contracts involving an amount below Three hundred Million Pesos (₱300 Million), whether publicly bid or excepted from public bidding; this provision and

Section 7(b) of E.O. 109 seem to run counter to R.A. 9184, which grants the **governing boards** of GOCCs the **full authority** to approve and sign contracts. It is significant to state that under R.A. 9184, the governing boards of GOCCs have full responsibility and accountability for all their contracts, regardless of amount. This intent is clearly spelled out in the above-quoted third paragraph of Section 37 of R.A. 9184.

Moreover, Section 5 (j) of R.A. 9184 categorically states that, for GOCCs, the governing board or its duly authorized official shall be considered as the head of the procuring entity. In particular, Section 5 (j) of R.A. 9184 provides as follows:

(j) *Head of the Procuring Entity* – refers to: (i) the head of the agency or his duly authorized official, for national government agencies; (ii) **the governing board or its duly authorized official, for government-owned and/or controlled corporations**; or (iii) the local chief executive, for local government units. *Provided*, That in a department, office or agency where the procurement is decentralized, the Head of each decentralized unit shall be considered as the Head of the Procuring Entity subject to the limitations and authority delegated by the head of the department, office or agency. (Emphasis supplied)

In view of the foregoing, we believe that Sections 7 and 8 of E.O. 109 have been impliedly repealed by the provisions of R.A. 9184, and thus, under the current state of law, **governing boards** of GOCCs has the **full authority** to approve and sign contracts regardless of amount.

We trust that this clarifies matters.

Very truly yours,


JOSE LUIS C. SYQUIA
Executive Director

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