



REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF BUDGET AND MANAGEMENT
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

Unit 1103 Taipan Place, Emerald
Ave., Ortigas Center, Pasig City,
1605 Philippines
Tel.: 687-4853 to 55
Fax: (632) 638-3495

TSO NPM No. 011-2003

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MS. PURA (NENNETTE) SV. AMOLOZA
Office of the Vice Chancellor for Finance
and Administration
Open University
University of the Philippines
Los Baños, Laguna

**Re : Request for Comments/suggestions on the Comparison of the
Different Modes of Procurement Under R.A. 9184 and their
Existing or Internal University of the Philippines-Open University
("UPOU") Guidelines and Procedures**

Dear Mr. Amoloza:

This refers to your letter dated March 19, 2003, which we received on April 1, 2003, seeking for comments or suggestions regarding the existing UPOU Procurement Guidelines and Procedures in relation to the procurement rules and procedures under Republic Act No. 9184 ("R.A. 9184"), otherwise known as the "Government Procurement Reform Act."

Per the attached comparative matrix, we identified the following issues that need to be addressed, to wit:

1. Whether or not competitive bidding is applicable only if the cost for the project is more than P500,000.00;
2. Whether or not UPOU can still utilize the pre-qualification process to determine who are qualified to participate in the bidding;
3. Whether or not UPOU may procure supplies of foreign origin from exclusive Philippine Agents or Distributors;
4. Whether or not UPOU may employ Repeat Order as an alternative method of procurement, if it would exceed 25% of the original contract;

5. Whether or not UPOU can still conduct sealed bidding as an alternative method of procurement;
6. Whether or not UPOU can still procure by way of open canvass; and
7. Whether or not UPOU can procure by way of over-the-counter purchase.

Before we proceed with our discussion, it is noteworthy to point out that R.A. 9184 cannot be fully implemented until the Implementing Rules and Regulations (“IRR”) therefore have been finally approved by the President and duly issued. Thus, in the meantime, procurement laws, rules and regulations that are valid, effective and applicable prior to the passage of R.A. 9184 still apply. In this regard, we believe that Executive Order No. 40, series of 2001 (“E.O. 40”) and its IRR are still applicable pending the approval of the IRR of R.A. 9184, provided that its provisions do not contravene or are not in conflict with the clear, expressed and self-executing provisions of R.A. 9184.

In view of the foregoing, and in accordance with your request, our comments shall be based on the general provisions of R.A. 9184.

A. Competitive Bidding:

As provided for in R.A. 9184, the entire government procurement process undergoes the following stages, to wit:

1. Invitation to Bid/Advertisement (Article VII, Section 21, R.A. 9184);
2. Pre-Bid Conference (Article VII, Section 22, R.A. 9184);
3. Eligibility Screening (Article VIII, Section 23, R.A. 9184);
4. Receipt and Opening of Bids (Article VIII, Section 25, R.A. 9184);
5. Bid Evaluation (Article IX, Section 30, R.A. 9184);
6. Post-qualification (Article X, Section 34, R.A. 9184); and
7. Award of Contract (Article XI, Section 37, R.A. 9184).

Failure to observe and comply with the foregoing procurement processes will result to a failure of bidding, as provided under Section 41(b) of R.A. 9184, to wit:

Section 41. *Reservation Clause.* – The Head of the Agency reserves the right to reject any and all Bids, **declare a failure of bidding**, or not award the contract in the following situations:

- (a) x x x
- (b) If the BAC is found to have failed in following the prescribed bidding procedures; (Emphasis supplied)

Accordingly, in order for a government procurement to be valid within the ambit of R.A. 9184, the procuring entity must conform with the procurement processes as aforesaid.

It will be observed that the stages of procurement as provided for in R.A. 9184 leads directly to competitive bidding. The rule is, government procurement must be conducted by way of *competitive bidding*, this is the clear requirement in Section 10 of R.A. 9184, which provides:

Section 10. *Competitive Bidding*. - All procurement shall be done through competitive bidding, except as provided in Rule XVI of this Act.

It should be noted under the afore-quoted provision that all government procurement shall be made through competitive bidding without any qualification as to the nature, character and kind of the project to be procured and the amount or cost thereof. Contrary to the practice UPOU, where it conducts public bidding only if the project cost is more that Five Hundred Thousand Pesos (Php 500,000.00), R.A. 9184 did not qualify or restrict the use of competitive bidding in government procurement. As it is, the general rule is to procure by way of competitive bidding regardless of the project cost, and it is only in particular circumstances that government agencies are allowed to procure utilizing the alternative methods of procurement.

At this juncture, it is timely to mention that in the draft IRR of R.A. 9184, which is now in its final stage of preparation, the definition of "competitive bidding" make no mention as to price, cap or ceiling. As defined, competitive bidding is "a method of procurement which is open to participation by any interested party and which consists of the following processes: advertisement, pre-bid conference, eligibility screening of prospective bidders, receipt and opening of bids, evaluation of bids, post-qualification, and award of contract." (Section 5[h], draft IRR, R.A. 9184)

B. Pre-qualification:

Regarding the pre-qualification of bidders, a process still being employed by UPOU, emphasis must be made that this procedure has no longer been applicable for the procurement of goods ever since Executive Order No. 262, series of 2000, up to E.O. 40, and now under R.A. 9184. In Sections 23 and 24 of R.A. 9184, the BAC is mandated to determine the eligibility of bidders to be able to participate in the bidding proper. It should be noted that the concept of pre-qualification was totally abandoned in R.A. 9184. In particular, Sections 23 and 24 of R.A. 9184 provides as follows:

Section 23. *Eligibility Requirements for the Procurement of Goods and Infrastructure Projects*. - The BAC or, under special circumstances specified in the IRR, its duly designated organic office shall determine the eligibility of prospective bidders for the procurement of Goods and Infrastructure Projects, based on the bidders' compliance with the eligibility requirements within the period set forth in the Invitation to Bid. The eligibility requirements shall provide for fair and equal access to all prospective bidders. The documents submitted in satisfaction of the eligibility requirements shall be made under oath by the prospective bidder or by his duly authorized representative certifying to the correctness of the statements made and the completeness and authenticity of the documents submitted. x x x

Section 24. *Eligibility Requirements and Short Listing for Consulting Services.* – The eligibility of prospective bidders for the Procurement of Consulting Services shall be determined by their compliance with the eligibility requirements prescribed for the Competitive Bidding concerned, within the period stated in the Invitation to Bid. The eligibility requirements shall provide for fair and equal access to all prospective bidders. The prospective bidder shall certify under oath as to the correctness of the statements made, and the completeness and authenticity of the documents submitted. x x x (Emphasis supplied)

Even under E.O. 40 and its IRR, pre-qualification has been substituted by the simple eligibility checking or screening process, where the Bids and Awards Committee (“BAC”) employs a non-discretionary pass/fail criteria during the eligibility screening of the bidders’ technical, legal and financial documents.

The simple eligibility checking abbreviates the tedious and prolonged process of pre-qualification, such that the use of the non-discretionary pass/fail criteria, bidders who submitted complete technical, legal and financial documents for eligibility purposes shall be declared eligible and shall be allowed to submit their respective bids; otherwise the bidder shall be disqualified and will not be allowed to participate further in the bidding process.

In view of the foregoing, we believe that UPOU should now use the simple eligibility checking or screening in place of the pre-qualification process.

C. Procurement of Supplies of Foreign Origin from Exclusive Philippine Agents or Distributors:

In R.A. 9184 and even in E.O. 40 and its IRR, procurement by government agencies from exclusive Philippine agents and distributors through competitive bidding is allowed, subject to eligibility requirements with respect to ownership and equity considerations. However, we wish to point out that in the adoption of Direct Contracting/Single Source Procurement, an alternative method being employed by UPOU, procurement from Philippine agents or distributors is likewise allowed subject to certain limitations and requirements.

Direct Contracting, otherwise known as Single Source Procurement, is “a method of procurement that does not require elaborate Bidding Documents because the supplier is simply asked to submit a price quotation or a pro-forma invoice together with the conditions of sale, which offer may be accepted immediately or after some negotiations.” (Section 48[b], R.A. 9184) UPOU may avail of this alternative method only when any of the following conditions are attendant, to wit:

- a) Procurement of Goods of proprietary nature, which can be obtained only from the proprietary source, *i.e.* when patents, trade secrets and copyrights prohibit others from manufacturing the same item;
- b) When the Procurement of critical components from a specific manufacturer, supplier or distributor is a condition precedent to hold a

contractor to guarantee its project performance, in accordance with the provisions of his contract; or

c) Those sold by an exclusive dealer or manufacturer, which does not have sub-dealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the Government. (Section 50, R.A. 9184)

As presented in the attached matrix, it appears that the rules of UPOU in the procurement of supplies of foreign origin are similar to the rules on Direct Contracting under R.A. 9184, with particular reference to Section 50(c) of the latter. Thus, we believe that UPOU may procure from exclusive dealers or manufacturers provided they do not have sub-dealers selling at lower prices, and no suitable substitute can be obtained at more advantageous terms to the Government.

D. Repeat Order:

R.A. 9184 allows the use of Repeat Order as an alternative method of procurement. However, in order to avail of this mode, each procuring entity would have to comply with the conditions provided for under Section 51 of R.A. 9184, to wit:

Section 51. *Repeat Order.* – When provided for in the Annual Procurement Plan, Repeat Order may be allowed wherein the Procuring Entity directly procures Goods from the previous winning bidder whenever there arises a need to replenish goods procured under a contract previously awarded through Competitive Bidding, subject to post-qualification process prescribed in the Bidding Documents and provided all the following conditions are present:

a) The unit price must be equal to or lower than that provided in the original contract;

b) The repeat order does not result in the splitting of requisitions or purchase orders;

c) Except in special circumstances defined in the IRR, the repeat order shall be availed of only within six (6) months from the date of the Notice to Proceed arising from the original contract; and

d) The repeat order shall not exceed twenty-five percent (25%) of the quantity of each item of the original contract.

As long as the foregoing conditions are all present, the procuring entity may utilize Repeat Order as an alternative procedure to procure goods and services under R.A. 9184. It must be stressed, however, that the Repeat Order shall not exceed twenty-five percent (25%) of the quantity of each item of the original contract. Thus, under R.A. 9184, UPOU would no longer be able to conduct Repeat Order more than 25% of the quantity of the original contract as previously practiced.

The rationale behind the rule is that, if the procuring entity would be allowed to procure by way of Repeat Order beyond twenty-five percent (25%) of the quantity of each item of the original contract, the same may be considered as a substantial addition to the original procurement and, as such, should have been foreseen and included by the agency concerned in its procurement plan for the item concerned. Also, allowing Repeat Order beyond 25% of the original contract might pave the way for splitting of contracts, a procurement practice directly prohibited by law.

E. Sealed Bidding:

Sealed bidding as an alternative mode of procurement is not allowed under R.A.9184. There is nothing in the provision of the law that supports the use of this method. In fact, Section 48 of R.A. 9184, the provision governing the various alternative methods of procurement, makes no mention of "sealed bidding."

F. Open Canvass:

Open canvass as an alternative mode of procurement is still sanctioned by R.A. 9184 in the form of Shopping. In Shopping, the Procuring Entity simply requests for the submission of price quotations for readily available off-the-shelf Goods or ordinary/regular equipment to be procured directly from suppliers of known qualification. (Section 48 [d], R.A.9184)

Emphasis must be made, however, that under Section 52 of R.A. 9184, Shopping as an alternative method of procurement may only be resorted to under any of the following circumstances:

a) When there is an unforeseen contingency requiring immediate purchase: *Provided, however,* That the amount shall not exceed Fifty thousand pesos (P50,000), or

b) Procurement of ordinary or regular office supplies and equipment not available in the Procurement Service involving an amount not exceeding Two hundred fifty thousand pesos (P250,000): *Provided, however,* That the Procurement does not result in Splitting of Contracts: *Provided further,* That at least three (3) price quotations from bona fide suppliers shall be obtained.

G. Over-the-Counter Purchase:

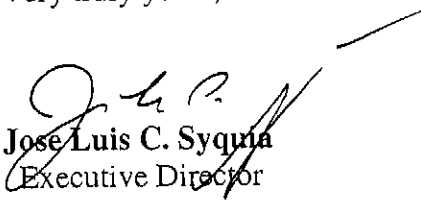
As already discussed, government procurement must be conducted through competitive bidding in order to obtain more competition and to secure the best price to the advantage and benefit of the government. As such, over-the-counter purchases, which we would consider as falling under the term "Shopping," may only be undertaken under the circumstances enumerated in Section 52 of R.A. 9184, quoted above. With respect to item (b) of the same section, it should be noted that if the office supply is available in the

Procurement Service ("PS") of the Department of Budget and Management ("DBM"), the same may only be obtained therefrom, because PS-DBM is tasked with a centralized procurement of commonly used Goods for the government. (See Section 53[e], R.A. 9184)

With the foregoing, we trust that our comments provided UPOU with the needed information pertaining to the different methods by which government procurement may be undertaken in consonance with the provisions of R.A. 9184.

This opinion is being rendered on the basis of the facts and particular circumstances as represented. However, if upon further study or investigation, it would be disclosed that the facts are different from the afore-mentioned representations and assumptions, if any, then this opinion may no longer be applicable. Nor may this opinion be necessarily applicable upon a different set of facts or circumstances.

Very truly yours,


Jose Luis C. Syquia
Executive Director