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GOVERNMENT PROCUREMENT POLICY BOARD
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TSO NPM No. 15-2003

July 30, 2003

MS. BINGLE H.B. GUTIERREZ

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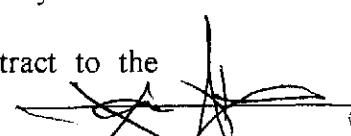
Re : **Clarifications on Various Provisions of R.A. 9184**

Dear Ms. Gutierrez:

This refers to your letter dated May 7, 2003, requesting for clarifications on the provisions of Republic Act No. 9184 ("R.A. 9184"), otherwise known as the Government Procurement Reform Act ("GPRA").

The questions sought to be clarified are as follows:

1. Is the PRRC Inter-Agency Bids and Awards Committee ("IABAC") legal in relation to Section 5 of R.A. 9184?
2. May the PRRC decentralize its procurement authority to another government agency/department or local government unit who acts as implementing agency for PRRC projects?
 - a. May these implementing agencies, pursuant to R.A. 9184, be responsible for the approval of the project cost/budget and award of the contract?
 - b. May the approval of project cost/budget and award of the contract be relinquished to the Mayor as Head of Agency?
3. Does Section 11 of R.A. 9184 make it mandatory for PRRC to establish its own BAC even if it has already delegated this authority to an implementing agency?
4. Is it valid for the BAC to recommend award of the contract to the implementing agency?

Received By  ALEX ENTUNA
PRRC

Date: 08 - 7 - 03

5. Does Negotiated Procurement apply to supplemental contracts and variation orders?

Applicability of R.A. 9184

Before we proceed with the discussion of the foregoing concerns, it is imperative to note that although there are self-executing provisions in R.A. 9184, the same cannot be fully implemented unless and until the Implementing Rules and Regulations ("IRR") therefor has been finally approved by the President and published for dissemination. It is in this connection that we inform your office that during the 3rd Meeting of the Government Procurement Policy Board ("GPPB") on May 26, 2003, the members unanimously agreed that Government agencies are justified in applying Executive Order No. 40 ("E.O. 40") and its IRR pending the approval by the President of the IRR of R.A. 9184, and that a provision should be included in the Transitory Clause of the draft IRR of R.A. 9184 that in cases where the invitations for bids were issued after the effectivity of R.A. 9184 but before the effectivity of its IRR, procuring entities may continue adopting the procurement procedures, rules and regulations provided in E.O. 40 and its IRR, or other applicable laws.

On this note, considering that the IRR of R.A. 9184 is not yet approved by the President, PRRC may still use the provisions of E.O. 40 and its IRR. At any rate, since the current draft of the IRR of R.A. 9184, which is scheduled to be submitted to the President for approval, does not vary much from the provisions of the IRR of E.O. 40, we deem it fit to discuss the above-enumerated queries within the context of R.A. 9184 and its proposed IRR.

Legality of an Inter-Agency Bids and Awards Committee ("IABAC")

The establishment of the Bids and Awards Committee ("BAC") including its composition is provided for under R.A. 9184. R.A. 9184 specifically provides that procuring entities shall establish a single BAC, except that, as may be deemed fit by the head of the procuring entity, there may be separate BACs where the number and complexity of the items to be procured warrants the creation of the same. Section 11, R.A. 9184 provides:

SEC. 11. *The BAC and its Composition.* - Each procuring entity shall establish a single BAC for its procurement. The BAC shall have at least five (5) members, but not more than seven (7) members. It shall be chaired by at least a third ranking permanent official of the procuring entity other than its head, and its composition shall be specified in the IRR. Alternatively, as may be deemed fit by the head of the procuring entity, 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 procuring entity.

The members of the BAC shall be designated by the Head of Procuring Entity. However, in no case shall the approving authority be a member of the BAC. (Emphasis ours)

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It will be observed that the above-cited provision is silent as regards the creation of an IABAC. If at all, what was specifically mandated is the creation of a single BAC or separate BACs when the nature of the procurement shall so warrant, or, to go a step further, the creation of similar BACs for decentralize and lower level offices within the same agency. Considering that there is no prohibition, expressed or implied, in Section 11 of R.A. 9184 as regards the creation of an IABAC, it is our opinion that the establishment thereof by PRRC is allowed, provided, that the composition and membership, including the ranking of the members to be designated must comply with the requirements of R.A. 9184 and its proposed IRR. For purposes of determining the ranking of IABAC members, we quote Section 11.2 of the proposed IRR of R.A. 9184, to wit:

11.2. *BAC Composition*

11.2.1. *National Government agencies, departments, bureaus, offices, or instrumentalities of the Government, including the judiciary and legislative branches, constitutional commissions, SUCs, GOCCs, and GFIs:*

Regular Members:

1. Chairman, who is at least a third ranking permanent official of the procuring entity;

2. An officer, who is at least a fifth ranking permanent official, with knowledge, experience and/or expertise in procurement who, to the extent possible, represents the legal or administrative area of the procuring entity, provided that in the case of bureaus, regional offices and sub-regional/district offices, BAC members shall be at least a third ranking permanent personnel;

3. An officer, who is at least a fifth ranking permanent official, with knowledge, experience and/or expertise in procurement who, to the extent possible, represents the finance area of the procuring entity, provided that in the case of bureaus, regional offices and sub-regional/district offices, BAC members shall be at least a third ranking permanent personnel;

Provisional Members:

4. An officer who has technical expertise relevant to the procurement at hand, and, to the extent possible, has knowledge, experience and/or expertise in procurement; and

5. A representative from the end user unit who has knowledge of procurement laws and procedures.

The members of the BAC, including the Chairman and the Vice-Chairman, shall be designated by the head of the procuring entity. Moreover, the Vice-Chairman shall be a regular member of the BAC. For purposes of this IRR-A, the term "permanent" shall refer to a *plantilla* position within the procuring entity concerned.

Additionally, it is worthy to note that the unique setup of PRRC, the same being an inter-agency Commission composed of and collectively governed by the Secretaries and Heads of the different member agencies, would allow it to create an IABAC to promote direct and active participation among its members on matters relating to its procurement activities. For this reason, we believe that the present IABACs created under Section 12, Rule IV of the Rules and Regulations Implementing ("RRI") Executive Order No. 54 ("E.O. 54") Series of 1999, entitled "Creating the Pasig River Rehabilitation Commission", as amended by Executive Order No. 65 ("E.O. No. 65") Series of 1999, may continue to perform their assigned tasks, functions, duties and responsibilities. Section 12, Rule IV, RRI of E.O. 54 as amended, provides:

Section 12. Pre-qualification, Bids and Awards Committee. The PMO shall constitute a Prequalification, Bids and Awards Committee (PBAC) which shall conduct pursuant to existing rules and regulations, bidding processes or enter into negotiated contracts as the case may be for the procurement of goods and services necessary in the implementation of its plans, programs, projects and activities. The Commission may assign its prequalification, bids and awards functions to its implementing agencies or engage the services of government or private procurement agents and entities, as it sees fit, to facilitate plan, program and project implementation subject to existing rules and regulations on the matter.

Decentralization of PRRC's Procurement Activities

Section 12, Rule IV, RRI of E.O. 54, quoted-above, allows PRRC to engage the services of government or private procurement agents and entities to conduct the procurement activities for and in its behalf. The same authority is given to PRRC under the proposed IRR of R.A. 9184, in that, PRRC may "outsource" its procurement projects, where it may request other agencies to undertake such procurement activities for the Commission. Section 53(e) of the proposed IRR of R.A. 9184, provides:

- a) Purchases of goods from another agency of the Government, such as the PS-DBM, which is tasked with a centralized procurement of commonly used Goods for the government in accordance with Letters of Instruction No. 755 and Executive Order No. 359, series of 1989. **Further, in order to hasten project implementation, agencies which may not have the proficiency or capability to undertake a particular procurement, as determined by the head of the procuring entity concerned, may request other agencies to undertake such procurement for them, or at their option, recruit and hire consultants or procurement agents to assist them directly and/or train their staff in the management of the procurement function;** (Emphasis supplied)

Considering the above-cited provision, it is clear that PRRC may outsource its procurement projects to other agency/department of the government, including local government units, to expedite its procurement activities and hasten its project implementation.

Approval of Project Cost/Budget and Award of Contract

R.A. 9184 is very clear on the functions of the BAC, and in the same manner, these functions likewise apply to the IABACs created by PRRC. Section 12, R.A. 9184, provides that:

SEC. 12. Functions of the BAC. - The BAC shall have the following functions: **advertise and/or post the invitation to bid, conduct pre-procurement and pre-bid conferences, determine the eligibility of prospective bidders, receive bids, conduct the evaluation of bids, undertake post-qualification proceedings, recommend award of contracts to the Head of the Procuring Entity or his duly authorized representative;** Provided, that in the event the Head of the Procuring Entity shall disapprove such recommendation, such disapproval shall be based only on valid, reasonable and justifiable grounds to be expressed in writing, copy furnished the BAC; **recommend the imposition of sanctions in accordance with Article XXIII,** and perform such other related functions as may be necessary, including the creation of a Technical Working Group from a pool of technical, financial and/or legal experts to assist in the procurement process.

In proper cases, the BAC shall also **recommend to the Head of the Procuring Entity the use of Alternative Methods of Procurement** as provided for in Article XVI hereof.

The BAC shall be responsible for ensuring that the Procuring Entity abides by the standards set forth by this Act and the IRR, and it shall prepare a procurement monitoring report that shall be approved and submitted by the Head of the Procuring Entity to the GPPB on a semestral basis. The contents and coverage of this report shall be provided in the IRR. (Emphasis supplied)

Pursuant to the above-cited provision, the functions of the BAC are confined within the scope of the responsibilities enumerated in Section 12, and the approval of project/cost or the Approved Budget for the Contract (“ABC”) is not one of them. Moreover, the approval of the ABC is not within the ambit of the powers of the BAC, as a matter of fact, the approval thereof properly pertains to the Head of the Procuring Entity, the governing Boards or the respective Sanggunian. Witness Section 5(a), R.A. 9184, to wit:

SEC. 5. *Definition of Terms.* – For purposes of this Act, the following terms or words and phrases shall mean or be understood as follows:

a) ***Approved Budget for the Contract (ABC)*** – refers to the budget for the contract duly approved by the Head of the Procuring Entity, as provided for in the General Appropriations Act and/or continuing appropriations, in the case of National Government Agencies; the Corporate Budget for the contract approved by the governing Boards, pursuant to E.O. No. 518, series of 1979, in the case of Government-Owned and/or Controlled Corporations, Government Financial Institutions and State Universities and Colleges; and the Budget for the contract approved by the respective *Sanggunian*, in the case of Local Government Units. (Emphasis supplied)

Moreover, the BAC has no power to approve and award contracts for specific procurement projects, for under R.A. 9184, said function pertains to the Head of the Procuring Entity. Section 37, R.A. 9184 states that:

SEC. 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. (Emphasis supplied)

For convenience, the term 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. Witness Section 5(j), to wit:

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.

Further, even if the Head of the Procuring Entity is allowed to delegate his/its power to approve and award contracts to his/its duly authorized representative, the said power cannot be validly delegated to the BAC due to the proscription under Section 11.2.5 of the proposed IRR of R.A. 9184, which provides that the approving authority for the ensuing contract shall not be the Chairman or a member of the BAC. Witness Section 11.2.5 of the proposed IRR of R.A. 9184, to wit:

11.2.5. In no case shall the head of the procuring entity and/or the approving authority be the Chairman or a member of the BAC.

**Relinquishment of Authority to the Mayor
Re: Approval of Project Cost/Budget and
Award of the Contract**

Under Section 8, Rule III, RRI of E.O. 54, "the Commissioners sitting *en banc* shall be the governing board and policy-making body of PRRC", this being so, and in line with Section 5(a) of R.A. 9184, *supra*, the Commission itself is the governing Body mandated and tasked to approve the project cost or the ABC, and such authority to approve the ABC, may not be delegated by the Commission to the Head of the member agencies or the City Mayors since the law is clear that the Head of the Procuring Entity shall be responsible for the approval of the ABC.

On the contrary, with respect to the approval and award of contract, Section 37 of R.A. 9184, *supra*, specifically provides that the Head of the Procuring Entity or his **duly authorized representative** shall approve or disapprove the recommendation to award made by the BAC, and 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. Clearly then, the approval and award of contract may be delegated by the Head of the Procuring Entity to its duly authorized representative, except the BAC as

already explained, and in this regard, PRRC may choose to authorize the Local Chief Executive to approve the recommendation made by the BAC and award the contract corresponding to such recommendation.

Establishment of PRRC's Own BAC

Section 11 of R.A. 9184 is couched in no uncertain terms, in that, said provision mandates the creation of a single BAC in every agency or several BACs when the nature of the procurement activities in said agency shall so warrant. For this reason, we believe that PRRC should establish its own BAC aside from the IABAC it previously created. However, as already stated, PRRC may still opt to outsource, as provided for under Section 53(e) of R.A. 9184, *supra*, its procurement to expedite and hasten its procurement activities.

Recommendation of Award to Implementing Agency

The actual Procuring Entity in this case is the PRRC, as such, the BAC, under Section 12 of R.A. 9184, is mandated to recommend approval and award of contract to the Head of PRRC, that is the governing Board of the Commission, or its duly authorized representative. Thus, the primary obligation of the BAC is to make the recommendation directly to the Head of the Procuring Entity unless there was prior delegation of the power to approve and award in favor of another Agency or Local Government Unit. Only when a delegation of authority was made to an Agency or Local Government Unit, in so far as the approval and award of the contract are concerned, may the BAC make such recommendation to the designated Agency, Local Government Unit or authorized representative.

Applicability of Negotiated Procurement to Supplemental Contracts and Variation Orders

Negotiation as an alternative method of procurement presupposes that there is no existing contract between the agency and the bidder, as such, the would be parties to the contract are supposed to negotiate on the terms and conditions of the contract with respect to the project being bid out, subject to the provisions of existing procurement laws, rules and regulations. On the other hand, in "supplemental contracts" and "variation orders", the assumption is that, there is already an existing contract between the agency and the winning bidder only that, either or both parties would want to introduce an amendment, addition or improvement to the stipulations, agreements and covenants in their original contract.

Section 48(e) of R.A. 9184 provides that "*Negotiated Procurement* is a method of Procurement whereby the Procuring Entity **directly negotiates a contract** with a technically, legally and financially capable supplier, contractor or consultant. From the definition, it can be safely deduced that Negotiated Procurement may only be utilized for contracts that are yet to be entered into by the agency and the bidder,

and not to those which has already been signed and executed. Although in "supplemental contract" and "variation order" there is, in a way, negotiation between the parties, this negotiation, however, is not the same negotiation being contemplated and understood in Section 48(e) of R.A. 9184.

We trust that this clarifies matters.

Very truly yours,

JOSE LUIS C. SYQUIA
Acting Executive Director

By:



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Procurement Training Advisor