



REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF BUDGET AND MANAGEMENT
GOVERNMENT PROCUREMENT POLICY BOARD
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TSO NPM No. 020-2003

August 28, 2003

MS. ARMINDA A. ALARAS
Deputy General Manager
Chairman, Bids and Awards Committee
Public Estates Authority (PEA)
7th Floor Legaspi Towers 200, Paseo de
Roxas, Makati City 1226

Re : Queries on Republic Act No. 9184 and its Implementing Rules and Regulations

Dear Ms. Alaras:

This refers to your letter dated July 31, 2003, which we actually received on August 11, 2003, requesting for advice regarding the implementation of the provisions of Republic Act No. 9184 ("R.A. 9184"), otherwise known as the "Government Procurement Reform Act." Your request pertains to the public bidding conducted by your agency on July 24, 2003, for the health care services of your employees. You have also informed us that all the bids received from the three (3) pre-qualified bidders were higher than the approved budget for the contract ("ABC") of P 1,880,000.00. Culled from the narrations and queries in your letter, we deem it proper to resolve the following issues, to wit:

1. Whether or not R.A. 9184 can now be fully implemented;
2. Whether or not the Public Estates Authority ("PEA") should still conduct prequalification;
3. Whether or not after a failed bidding, PEA may revise its original terms of reference ("TOR") for the project being bid out;
4. Whether or not bidders who were declared eligible or ineligible in the first failed bidding can participate in the re-bidding of the same project; and
5. Whether or not PEA may conduct Negotiated Procurement as an alternative method after one (1) failed bidding.

Applicability of the IRR of R.A. 9184

Although R.A. 9184 has already been signed by her Excellency President Gloria Macapagal Arroyo on January 10, 2003 and became effective on January 26, 2003, the said

legislative enactment cannot be applied in its totality without its IRR. Hence, even if 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 have 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 GPPB on May 26, 2003, the members unanimously agreed that, (1) Government agencies are justified in applying Executive Order No. 40, series of 2001 (“E.O. 40”) and its IRR, pending the approval of the IRR of R.A. 9184; and, (2) 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 embodied in E.O. 40 and its IRR, or other applicable procurement laws, rules and regulations. Hence, pending approval of the proposed IRR of R.A. 9184, we believe that PEA may still use the provisions of E.O. 40 and its IRR in the conduct of its procurement.

However, in addressing the issues raised in your letter, we opted to view matters prospectively and consider the provisions of R.A. 9184 as well.

Conduct of Prequalification

In order to save time and make public procurement more expeditious, government procurement rules and procedures have already move away from the use of “pre-qualification” as a means to determine the eligibility and/or capacity of a prospective bidder to participate in a particular bidding even prior to the enactment of R.A. 9184. As a matter of fact, E.O. 40 and its IRR have already shifted from “pre-qualification” to “simple eligibility checking,” pursuant to the policy of the State expressed in Section 3, IRR of E.O. 40, to wit:

General Guidelines on Procurement Reforms and Definition of Terms

3.1. Government procurement of civil works, goods, supplies, materials and related services, and consulting services shall be guided by the following reform principles:

- a) Simplification of pre-qualification through the use of eligibility check, and strengthening of post-qualification;

The same principle and policy were adopted by R.A. 9184 and, as such, the eligibility of bidders to participate in a specific project being bid out by a procuring entity is determined by conducting a simple eligibility check through the examination of required eligibility documents using the non-discretionary pass/fail criteria as a standard. Sections 23 and 24 exemplify the conduct of simple eligibility checking, to wit:

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 bidder’s 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.

A prospective bidder may be allowed to submit his eligibility requirements electronically. However, said bidder shall later on certify under oath as to correctness of the statements made and the completeness and authenticity of the documents submitted.

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.

A prospective bidder may be allowed to submit his eligibility requirements electronically. However, said bidder shall later on certify under oath as to correctness of the statements made and the completeness and authenticity of the documents submitted.

The eligible prospective bidders shall then be evaluated using numerical ratings on the basis of the short listing requirements prescribed for the Competitive Bidding concerned, within the period stated in the Invitation to Bid to determine the short list of bidders who shall be allowed to submit respective bids.

In view of the foregoing clarifications, we suggest that instead of using "pre-qualification," PEA should now adopt "simple eligibility checking," through the use of non-discretionary pass/fail criteria, as a means to determine the capacity or eligibility of a bidder to participate and bid in a certain procurement project. To do otherwise would be illegal.

Revision of the Terms of Reference and Instructions to Bidders after a Failed Bidding

After a failed bidding, the procuring entity has the option either to re-bid the project without revising the Terms of Reference/Instruction to Bidders or revises and enhances the same and conducts a re-bidding. The option lies with the procuring entity whenever it sees the necessity and propriety of revising the requirements and specifications laid down in the Terms of Reference/Instruction to Bidders.

It is therefore incumbent upon PEA to review and revise its Terms of Reference/Instruction to Bidders should there be a necessity to do the same. Often enough, procuring entities opt to revise the Terms of Reference/Instruction to Bidders when it becomes clear to them that no bidder can respond and comply with the requirements and specifications provided therein.

Participation of Eligible and Ineligible Prospective Bidders in the Re-bidding

In case of a failed bidding, the procuring entity should conduct a re-bidding with re-advertisement of the Invitation to Apply for Eligibility and to Bid. Section 35 of R.A. 9184 provides that under any of the instances enumerated therein, "[t]he contract shall be re-advertised and re-bid. The BAC shall observe the same process and set the new periods according to the same rules followed during the first bidding."

In the ensuing bidding, the procuring entity shall allow all prospective bidders in the first failed bidding to participate, whether the prospective bidders were previously declared eligible or ineligible, as well as any other company that may wish to participate.

Conduct of Negotiation After One Failed Bidding

From the narrations in your letter, it appears that PEA intends to adopt "negotiation" after the first failed bidding for the procurement of health care services for its employees. Negotiation as an alternative method of procurement is sanctioned by Section 35.1.5 of the IRR of E.O. 40 and Section 53(a) of R.A. 9184.

Negotiation is a mode of procurement of goods, infrastructure projects and consulting services whereby a procuring entity directly negotiates a contract with a technically, legally and financially capable supplier, contractor or consultant. However, it must be stressed that in cases of failure of bidding, negotiation is available only when there are two failures involving the same project being bid out. Consequently, a single failure of bidding shall not entitle a procuring entity to adopt negotiation as an alternative method of procurement. Section 35.1.5 of the IRR of E.O. 40 provides:

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;

On the other hand, Section 53(a) of R.A. 9184 provides:

Section 53. *Negotiated Procurement*. - Negotiated Procurement shall be allowed only in the following instances.

- a) In cases of two (2) failed biddings, as provided in Section 35 hereof;

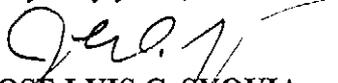
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Thus, after the first failed bidding, PEA may opt to revisit and revise its technical specifications and other requirements in the instructions to bidders and thereafter re-advertise the project and conduct a second bidding. Only when the second bidding fails can PEA adopt negotiation as an alternative method of procurement as mandated by Section 35.1.5 of the IRR of E.O. 40 and Section 53(a) of R.A. 9184.

With the foregoing elucidations, we trust that our opinion provided PEA the needed information in the proper conduct of its procurement of health care services for its employees.

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
Acting Executive Director