

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

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TSO NPM No. 001-2004

January 5, 2004

COL. REYNALDO S. RAMIREZ

Chairman, Bids and Awards Committee
Armed Forces of the Philippines
Logistics Center (AFPLC)
Camp General Emilio Aguinaldo,
EDSA, Quezon City

Re : Compliance with NFCC Requirement

Dear Col. Ramirez:

We acknowledge receipt of your letter dated September 18, 2003, addressed to Asst. Sec. Eduardo P. Opida, seeking assistance on possible issues that could affect or influence the outcome of the AFP Logistic Center's ("AFPLC") procurement of Combat Clothing and Individual Equipment ("CCIE"), Ordinance and Medical Items for use of the various AFP Units and the CAFGUs. The concerns sought to be addressed are as follows:

1. The Net Financial Contracting Capacity ("NFCC") of prospective bidders may not comply with the requirement that the same should be at least fifty percent of the approved budget for the contract ("ABC"); and
2. The available remedy should three (3) bidders submit identical-offers for an item.

Compliance with the NFCC

As part of the eligibility criteria for the procurement of goods under the Implementing Rules and Regulations ("IRR") of Executive Order No. 40, series of 2001 ("E.O. 40"), specifically Section 16.2.1(3), prospective bidders are mandated to comply with the NFCC requirement, such that it is imperative that their NFCC, based on their net working capital, must be at least equal to the approved budget for the contract to be bid. Should the prospective proponent fail to satisfy the NFCC requirement, it will be declared ineligible to participate in the ensuing public bidding. The disqualification in case of failure to satisfy the NFCC requirement is brought about by the use of the non-discretionary pass/fail criteria sanctioned by Section 16.4 of the IRR of E.O. 40, to wit:

In relation to Section 18 on submission of bids, and subject to the provisions of Section 14.6 of these IRR, the BAC shall determine if each prospective bidder is eligible to participate in the bidding by examining the completeness of each prospective bidder's eligibility requirements or statements against a checklist of

requirements, **using a non-discretionary "pass/fail" criteria**, as stated in the Invitation to Apply for Eligibility and to Bid, and shall be determined as either "eligible" or "ineligible" x x x (Emphasis supplied)

As such, in the event the interested bidders fail to comply with the NFCC requirement, then AFPLC has no other recourse but to declare a failure of bidding and re-bid the project with a re-advertisement. The inclusion of the NFCC as an eligibility criteria under E.O. 40 and its IRR was intended to determine at the earliest opportunity the financial capacity of the bidder to perform or deliver the project being bid out, such that if it is determined at the outset that the bidder has no financial capacity or would have possessed such capacity were it not for the fact that it has spread resources throughout too many on-going contracts, it will not be allowed to participate in the bidding process.

Section 16.2.1 and Section 16.2.2 of the Implementing Rules and Regulations ("IRR"), Executive Order No. 40, series of 2001 ("E.O. 40"), provide as follows:

NFCC = [(Current assets minus current liabilities) multiplied by (K)] minus the value of all outstanding works or projects under ongoing contracts, including awarded contracts yet to be started.

Where:

K = 10 for a contract duration of one year or less, 15 for a contract duration of more than one year up to two years, and 20 for a contract duration of more than two years.

In consonance with this, R.A. 9184 or the Government Procurement Reform Act which consolidated all existing laws, rules and executive orders on government procurement was signed into law by her Excellency President Gloria Macapagal Arroyo on January 10, 2003 and became effective on January 26, 2003. Moreover, the IRR part A ("IRR-A") of R.A. 9184 was finalized by the Government Procurement Policy Board ("GPPB") and the Joint Congressional Oversight Committee ("JCOC") on July 11, 2003, and it has already been approved by the President through Memorandum Order No. 119, dated September 18, 2003. Further, IRR-A of R.A. 9184, having been published in two (2) newspapers of general nationwide circulation, namely Manila Times and Malaya, on September 23, 2003 became effective on October 8, 2003 in accordance with Section 78 of the said IRR-A.

Section 23.11.1 and Section 23.11.2 of the Implementing Rules and Regulations Part A ("IRR-A") of R.A. 9184, providing the same computation for NFCC requirement, are quoted hereunder:

NFCC = [(Current assets minus current liabilities) multiplied by (K)] minus the value of all outstanding works or projects under ongoing contracts, including awarded contracts yet to be started.

Where:

K = 10 for a contract duration of one year or less, 15 for a contract duration of more than one year up to two years, and 20 for a contract duration of more than two years.

However, it is important to note that under the Implementing Rules and Regulations, Part A of R.A. 9184, a bidder who fails to meet the NFCC requirement is not without recourse. Section 23.11.1 (3), Rule VIII of the IRR, in part, provides:

The prospective bidder must present a commitment from a licensed bank to extend to it a credit line if awarded the contract to be bid, or a cash deposit certificate in an amount not lower than that set by the procuring entity in the Bidding Documents, which shall be at least equal to ten percent (10%) of the approved budget for the contract to be bid; or must have a NFCC at least equal to the budget for the contract to be bid.

Hence, the new law has become more lenient by giving the prospective bidders an alternative to the NFCC requirement.

Identical Offers

At this point, it should be noted that this situation appears not to have been contemplated in either E.O. 40 or R.A. 9184 for lack of any provision therein. However, we believe that you have also raised a theoretical problem regarding a circumstance wherein three (3) bidders submit identical offers. Should this peculiar situation take place, procuring entities, such as the AFPLC may, if the three (3) bidders agree, award portions or components of the project to each of them, provided that the project is divisible. In the event that the project being bid out is indivisible or has no separate components, the procuring entity may consider re-bidding the contract among the three (3) remaining bidders, with respect to the financial proposal so as to determine the lowest price while retaining the approved budget for the contract.

In fine, should three bidders submit identical offers for an item, all of which fail to comply with the bid requirements, we recommend that the procuring entity:

1. Award portions or components of the project to each of the bidders, if the bidders agree, provided that the project is divisible; or
2. Exercise the remedy under Section 35.2 of the IRR-A, which is to declare a failure of bidding and re-bid the contract while retaining the approved budget for the contract if the project is indivisible.

We trust that the foregoing is helpful.

Very truly yours,


ESTANISLAO C. GRANADOS
Acting Executive Director

Copy furnished:

Honorable EDUARDO P. OPIDA
Assistant Secretary
Department of Budget and Management