



Department of Budget and Management
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE

NPM No. 24-2012

24 February 2012

MR. FELIPE ANTONIO B. REMOLLO
President and Chief Executive Officer
CLARK DEVELOPMENT CORPORATION
Bldg. 2122 Elpidio Quirino St., Clark Freeport Zone

**Re: Eligibility Requirements for Joint Venture Agreements
for Design and Build Infrastructure Projects**

Dear Mr. Remollo:

We respond to your letter dated 1 February 2012 requesting for clarification on the required Class "B" documents for a Design and Build Infrastructure Project under Republic Act (RA) 9184 and its Implementing Rules and Regulations (IRR).

As represented, Clark Development Corporation (CDC) is undertaking a project called "Design and Build Services for Clark 230KV Power Transmission Line Phase 3B". The lone bidder is a Joint Venture (JV) where the partners are Meralco Industrial Engineering Services Corporation (MIESCOR) and Asiaphil/Alsom. The latter is a newly created corporation with two main investors. In its bid, the JV submitted a Joint Venture Agreement (JVA) signed by the representatives of MIESCOR and Asiaphil/Alsom. The submission, however, shows that only MIESCOR submitted the relevant incorporation papers; no incorporation papers were submitted by Asiaphil/Alsom to show that it is a validly registered corporation or that its representatives are validly authorized by such corporation.

The specific queries of CDC are the following:

1. Would the submission of the JVA between the two member corporations of the JV suffice or should the corporate papers of each member corporation also be required in the submission?
2. In evaluating the JVA documents, should the Special Bids and Awards Committee (SBAC) look for past project performance of the two members of the JVA? Is the SBAC allowed to consider the past project performance of the two corporate investors of Asiaphil/Alsom?

Legal Documents Required to be Submitted by a JV

As provided in Section 9.2 of the Guidelines for the Procurement and Implementation of Contracts for Design and Build Infrastructure Projects¹ (Guidelines), eligibility requirements shall include Class "A" and Class "B" documents provided in the IRR of RA 9184.

Section 23.1(b) of the IRR requires the submission of a valid JVA in case the JV is already in existence, or duly notarized statements that all the potential JV partners will enter into and abide by the JVA in the event that the bid is successful. The same section also provides that each partner of the joint venture shall submit the legal eligibility documents, but the submission of technical and financial eligibility documents by any of the joint venture partners constitutes compliance. Thus, as we have discussed in a previous opinion², in addition to the JVA or duly notarized statements, each partner or prospective partner to the JV, whether local or foreign, are obliged to submit their individual Class "A" legal documents³. The rationale for this requirement is to ensure that all the parties in the JV have the requisite legal personality to conduct business.⁴

In light of the foregoing, we are of the view that the submission by the JV of its JVA does not amount to sufficient compliance with the eligibility requirements since each partner in the JV, *i.e.*, MIESCOR and Asiaphil/Alsom, are obligated to submit their individual legal eligibility documents prescribed in Section 23.1(a)(i) to (ii) of the IRR. Moreover, Section 30.1 of the IRR of RA 9184 provides that the Bids and Awards Committee (BAC) shall determine each of the prospective bidder's eligibility by examining the completeness of its eligibility requirements against a checklist using "pass/fail" criteria. Consequently, if a bidder submits an eligibility document, it shall be rated as "passed". Otherwise, it shall be rated "failed". No discretion is allowed.⁵

Compliance with Technical and Financial Requirements by a JV

As mentioned above, Section 23.1(b) of the IRR recognizes compliance by any of the JV partners with the technical and financial requirements as sufficient compliance by the JV. Thus, unlike in the case of legal eligibility documents, it is sufficient that the technical documents and the financial documents under the eligibility requirements should be complied with or submitted by at least one of the members of the JV.⁶

We wish to clarify, however, that the documents to be submitted and evaluated should be those of the actual JV partners. In case one of the JV partners is also a JV, only the technical experience/capability and financial standing attributable to the JV shall be considered, and should not include those of its individual member entities.

¹ Annex "G" of the IRR of RA 9184

² NPM No. 066-2009 dated 29 December 2009

³ Legal Documents

i) Registration certificate from the Securities and Exchange Commission, Department of Trade and Industry for sole proprietorship or Cooperative Development Authority for cooperatives, or any proof of such registration as stated in the bidding documents;

ii) Mayor's permit issued by the city or municipality from its principal place of business

⁴ NPM No. 044-2007 dated 13 August 2007

⁵ NPM No. 002-2007 dated 12 January 2007

⁶ NPM No. 044-2007 dated 13 August 2007

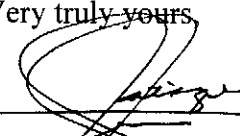
It should be noted that, in the case of *Aurbach v. Sanitary Wares Manufacturing*⁷, the Supreme Court held that a JV is a form of partnership and should, thus, be governed by the laws of partnership. Since Article 1768 of the Civil Code of the Philippines provides that a partnership has a juridical personality separate and distinct from that of each partner, a JV may be considered as having a distinct and separate personality from its members or investors. As such, if the JV enters into another JV, it should be treated as an entity different from its members.

Based on the foregoing, we are of the opinion that the SBAC may consider the individual experiences of the JV partners, *i.e.*, MIESCOR and Asiaphil/Alsom, as appearing in its bid. However, it cannot consider the experience or capability of the corporate investors of Asiaphil/Alsom JV in as much as these corporations are technically not a member of the MIESCOR-Asiaphil/Alsom JV. If the intention of the MIESCOR-Asiaphil/Alsom JV was to take advantage of the technical experience/capability or financial standing of a particular member of the Asiaphil/Alsom JV, the JVA should be with these juridical entities rather than with Asiaphil/Alsom JV alone.

In sum, the JV partners are required to submit their individual legal eligibility documents in addition to the JVA in order to be deemed compliant with the eligibility requirements under the IRR and the Guidelines. As regards the evaluation of the technical and financial eligibility, only those belonging or pertaining to the actual members of the MIESCOR-Asiaphil/Alsom JV shall be considered, and shall not include the juridical partners/investors of the Asiaphil/Alsom JV.

We hope our advice provided sufficient guidance on the matter. This view is based on the information presented, and may not be applicable to a different set of facts and circumstances. Should you have other questions, please do not hesitate to contact us.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director III

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⁷ G.R. No. 75875, 15 December 1989