



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

NPM No. 41-2014

10 October 2014

HON. FERNANDO I. MANALO

Undersecretary/ Chairman, BAC

DEPARTMENT OF NATIONAL DEFENSE (DND)

DND Building, Segundo Avenue, Camp Aguinaldo,
Quezon City

Re: Government Procurement Policy Board Resolution No. 29-2012 and Bank Draft/Guarantee or Irrevocable Letter of Credit Issued by a Foreign Bank

Dear Undersecretary Manalo:

This refers to the Honorable Undersecretary's letter dated 28 May 2014 seeking clarification on certain requirements imposed by Non Policy Matter Opinion (NPM) No. 08-2014; Government Procurement Policy Board Resolution (GPPB) No. 29-2012; and the revised Implementing Rules and Regulations of Republic Act (RA) No. 9184 (IRR).

It is represented that Section 23.1(a)(iii) of the IRR of RA 9184 has affected the participation of some suppliers in the procurement of defense material for the Armed Forces of the Philippines (AFP). Large companies, especially foreign manufacturers, had a hard time complying with the said section since there are bidders who have a wide range of contracts (ie. Commercial vessels to repair and refit of other sea and ocean-going vessels from small craft to large vessels). This means that had they listed all the completed and on-going contracts, it would have involved voluminous documents, from the most minor repair of components of vessels to commercial vessels themselves and would be hard to thoroughly examine. Further, there are instances when certain contracts are governed by non-disclosure agreements or confidentiality clauses.

Section 23.1(a)(iii) of the IRR of RA 9184

Section 23.1(a)(iii) of the IRR of RA 9184 was amended by GPPB Resolution No. 29-2012 where the phrase "*or completed*" was deleted. Consequently, bidders are required to disclose all on-going government and private contracts to determine the extent of its exposure relative to its capacity to perform and deliver the requirements of the project being procured. In addition, the provision did not make any distinction between small and large companies, thus, the mandatory disclosure of all ongoing and present contracts shall apply to all bidders regardless of their size.

It is worthy to point out that the amended provision states statement of "all" on-going government and private contracts, including awarded but not yet started, if any, whether similar or not similar in nature and complexity to the contract to be bid within the relevant period as

provided in the Bidding Documents. As such, even contracts that include non-disclosure agreements or confidentiality clauses are required to be disclosed. It is likewise good to clarify that the requirement refers to a “statement” to be made by the bidder relative to all its ongoing and private contracts, and not the actual submission of the physical contracts.

Credit Line Commitment (CLC)

GPPB Resolution No. 20-2013 amended Section 23.1(a)(vi) of the IRR of RA 9184 removing the prospective bidder’s option to submit its CLC as an alternative to the computation of NFCC. Due to the revision, the discussion relative to the submission of all ongoing government and private contracts if a CLC is submitted becomes moot. However, in the event a CLC is still allowed, bidders are nonetheless required to submit its statement of all ongoing government and private contracts for the reason that the information provided through the statement shall set the stage to determine if the prospective bidder is incurring delay or slippage in the execution of all its ongoing projects that may ultimately affect the eventual execution of the project subject of the bid.

Bank Draft/Guarantee or Irrevocable Letter of Credit (LC) Issued by a Foreign Bank

Insofar as the confirmation of the LC issued by a foreign bank, Section 27.2 of the IRR of RA 9184 states that Bank Draft/Guarantee or Irrevocable Letter of Credit issued by a foreign bank can be confirmed or authenticated by a Universal or Commercial bank, the confirmation contemplated in the rule refers to the confirmation of the “local” Universal or Commercial Bank that has linkage or tie-up with the foreign bank to assure government that it may call against the Bank Guarantee or the irrevocable LC with a bank in the local jurisdiction lest the requirement will be futile when it cannot be enforced against a bank outside the jurisdictional reach of the government, and even by the courts in the event a claim against the Bank Guarantee or Irrevocable LC is made to answer for an identified violation under the procurement law and the rules.

Summary

As regards the submission of a CLC in lieu of the NFCC, it is important to emphasize that the same is no longer applicable. On the other hand, the submission of all ongoing government and private contracts is a necessary eligibility technical requirement regardless of whether or not NFCC may still be substituted by a CLC.

We hope that the opinion issued by GPPB-TSO provided sufficient guidance on the matter. Note that this is issued on the basis of particular facts and situation presented, and may not be applicable given a different set of facts and circumstances. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director V

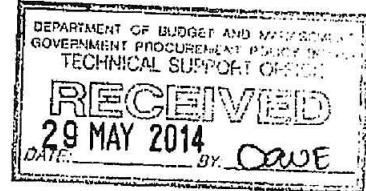


Republika ng Pilipinas
Republic of the Philippines
Kagawaran ng Tanggulang Pambansa
Department of National Defense

MAY 28 2014

ATTY. DENNIS SANTIAGO

Executive Director
Technical Support Office
Government Procurement Policy Board
Unit 2506 Raffles Corporate Center
F. Ortigas Jr. Road, Ortigas Center
Pasig City



Dear **Atty. Santiago**:

This is to seek clarification and guidance on certain requirements imposed by Non-Policy Matter (NPM) No. 08-2014, Government Procurement Policy Board Resolution No. 29-2012 and the Revised Implementing Rules and Regulations of Republic Act No. 9184 (IRR of RA 9184).

Non-Policy Matter (NPM) No. 08-2014

NPM No. 08-2014 issued by the Government Procurement Policy Board (GPPB) on 28 March 2014 states, among others, that *"the statement of ongoing government and private contracts to be submitted by the bidder should include all its ongoing government and private contracts, even if they are immaterial or dissimilar to bid."* It is also mentioned under the subject NPM that *"failure to include an immaterial ongoing contract or failure to disclose complete information in the statement of contracts shall result in the 'disqualification' of the bidder for non-compliance with the eligibility requirement under Sections 22.1 or 24.1 of the revised IRR"*¹.

This Department would like to clarify whether or not the aforementioned requirement under NPM No. 08-2014 applies only to small companies because this provision has affected the participation of some suppliers in the procurement of defense materiel for the Armed Forces of the Philippines (AFP). It is observed that large companies, especially foreign manufacturers, had a hard time complying with the subject requirement since it will complicate their submission of documents. To illustrate, in one of the biddings undertaken by this Department's Special Bids and Awards Committee 1 (SBAC1), a bidder only submitted a statement of "relevant/similar" ongoing and completed contracts which prompted the SBAC1 to rule for the disqualification of said bidder to participate in the project. In its Motion for Reconsideration, the bidder raised that they have contracts that range from commercial vessels to repair and refit of other sea, and ocean-going vessels, as their shipyards service the gamut of all vessels, from

¹ GPPB Resolution No. 29-2012

small craft to large vessels. Furthermore, their shipyards also conduct small repairs to watercraft and vessels, as well as retrofitting, design, and fabrication work not necessarily related to the defense industry. Hence, if they will include all of these dissimilar contracts and projects in their submission, it would have proved too voluminous for SBAC1 to thoroughly examine. Otherwise stated, had they listed all the completed and ongoing contracts, it would have involved voluminous documents, from the most minor repair of components of vessels to commercial vessels themselves, and this would complicate matters as said projects are not akin or similar to the procurement under consideration.

In another instance, a supplier disclosed that, for the period provided for the submission of similar contracts, it has more 24,000 contracts and this does not include the contracts of its other departments/subsidiaries.

It is believed that the purpose of the requirement is to determine the capacity of a bidder to supply the equipment being bid out. With the submission of a statement of all "relevant/similar" contracts, the purpose for which the requirement was imposed can be achieved. The stability of the company can, in fact, be established by said submission.

In addition, this Department would like to inform you that there are instances when certain contracts of bidders, whether ongoing or completed, are governed by non-disclosure agreements or confidentiality clauses. As a result, bidders cannot divulge the required information in their statement of all ongoing and completed government and private contracts. This is material to the issue as this will affect their submission since the value of all outstanding or uncompleted portions of the projects under ongoing contracts will be needed in the computation of the Net Financial Contracting Capacity or NFCC.

In this regard, are the bidders still required to submit the list of **all** their ongoing and completed contracts, including those governed by non-disclosure agreements/ confidentiality clauses? Moreover, may the BAC just allow them to submit the statement of all the contracts without divulging the details of the contracts except for its amount, subject to post-qualification?

GPPB Resolution No. 29-2012

GPPB Resolution No. 29-2012, issued on 23 November 2013, clarified issues relative to the submission of eligibility documents, particularly the technical requirements stated under Section 23 of the RIRR. One of the issues raised under said Resolution is Whether the submission of a Statement of all On-going and Completed Contracts may be dispensed with if the bidder opted to submit a Credit Line Commitment (CLC) instead of the Net Financial Contracting Capacity (NFCC).

To answer the foregoing, the Inter-Agency Technical Working Group (IATWG) resolved to recommend in its 10th meeting held on 09 November 2012 the amendment of Section 23.1(a)(iii) to reflect the following:

- a. That submission of a Statement of Ongoing Contracts should only be required if the bidder opts to submit an NFCC computation. If the bidder opts to submit a CLC, it need not submit said statement.
- b. That a Statement of Completed Contract(s) should always be required for the purpose of showing the bidder's Single Largest Completed Contract that is similar to the contract to be bid.

In its 10th meeting held on 23 November 2012, GPPB, after a careful review and deliberation of the issues presented, resolved to adopt the recommendation of the IATWG in its 09 November 2012 meeting.

This Department, however, observed that the dispositive portion of the subject Resolution failed to reflect what the IATWG recommended. As an amendment of Section 23.1(a)(iii), said dispositive portion provides:

"Statement of the prospective bidder of all its ongoing government and private contracts, including contracts awarded but not yet started, if any, whether similar or not similar in nature and complexity to the contract to be bid, within the relevant period as provided in the Bidding Documents;

Statement identifying the bidder's single largest completed contract similar to the contract to be bid, except under conditions provided for in Section 23.5.1.3 of this IRR, within the relevant period as provided in the Bidding Documents in the case of goods.

All of the above statement shall include all information required in the PBDs prescribed by the GPPB."

Be it noted that the above-mentioned amendment merely requires a Statement of the prospective bidder of all its ongoing government and private contracts, without qualifying whether the bidder opted to submit a CLC or NFCC. This appears to be in conflict with the adopted recommendation of the IATWG.

Considering that the recommendation of the IATWG was not captured by the above-mentioned dispositive portion, this Department would like to ask guidance as to whether or not the list of all ongoing projects is no longer required in case a bidder opts to submit CLC instead of NFCC.

Sections 27 and 39 of the IRR of RA 9184

This Department would also like to seek clarification with respect to the requirements imposed by Sections 27 (Bid Security) and 39 (Performance Security) of the IRR of RA 9184. Under said provisions, both bid security and performance security may be in the form of a bank draft/guarantee or irrevocable letter of credit provided the following requirements are present:

1. That the bank guarantee/draft or irrevocable letter of credit is issued by a Universal or Commercial Bank; and

2. Provided, however, that it shall be confirmed or authenticated by a Universal or Commercial Bank, if issued by a foreign bank.

With regard the second requirement, this Department would like to clarify if the requirement of confirmation/authentication should be done by a local bank. This is material because to require certain foreign proponents to obtain confirmation/authentication by a local bank would entail additional expense on their part. Therefore, this will be a cost driver that will surely affect the financial bid of said proponent.

As a recap, this Department would like to seek clarification as to the following:

1. Whether or not the statement of all ongoing and completed government and private contracts shall apply to all bidders with no qualification whether small or large companies?
2. Are the bidders still required to submit **all** their ongoing and completed contracts, including those governed by non-disclosure agreements/confidentiality clauses? Or may the BAC just allow the bidders to submit all the contracts without divulging the details of the contracts except for its amount?
3. Is the list of all ongoing projects still required if a bidder opts to submit CLC instead of NFCC?
4. Whether or not the confirmation and authentication of bank guarantee/draft or irrevocable letter of credit issued by a foreign bank, as mandated by Sections 27 and 39 of the IRR of RA 9184 IRR of RA 9184, be done by a local bank?

Thank you and looking forward to your immediate consideration on the foregoing matters.

Truly yours,



FERNANDO J. MANALO

Undersecretary / Chairman, DND Special Bids and Awards Committee 1