



TECHNICAL SUPPORT OFFICE

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NPM No. 07-2006

April 05, 2006

MR. IMMANUEL A. MAGALIT

Action Center Director
Fellowship of Christians in Government, Inc. (FOCIG)
Rm. 305 Don Raul Bldg.,
77 Kamuning Road, Quezon City 1103

Re: Clarification on the provisions of Republic Act 9184 (R.A. 9184) and its Implementing Rules and Regulation Part A (IRR-A)

Dear Mr. Magalit:

This pertains to your letter dated 03 February 2006 requesting clarification on some of the provisions of Republic Act 9184 (R.A. 9184), otherwise known as the Government Procurement Reform Act (GPRA) and its Implementing Rules and Regulations Part A (IRR-A). As contained in your letter-request, this office finds it prudent to provide elucidations on the issues enumerated hereunder that proves relevant to your duty as Civil Society Organizations (CSO) Observers in procurement undertakings:

- 1. Whether or not it is valid for the Bids and Awards Committee (BAC) to accept documents other than those specified in the Bidding Documents;*
- 2. Whether or not the decision of the BAC in accepting the 2005 Mayor's permit and the submission by a bidder of only one (1) envelope containing all the documents, instead of three (3) separate envelopes, permissible under R.A. 9184; and,*
- 3. Whether or not the action of the BAC in post-qualifying two (2) bidders and not further validating the documents submitted, even if there were apparent indications that the lowest bidder and the next lowest bidder were owned by the same family or clan, valid in light of R.A. 9184 and its IRR-A? Is there a rule for "sister companies?" Does Section 65.2.2 of the GPRA refer to sister companies?*

We shall deal with the issues sequentially.

Legally Valid Substitutions

The issue of whether or not the acceptance by the BAC of the Certificate of Compliance from the SSS Pasig Branch instead of an SSS Clearance from the Legal and Collection Group of the SSS Main Office is a matter not within the ambit of the authority or well-defined functions of the Government Procurement Policy Board (GPPB) under R.A. 9184¹ and its IRR-A. It must be pointed out, however, that the aforementioned certificate is not one of the minimum requirements/documents set forth under the law.

Pointedly, matters regarding the interpretation of additional eligibility requirements required by the procuring entity in their bidding documents and the determination of whether the submitted eligibility documents of the prospective bidders comply with their requirements is properly within the domain and prerogative of the procuring entity, specifically the BAC, that is most disposed to rule on the matter.

With reference however to the Tax Clearance Certificate requirement, please take note that in addition to the Class "A" Legal Documents required under the Eligibility Requirements for the procurement of Goods and Infrastructure Projects, and Consulting Services, procuring entities by virtue of GPPB Circular No. 02-2005 are now mandated to require prospective bidders the submission of tax returns and tax clearances (for purpose of Executive Order 398) in compliance with the provisions of Executive Order No. 398 (E.O. 398), Revenue Regulation No. 03-2005 (RR 03-2005), and Revenue Memorandum Circular No. 16-2005 (RMC 16-2005). At this juncture, our office is yet to receive any advisory from the Bureau of Internal Revenue that they have already allowed exceptions to their issuances vis-à-vis E.O. 398. Clearly, we are of the view that the submission of a Tax Clearance Certificate issued by the Bureau of Internal Revenue-Regional District Office (BIR- RDO 47), Makati is not in compliance with E.O. 398 and the abovementioned GPPB Circular. ✓

Valid and Current Mayor's Permit/Municipal License

Section 23.6 of the IRR-A of R.A. 9184 provides that the determination of eligibility of prospective bidders shall be based on the submission of the documents enumerated in the bidding documents, among which, is a valid and current mayor's permit/municipal license. Moreover, Section 23.2 of the said IRR-A provides that the determination of eligibility shall be through an examination of the completeness of each prospective bidder's eligibility requirements or statements against a checklist of requirements using a non-discretionary "pass/fail" criteria. In using the non-discretionary "pass/fail" criteria, the BAC merely checks for the presence or absence of the required documents. A prospective bidder is declared to be "eligible" for a particular requirement if such document is present, complete, and patently sufficient; otherwise, the absence, incompleteness, or patent insufficiency of a requirement will result to a prospective bidder's ineligibility to bid.

¹ See Section 63, R.A. 9184

In this regard, the submission of documents other than the actual/original mayor's permit itself cannot be considered as sufficient compliance with the requirement, regardless of the fact that such documents tend to prove that a mayor's permit has been applied for. Consideration of the documents submitted in lieu of the mayor's permit will lead to an exercise of discretion among the BAC members – an action which the IRR-A of R.A. 9184 expressly prohibits during eligibility check.

With reference to the propriety of the BAC's act in accepting the bidder's submission of one (1) envelope containing all the documents necessary for bidding, please take note that Item 24.1 of the Instruction to Bidders (ITB) in the Philippine Bidding Documents Edition II provides:

Unless otherwise indicated in the BDS, Bidders shall enclose their original Eligibility Documents described in ITB Clause 13.2 sealed in a separate envelope marked "ORIGINAL- ELIGIBILITY DOCUMENTS," xxx **These envelopes containing the original and the copies shall then be enclosed in one single envelope.** (Emphasis supplied)

As can be inferred from the abovequoted provision, prospective bidders are not precluded to make his/her bid submission in this format, provided however, that the eligibility documents, as well as the technical and financial documents are contained separately in three (3) different envelopes and thereafter contained in one outer envelope as provided under Section 25.1 of the IRR-A, to wit:

Eligible bidders shall submit through their authorized managing officer or their duly authorized representative (i) in the prescribed Bid Form, including its annexes, as specified in the bidding documents, (ii) on or before the specified deadline, and (iii) in two (2) separate sealed bid envelopes, the first containing the technical component of the bid, and the second containing the financial component of the bid. xxx **Both envelopes shall then be sealed in an outer envelope** which shall be addressed to the BAC and shall be marked as specified in the Instruction to Bidders. (Emphasis supplied)

Post-Qualification Stage

One of the basic reforms introduced under R.A. 9184 and its IRR-A is the simplification of the prequalification process through a simplified and an objective eligibility check and a strengthened post qualification, with the end in view of addressing the problems of delays, collusion, abuse of discretion among government officials, and lack of competition. Section 34.2 of the IRR-A of R.A. 9184 proves helpful in our present discourse, to wit:

The post-qualification shall verify, validate and ascertain all statements made and documents submitted by the bidder with the Lowest Calculated Bid/Highest Rated Bid, using non-discretionary criteria, as stated in the Invitation to Apply for Eligibility and to Bid (IAEB) and the Instruction to Bidders (ITB).

A perusal of the aforementioned provision would lead us to infer that the *raison d'être* for the post-qualification stage is essentially to authenticate and certify the veracity of the representations made by a prospective bidder as contained in the documents submitted by them which could not have been certified by the BAC during the Eligibility Check considering that the mechanism involved at this stage is a pass/fail criterion. We are of the opinion, however, that the refusal by the BAC to make a detailed check as to the veracity of the submitted documents, since this would entail a longer period of time and may even result to court cases, does not find legal basis under the law. In fact, in exceptional cases, the seven (7) calendar day period provided for post-qualifying the Lowest Calculated Bid or the Highest Rated Bid, as the case may be, may be extended by the GPPB.²

With reference to the last issue contained in your letter, Section 65.2.2 of the IRR-A explicitly prohibits the submission of different bids through two or more persons, corporations, partnerships or any other business entity in which the bidder has an interest to create the semblance of competition. Corollary to this, the procuring entity is given the right to reject any and all bids if there is prima facie evidence of collusion between or among bidders, including any act which restricts, suppresses or nullifies or tends to restrict, suppress or nullify competition.³

At this point, we would like to express our appreciation for the efforts of FOCIG to undertake with us the implementation of Republic Act 9184 and its IRR-A. We trust that through your invaluable assistance and cooperation, government procurement will be more transparent, economical, efficient and competitive.

Thank you.

Very truly yours,


ESTANISLAO C. GRANADOS JR.
Executive Director IV

² Section 34.1 of the IRR-A of R.A. 9184.

³ Section 41.1 (a) of the IRR-A of R.A. 9184