NPM No. 71-2014

20 October 2014

MR. LEO JOHN DUSABAN
Authorized Representative
ENDURE MEDICAL, INC.
17 A Belvedere Tower, San Miguel Ave.,
Ortigas, Pasig City

Re: Origin of Goods

Dear Mr. Dusaban:

This refers to your letter dated 22 September 2014, seeking clarification with regard to the proper interpretation and application of the provisions of the Philippine Bidding Documents (PBDs) for Goods, specifically, Clause 7, Instructions to Bidders (ITB), which states that:

> *"7. Origin of Goods - Unless otherwise indicated in the BDS, there is no restriction on the origin of goods other than those prohibited by a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations, subject to ITB Clause 27.1."*

It is represented that the above-mentioned provision has been the subject of Endure Medical, Inc.'s clarification with the Bids and Awards Committee (BAC) of the City Government of Muntinlupa. The BAC cited the said provision to justify its requirement in the technical specifications that the Medical Equipment to be bid must have originated from U.S. or Europe.

At the outset, we wish to inform you that the Government Procurement Policy Board (GPPB) and its Technical Support Office (GPPB-TSO) only render policy and non-policy opinions, respectively, on issues purely relating to the interpretation and application of our procurement laws, rules, and regulations. It has no jurisdiction to rule over actual controversies with regard to the conduct of the bidding since it has no quasi-judicial functions or investigatory powers under the law. Moreover, we adhere to the position that apart from courts having actual jurisdiction over the subject matter of a case, we cannot, nor any other government agency, authority, or official, encroach upon or interfere with the exercise of the functions of the BAC, since these duties and responsibilities fall solely within the ambit of its authority and discretion as sanctioned by law.[1]

Endure challenges the said requirement considering that there are GPPB Opinions consistently declaring that the Procuring Entity (PE) is precluded from prescribing the

[1] Non-Policy Matter (NPM) No. 46-2013 dated 11 June 2013.

country of origin of the goods subject of the Bidding. For this reason, you ask for the proper interpretation and application of the provision.

We wish to confirm that under Section 43.1.1 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, consistent with the obligation of the Philippines under a Treaty or international or executive agreement, goods may be obtained from domestic or foreign sources and the procurement shall be open to all eligible suppliers, manufacturers, and distributors. As such, although procuring entities are given leeway in formulating the Technical Specifications, they cannot limit the origin of goods to their preferred countries of origin nor to preferred regions, *e.g.* North America, Europe, etc., which in effect limits the market operators to specific countries in such regions, to the exclusion of other market participants from other countries.

We have previously clarified that the phrase "unless otherwise indicated in the BDS" seeks to allow adoption of conditions on origin of goods depending on the Institution funding the procurement activity in view of the fact that the PBDs for Goods is harmonized with the procurement guidelines of Development Partners[2], which have different rules on origin of goods. In this regard, the Bid Data Sheet (BDS) corresponding provision for Clause 7, ITB, PBDs for Goods state "No further instructions".

In this light, the rule on origin of goods provided in said Clause 7 may be changed depending on the applicable rule of the Institution funding the procurement activity. In cases of projects governed by RA 9184 and its IRR, the rule provided in Section 43.1.1 applies[3] and the corresponding Clause 7 in the BDS should reflect the sentence -- "No further instructions".

In view of the foregoing, we wish to reiterate that under RA 9184 and its revised IRR, procuring entities are precluded from requiring specific country of origin as part of the Technical Specification for the project. The rules on Origin of Goods in Clause 7 of the BDS may only be changed depending on the applicable rule of the Institution funding the procurement activity; while the same Clause 7 of the BDS for Government of the Philippines (GOP) funded projects, governed by RA 9184 and its IRR, shall reflect the sentence -- "No further instructions".

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

Very truly yours,

DENNIS S. SANTIAGO
Executive Director V

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[2] Example: Asian Development Bank, Japan International Cooperation Agency, World Bank. etc.
[3] Non-Policy Matter (NPM) No. 13-2011 dated 21 June 2011.

01/09/15

ENDURE MEDICAL, INC.

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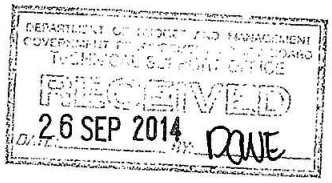
22 September 2014



The Government Procurement Policy Board
Unit 2506, Raffles Corporate Center,
F. Ortigas Jr. Road, Ortigas Center 1605

RE: Interpretation of Paragraph 7- Philippine Bidding Documents.

Greetings!

We write before this Honorable Office to seek clarification with regard to the proper interpretation and application of the provisions of the Philippine Bidding Document, specifically, **Paragraph 7, Section II- Instruction to Bidders** of the standard Philippine Bidding Document which states that:

> "7. **Origin of Goods**. - Unless otherwise indicated in the **BDS**, there is no restriction on the origin of goods other than those prohibited by a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations, subject to **ITB** Clause."

The above-quoted provision is the subject of our clarification with the BAC of the City government of Muntinlupa (BAC for brevity). The BAC prescribed in their technical specifications a country of preference for the Medical Equipment to be bid, particularly, U.S. or Europe as the origin.

We find it reasonable to challenge the said requirement considering that there are GPPB Opinions with regard to the matter. Our argument is anchored on the NPM Opinion 015-2012 and NPM Opinion 022-2013 that consistently declare that the Procuring Entity is precluded from prescribing the specific/preference country of origin of the goods subject of the Bidding.

On the other hand, the BAC contended that they are not precluded from doing the same citing the above provision of the Bidding Documents.

For this reason, we most respectfully submit before this Honorable Office that the subject provision be given a proper interpretation and application.

We are attaching herewith the copy of our correspondences with the BAC for your reference. Copies of the said letters of the Company are marked as Annex "A" and "A-1", and of the BAC as Annex "B" and "B-1". Also, a copy the schedule of requirements with technical specifications of the bidding document reflecting in item No. 7 the challenged technical specification requirement of the BAC is also attached and marked as Annex "C" to form an integral part hereof.

We hope that the GPPB would enlighten us with regard to the matter. Thank you very much!

Sincerely,

LEO JOHN DUSABAN
Authorized Representative

5 Oct 2014

Jen/Greg,

Please prepare OPINION.
Note that we are not suppose to provide opinion on the merits. Thanks!

Annex "A"

September 15, 2014

ATTY. GENALYN C. ESTRERA
Chairman
Bids and Awards Committee
City Government of Muntinlupa
National Road, Putatan, Muntinlupa City

Dear Ma'am;

This clarificatory letter is made pursuant to Section 22.5 1 of the Revised Implementing Rules and Regulations of Republic Act 9184 which states:

xxxxxxxxxxxxxxxxx

Section 22.5.1. Request for clarification(s) on any part of the Bidding Documents or for an interpretation must be in writing and submitted to the BAC of the procuring entity concerned at least (10) calendar days before the deadline set for the submission of bids. The BAC shall respond to the said request by issuing a Supplemental/ Bid Bulletin, duly signed by the BAC Chairman, to be made available to all those who have properly secured the Bidding Documents, at least seven (7) calendar days before the deadline for the submission and receipt of bids. ***(Italics supplied)***

Timeliness

The City Government of Muntinlupa will conduct bidding on September 26, 2014. Based on the afore-cited provision, we have until September 16, 2014 within which to make a request for clarification. Thus we would like to manifest that this clarificatory letter is timely made.

Discussion

It was discussed during the pre-bidding conference that Section VI- Technical Specification of your bidding document prescribed a specific source or country of origin of the goods of the items to be bid.

We wish to stress that the questioned Section of your bidding document is contrary to the existing GPPB Opinions. NPM Opinion 015-2012 and NPM Opinion 022-2013 is consistent in declaring that the Procuring Entity is precluded from prescribing the specific country of origin of the good subject of the Bidding. (Copy of the said GPPB opinions is herewith attached as Annex "A" for your reference)

We hope that the BAC would clarify the matter and issue a corresponding supplemental bid bulletin amending the questioned provision of the bidding documents. Thank you very Much!

Sincerely,

LEO JOHN DUSABAN
Authorized Representative

Non-Policy Opinions

2012-01-19
NPO# 015-2012

Requesting Entity: Philippine Coast Guard
Issues Concern: Nationality Preference as part of specification

Details:

Whether requiring a country of origin in the specification is in line with the provisions of Republic Act (RA) 9184 and its revised Implementing Rules and Regulations (IRR).

[P]lease note that as provided under Section 43.1.1 of the IRR of RA 9184, consistent with the obligation of the Philippines under international treaties or agreement, goods may be obtained from domestic or foreign sources and the procurement shall be open [sic] to all eligible suppliers, manufacturers, and distributors. As such, although procuring entities are given leeway in formulating the specifications in the terms of reference, they cannot limit the origin of goods to their preferred countries of origin to the exclusion of other countries.

Thus, considering the foregoing, we wish to reiterate that under the revised IRR, procuring entities are precluded from requiring specific country of origin as part of the technical specification for the project. Rather, the specifications shall be based on the performance requirements and recognized industry standards and not on the basis of country of origin.

Back

Annex "A-1"

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16 September 2014

ATTY. GENALYN C. ESTRERA
Chairman
Bids and Awards Committee
City Government of Muntinlupa
National Road, Outatan , Muntinlupa

RE: Response to Letter dated 16 September 2014 re: Bidding Documents for Supply & Delivery of Cardiac Monitors, Ospital ng Muntinlupa (OSMUN)

Dear Atty. Estrera:

We write in response to your letter informing us that your requirement for "North America or European Manufactured " under the Technical Specifications does not violate the principle of competitive bidding because no specific country of origin was prescribed therein but rather the preferred regions of manufacture , which correspond to any number of countries. You have stated that any brand of the required cardiac monitor manufactured in any of the countries in North America and Europe will qualify. Further, you said that what is expressly prohibited in the GPPB Opinions cited is "requiring a specific country of origin", thereby limiting the origin of the goods/items to the country or countries so designated to the exclusion of other.

We respectfully submit that the above contention is misplaced if not downright erroneous. In prescribing the requirement "North America or European Manufactured" , the procuring entity had in effect limited the origin of the goods which pertains to the place of manufacture to North American and European countries to the exclusion of Australian, Asian and other countries including the Philippines which is what is sought to be prevented by the GPPB opinion. Semantics does not change the import of its meaning. Your act of not naming a specific country or countries of origin does not change the fact that you are limiting the sources of goods in violation of Section 43.1.1 of the Revised IRR of RA 9184 and that you are discriminating goods from other countries including Asia which is the region where the Philippines belong.

Sec. 18 of RA 9184 provides that the specifications for the procurement of goods shall be based on relevant characteristics and performance requirements. **The requirement** "North America or European Manufactured" **is not a valid technical specification because it does not relate to performance requirement nor justifiably refers to a regional standard** even if it was placed under the requirement for "Standards, Safety and Training'.

The Manual Procedures for the Procurement of Goods provides that in determining the technical specifications of the goods it will procure, the PMO or end-user unit must consider the objectives of the project or the procurement at hand, and identify the standards that should be met by the goods in terms of function, performance, environmental interface and/or design. It must also conduct a market survey that will include a study of the available products or services, industry developments or standards, product or service standards specified by the authorized government entity like the Bureau of Product Standards, ISO9000 or similar local or international bodies. As a rule, Philippine standards, as specified by the Bureau of Product Standards, must be followed. For products where there are no specified Philippine standards, the **standards of the country of origin or other international body may be considered.** xxxxx

On the other hand, the Sample Clause: Equivalency of Standards and Codes of the PBD for the Procurement of Goods 4th Edition provides that wherever reference is made in the Technical Specifications to specific standards and codes to be met by the goods and materials to be furnished or tested, the provisions of the latest edition or revision of the relevant standards and codes shall apply, unless otherwise expressly stated in the Contract. Where such **standards and codes are national or relate to a particular country or region, other authoritative standards that ensure substantial equivalence to the standards and codes specified will be acceptable.**

It may be noted that in both the Manual for the Procurement of Goods and the PBD for the Procurement of Goods 4th Edition, the phrase "country of origin" was mentioned in relation to technical specification. The instructions in the aforementioned Manual and Bidding Documents however refer to the "standard" in the country of origin of the goods to be offered in relation to performance requirement and not the country of origin or region of manufacture as a technical specification by itself.

Hence, the Procuring Entity may only take into consideration the country of origin or region of manufacture in its technical specification in so far as the standard for the item being bid is concerned.

For illustration, let us say that there is a bidding for ballpens. Three bidders offered ballpens coming from different countries of origin, Countries A, B and C. If there

is a standard in the Philippines , such as it must write at 1.5km should do so continuously and smoothly, without skipping, and with the color of the ink being consistent, then that Philippine standard should be applied. If there is no standard for ballpens in the Philippines, and the standard in Country A is that it must write at 1.5 km should do so continuously and smoothly, without skipping, and with the color of the ink being consistent, Country B is at 2.0km under the same conditions with Country A and country C is at 3.0km also under the same conditions, the Procuring Entity is obliged to evaluate the items being offered on the basis of the standard of countries A, B and C respectively. Even if the ballpen from Country C has the best standard at 3.0km, the Procuring Entity cannot disqualify the offer coming from Country A if it writes at 1.5 km continuously and smoothly, without skipping, and with the color of the ink being consistent because it complies with the standard of its country of origin. The Procuring Entity cannot also require that the standard for Country C shall be used as it will amount to discrimination of goods coming from other countries. However, if the industry standard for ballpens is that it must write at 2.0km under the same conditions previously mentioned in this illustration, then that standard may be required by the Procuring Entity. The same application may be applied to regions.

"North American or European manufactured" is not international standards nor does it refer to a conformity assessment body that could establish an industry standard unlike the US FDA, European CE or the like. A region may only be included in the technical specification when it pertains to a particular standard such as US FDA (hence US as a country is mentioned in reference) and European CE (hence a regional standard is mentioned in reference.

In view thereof, we hope that the BAC shall not circumvent the law by playing with semantics in total disregard of the spirit and intent of the law. If the BAC has any doubt, it is advised to consult the Government Procurement Policy Board as to the validity of the inclusion of the "North America or European Manufactured" in its Technical Specifications. It does not take a legal mind to discern that a "regional" limitation is nonetheless still a limitation that excludes other countries.

Thank you very much.

Very truly yours,

LEO JOHN DUSABAN
Authorized Representative

Republic of the Philippines
CITY GOVERNMENT OF MUNTINLUPA
National Road, Putatan, Muntinlupa City

BIDS and AWARDS COMMITTEE

18 September 2014

FAX
SEP 22 2014
Pages

LEO JOHN DUSABAN
ENDURE MEDICAL, INC.
17 A Belvedere Tower, San Miguel Ave.,
Ortigas Complex, Pasig City

RE: *Follow-Up Letter on Supply & Delivery of Cardiac Monitors, Ospital ng Muntinlupa (OSMUN)*

Dear **Mr. Dusaban**:

We appreciate your concern and interest in the bidding process. However, we wish to reiterate that the procuring entity is NOT precluded from prescribing the minimum standards that must be met in the goods or items to be bid. Open and competitive bidding does not mean absolute equality, without regard to quality or the standard of goods or items to be submitted by prospective bidders. Just like any prudent consumer, the City Government of Muntinlupa must ensure that limited public funds are used only in procuring goods or items that would redound to the best possible advantage of government. What R.A. 9184 expressly prohibits is reference to specific brand names, while the GPPB Opinions cited by you proscribe specifying a country or countries of origin thereby limiting the procurement to but a few or single brand.

We note your apprehension that, in indicating the region of manufacture, other countries may be excluded from participating in the bidding process. While this may be the case, however, it does not mean that the spirit of competitive bidding is in any way diminished because as previously explained, there are in fact many different cardiac monitors that are European or Northern American made. Therefore, the right of choice is not with the procuring entity but with the bidder to offer any brand that corresponds to the specifications and preferences indicated in the Bidding Documents.

In fact, in the standard "*Instruction to Bidders*" used by the City of Muntinlupa, paragraph 7 on Origin of Goods clearly provides the phrase "*unless otherwise indicated in the BDS, there is no restriction on the origin of goods xxx.*" This means that the procuring entity may actually indicate a preference

respecting the origin of goods as long as this is specifically indicated in the Bid Data Sheet (BDS). The right of the procuring entity to indicate a preference respecting the origin of goods is therefore clearly provided and recognized.

We hope we have been able to address your concerns regarding this matter.

Very truly yours,

ATTY. GENALYN C. ESTRERA
BAC - Chair

FAX
SEP 22 2014
Pages

Annex "C"

Schedule of Requirements with Technical Specifications

ITEM NO.	ITEM DESCRIPTION / SPECIFICATION	STATEMENT OF COMPLIANCE
1	OR MONITORING SYSTEM (Cardiac Monitor -5 Units)	
	Function:	
	Critical and Operative patients need to be monitored continuously in the Operating Room and Recovery Room.	
2	Operating Requirements:	
	OR and RR should have monitors at beside.	
	Capability of storage of patient data printing of patient reports	
	Equipment demonstration must be arranged.	
3	Technical Specifications:	
	Minimum 10 inches multicolored TFT display screen preferably touch screen.	
	Separate CPU/ Module rack.	
	At least eight (8) digital and waveforms/traces display	
	Combination of single, dual and multiparameter modules.	
	Parameter modules freely exchangeable between all the monitors	
	Multichannel (up to 12 leads) ST segment analysis.	
	Facility to monitor and display – ECG, Respiration, NIBP, SpO2, Temp, Cardiac output, EtCO2	
	Automatic arrhythmia detection & alarm for standard and lethal arrhythmia.	
	EtCO2 upgradeable	
	NMT Module / monitor for measurement and display of TOF count, TOF%, ST, DBS, Tetanic and trend for continuous usage. Automatic measurement facility in selected time interval. Automatic selection of supramaximal current. (optional)	
	ECG Module with all accessories. (Optional)	
	Central station for beside monitors with independently controlled 19" Multi Colour TFT Monitor. Complete with Ethernet LAN Cabling, alarm management, 72 hrs trending, bed to bed viewing of waveforms and remote alarm management like silencing of alarms	
	Should provide hemodynamic, oxygenation, Ventilation Calculation package. (Optional)	

	Should have drug calculation package. (Optional)	
	Trend of at least 72 hrs.	
	200 nos. event recall/snapshot facility both manually and automatically triggered by alarm.	
	Automatic Zoom in facility in the monitor display.	
	The Monitors should have monitor to monitor overview facility and data transfer over network.	
	Web browsing facility to review each networked monitors data through hospital LAN via office PC in Hospital LAN/ Network or through dial up facility from remote location (Optional)	
	At least two CRT slave monitors- at least 19 inches in ICU – one for central station	
	Communications with Informations with Management System	
	A. To provide HL-7 compatible server for sending and receiving information to and from the monitoring network to and from Hospital Information System, Laboratory Information etc. for integration of various information.	
	Include Laser Printer and dual channel strip chart recorder.	
	Specifications for each monitor:	
	1. Portable and lightweight < 10kg.	
	2. Modular with at least 10 inches multicolour TFT display	
	3. Monitoring parameters – ECG, Respiration, NIBP, SpO2 and temperature., EtCO2	
	4. Digital and at least eight waves / traces display	
	5. Trends up to 72 hrs	
	6. 60 minutes or more battery back up	
	7. Convenient handle for carrying	
	8. Able to fix with bed/ provide at least 3 trolleys	
4	System Configuration Accessories, spares and consumables	
	ECG/Resp: 5 Lead ECG Cable with clip – 2 sets per monitor and 10 Lead ECG Cable with clip – 1 set per monitor.	
	NIBP: Adult cuff – 2 nos. per monitor and two sizes of pediatric cuffs- one per monitor.	
	SpO: Adult SpO2 sensor with cable- two nos. per monitor and pediatric SpO2 sensor- one no. per monitor.	
	IBP: Include (at least two) nos. per monitor of reusable pressure transducer with bracket, holder and 100 nos. disposable domes per monitor.	
	Temperature: Rectal temperature probe- two per monitor and skin temperature probe- one per monitor.	
	Cardiac Output: Should be by thermo dilution method with all accessories	

	EEG Modules with all accessories. Should display at least two channels. (Optional)	
	BIS/Entropy Module: Adult Sensors- 200 numbers. Spectral analysis modules by compressed spectral array. (Optional)	
	Necessary cabling for networking the monitors on turnkey basis.	
	The supplier shall provide environment friendly furniture and wall fittings for the entire system. Cabling has to provided by the supplier.	
5	**Environmental Factors:**	
	The unit shall be capable of operating continuously in ambient temperature of 10-40 deg Celsius and relative humidity of 15-90%	
	The unit shall be capable of being stored continuously in ambient temperature of 0-50 deg C and relative humidity of 15-90%	
6	**Power Supply:**	
	Power Input to be 220-240VAC, 60Hz fitted with Philippine plug	
	Voltage corrector / stabilizer of appropriate ratings meeting ISI Specifications. (Input 160-260 V and output 220-240 V and 50-60 Hz)	
	Suitable UPS with maintenance free batteries for minimum one-hour back-up should be supplied with the system.	
7	**Standards, Safety and Training**	
	Should be FDA, CE,UL or BIS approved product	
	Shall meet the safety requirements per IEC 60601-2-27:1994- Medical electrical equipment –Part 2: Particular requirements for the safety of electrocardiographic monitoring equipment.	
	Shall meet IEC-60601-1-2 :2001 (Or Equivalent BIS) General Requirements of safety for Electromagnetic Compatibility. Or should comply with 89/366/ECC, EMC-directive.	
	Should have local service facility.	
	Back to back warranty to be taken by the supplier from the principal to supply spares for a minimum period 10 years.	
	Comprehensive warranty for 2 years	
	US or European Manufactured	
8	Documentation:	
	User Manual in English (2 Copies)	
	Service Manual in English (2 Copies)	
	Must submit end user list report within last 5 years among major	

	hospitals.	
	List of important spare parts and accessories with their part number and costing.	
	Log book with instruction for daily, weekly, monthly and quarterly maintenance checklist.	
	Original product literature of offered model	
	Certificate of calibration and inspection from factory.	
	Certificate from the Vendor as to capability to perform corrective and preventive all accessories	
	Certificate of sole distributorship from the Manufacturer indicating the name of the Philippine Representative / Vendor	
	SEC Registration of Phillppine Representative / Vendor	