



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

NPM No. 74-2012

11 June 2012

MR. ALBERT A. TEH
General Manager, Administrative Department
MAXIMA MACHINERIES INCORPORATED
871 Quezon Ave., Barangay Sta. Cruz,
Quezon City

Re: Participation of Foreign Bidders

Dear Mr. Teh:

We respond to your letter dated 3 May 2012 seeking clarification on whether Maxima Machineries Incorporated (Maxima), a corporation organized and existing under and by virtue of the laws of the Republic of the Philippines, with seventy-two percent (72%) of its outstanding capital owned by a foreign corporation, may be eligible to participate in the bidding for procurement of goods by the government.

It is represented that Maxima, an exclusive distributor of Komatsu heavy equipment and other industrial machineries, has been participating in government procurement for the last twenty five (25) years. It is likewise represented that when Marubeni Corporation assumed ownership of seventy-two percent (72%) of Maxima's outstanding capital stock, the latter could no longer participate in the government procurement of goods as a local bidder. It is in this context that you are seeking our opinion on whether Maxima could still participate in government procurement of goods despite having seventy-two (72%) foreign equity.

Section 23.5.1.1 of the Implementing Rules and Regulations (IRR) of Republic Act (RA) 9184 provides that corporations duly organized under the laws of the Philippines, and of which at least sixty percent (60%) of the outstanding capital stock belongs to Filipino citizens, may be eligible to participate in the bidding for the supply of goods. Consequently, corporations having less than sixty percent (60%) Filipino ownership or equity shall be ineligible to bid.

However, the IRR of RA 9184 states that upon determination by the procuring entity, after diligent market research, that the goods sought to be procured are not available from local sources, foreign bidders may be eligible to participate in the bidding for the supply of goods.¹ For this purpose, the Head of the Procuring Entity (HOPE) shall

¹Section 23.5.1.2. Foreign Bidders may be eligible to participate under any of the following circumstances:

- a) When provided for under any Treaty or International or Executive Agreement as provided in Section 4 of the Act and its IRR;
- b) When the foreign supplier is a citizen, corporation or association of a country, included in Annex "I" to be issued by the GPPB, the laws or regulations of which grant reciprocal rights or privileges to citizens, corporations or associations of the Philippines;

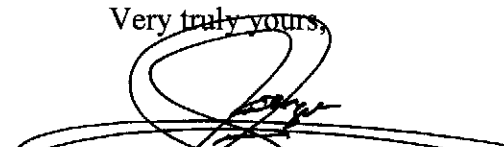
certify such instance.² If however, the goods can be supplied through a local bidder, but no such bidder is interested, the HOPE shall likewise certify to such circumstance, and that the same was due to reasons not attributable to the procuring entity concerned.³

From the foregoing, the determination of the unavailability of local suppliers or interested local suppliers capable of supplying the goods to be procured lies with the procuring entity. Upon determination that the goods sought to be procured are unavailable from local sources or when no sixty percent (60%) Filipino-owned corporation is interested in participating in the bidding process, the procuring entity may proceed with the procurement activity and allow domestic corporations with more than forty percent (40%) foreign equity or foreign corporations to participate.

In the case of a domestic corporation with seventy-two percent (72%) foreign equity, such as Maxima, although such juridical entity is generally regarded as ineligible to participate in the bidding process due to the sixty percent (60%) Filipino equity requirement, participation in government procurement activities may still be possible upon determination by the procuring entity of the unavailability of the goods from local suppliers or lack of local suppliers interested to participate in the procurement process.

We hope that our advice provided sufficient guidance on the matter. Please note that this opinion is being rendered on the basis of the facts and particular circumstances as represented. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director III

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- c) When the goods sought to be procured are not available from local suppliers; or
 - d) When there is a need to prevent situations that defeat competition or restrain trade.

The GPPB shall promulgate the necessary guidelines for this provision; Item 5, Guidelines in the Determination of Eligibility of Foreign Suppliers, Contractors, and Consultants to Participate in Government Procurement Projects.

²*Id.*, Item 5.2. ...[t]he head of the procuring entity or his duly authorized representative shall certify that, after diligent market research conducted by the procuring entity, the goods sought to be procured are not available from Local Suppliers...

³*Id.*, Item 5.3. If despite the availability of the goods sought to be procured, no local supplier is interested to participate in the procurement process, the head of the procuring entity shall certify that it has advertised the same for public bidding and shall make a statement that no local supplier participated in the bidding and that the same is due to reasons not attributable to the procuring entity.