

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

Unit 2506 Raffles Corporate Center, Emerald Avenue, Ortigas Center, Pasig City
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NPM No. 010-2005

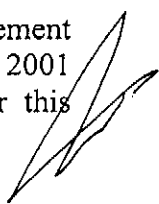
February 4, 2005

CAPT. LINO H. DABI PCG
Assistant Director, Philippine Coast Guard -
Project Management Office
Department of Transportation and Communications
Unit 103, 10/F The Columbia Tower, Ortigas Ave.,
Mandaluyong City

**Re : Construction of the Philippine Coast Guard Support Base
in Mactan, Cebu**

Dear Assistant Director Dabi:

This refers to your letter dated 10 January 2005, which we received on 11 January 2005, requesting clarification on the following concerns pertaining to the implementation by the Philippine Coast Guard (PCG) – Project Management Office (PMO) of the Department of Transportation and Communications (DOTC) of its Maritime Safety Improvement Project – Phase C (hereinafter the “Project”) involving the construction of the PCG Support Base:

1. Can DOTC still enter into contract with the winning bidder using the revised Approved Budget for the Contract (ABC) which is based on the reduced scope of work or new wharf design?
 2. Can DOTC initiate a re-bidding without re-advertisement following the provision of Executive Order 40, Series of 2001 (E.O. 40) since the project was initially bid out under this procurement law?
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3. Due to time constraint in the project implementation caused by factors beyond control, can DOTC use alternative procurement or directly enter into a negotiated procurement with the eligible bidders using the revised ABC?

Considering that the advertisement for the Project was issued on September, 2003, the applicable rules and regulations for its procurement is E.O. 40 and its Implementing Rules and Regulations (IRR) as per Section 77 of the IRR Part A (IRR-A) of Republic Act 9184 (R.A. 9184).

Whether DOTC may enter into contract with the winning bidder using the revised ABC

Per your representation, the revision of the ABC and the conduct of the review of the project design were brought about by the request of the winning bidder, EQUI-PARCO Construction Co. (ECC), for a price adjustment due to substantial increase in the price of construction materials particularly sheet piles and steel bars, and also upon its call for the reduction of scope of work or redesign of the wharf component of the project to be able to work within its bid price.

We are of the opinion that the first question should be answered in the negative based on the following reasons:

Grant of Price Adjustment

Firstly, it is a rule that for the given scope of work in the contract as awarded, all bid prices are considered fixed prices, and therefore not subject to price adjustment during contract implementation, except under extraordinary circumstances and upon prior joint approval of the Procurement Policy Board¹ and the Infrastructure Committee of the National Economic and Development Authority.² It is therefore presumed that before price adjustment may be granted in accordance with the aforementioned conditions, a valid contract should first be in existence. Considering that the contract for the Project was neither signed nor approved, its implementation cannot push through as well as any right to request price adjustment thereon.

Revision of ABC and Modification of Terms, Conditions, and Specifications

Secondly, although it appears that E.O. 40 and its IRR do not prohibit a procuring entity from initiating a review of the responsiveness of its ABC for a particular procurement to the current market prices, we are of the view that it is nonetheless prohibited from adjusting the same accordingly from the time the invitation to bid for the procurement project has been issued/advertised until after there has been a second failure of bidding.

¹ Now the Government Procurement Policy Board as provided under Section 63 of Republic Act 9184.

² Section 33, IRR, E.O. 40.

As provided in Section 18.4 of the IRR of E.O. 40, the procuring entity may modify the terms, conditions, and specifications of the bidding documents after the first failure of bidding in order to reflect current market prices. However, it is specifically provided therein that the ABC shall be maintained as the ceiling for the bid prices.

In case a second failure of bidding occurs, the procuring entity has three options to go about its procurement project, namely: (i) conduct a re-bidding with re-advertisement and/or re-posting under the same ABC, as provided in Sections 18.4 and 14.2 of the IRR of E.O. 40; (ii) enter into a negotiated procurement, as provided in Section 35 of the said IRR; or (iii) re-align its budget to accommodate the necessary increase in the ABC of the procurement project and bid out the same under the adjusted ABC and according to the provisions of the applicable law at the time of the publication of the Invitation to Apply for Eligibility and to Bid.

Thus, it is only after occurrence of a first failure of bidding that a procuring entity may modify the terms, conditions, and specifications of the project. On the other hand, the ABC may be revised after the first failed bidding if it is obvious that it does not reflect the current market prices; otherwise, it is strongly suggested that the ABC be revised only after a second failure of bidding has occurred.

Based on the foregoing discussion, it is apparent that the ABC and the terms, conditions, and specifications may only be revised after a failure of bidding is declared. Accordingly, there being no such declaration of failure by DOTC, the ABC for the Project cannot be revised nor the terms, conditions, and specifications therefor be modified; more so can DOTC enter into contract with ECC on such terms.

Withdrawal of Bid

Lastly, we take note of the action of ECC in withdrawing its bid.

Under ordinary circumstances, the winning bidder's withdrawal of its bid after the notice of award has been issued would prompt the procuring entity to call on its bid security or, if applicable, the performance security and proceed to post-qualify the next lowest rated bidder. However, taking into account the period that has lapsed since the issuance of the notice of award until the withdrawal by the winning bidder of its bid and the requirement for bid validity under Sections 19.3³ and 30.2.3⁴ of the IRR of E.O. 40, the performance security it has posted, as well as other bids, would have already ceased to be valid.

³ x x x. Bids and Bid Securities shall be valid for a reasonable period as determined by the head of the agency concerned, and shall be indicated in the Instruction to Bidders, but in no case shall exceed one hundred twenty (120) calendar days from the date of the opening of bids.

⁴ Contract award shall be made within the bid validity period. Should it become necessary to extend the validity of the bids and, if applicable, the bid securities, the agency concerned shall request in writing all those who submitted bids for such extension before the expiration date therefor. x x x

As such, the situation created by the withdrawal of ECC's bid where no other bid is still valid may be a basis for the declaration of a failure of bidding by DOTC – not revision of the ABC and the specifications of the Project.

Whether DOTC may initiate a re-bidding without re-advertisement using E.O. 40 and its IRR

Section 18.4 of the IRR of E.O. 40 mandates the re-advertisement and/or re-posting of the invitation for bids in cases of re-bidding. Thus, re-biddings necessarily include the process of issuing the invitation for bids through advertisement and/or posting as provided under Section 14.2 of the same IRR.

With the re-advertisement and/or re-posting of the invitation for bids, a new procurement opportunity is being opened to all who may be interested and qualified to participate therein which shall be conducted using the existing laws, rules, and regulations. As such, notwithstanding that the previous bidding was conducted under E.O. 40 and its IRR, the re-advertisement and/or re-posting should be made in accordance with the provisions of R.A. 9184 and its IRR-A.

This is supported by the fact that the transitory clause⁵ of the IRR-A of R.A. 9184 merely allowed the application of previous applicable laws, rules, and regulations to procurement activities that have already been advertised and/or posted prior to its effectivity in order to address the hiatus that may arise with the repeal of other laws then applicable.

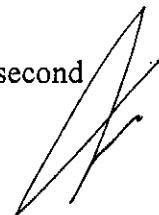
In this regard, we are of the opinion that DOTC cannot proceed to initiate a re-bidding without re-advertising and/or re-posting the invitation for bids for the Project using E.O. 40 and its IRR. Moreover, it is strongly recommended that DOTC bid out the Project in accordance with the provisions of R.A. 9184 and its IRR-A.

Whether DOTC may enter into negotiated procurement with the eligible bidders using the revised ABC

With the repeal of E.O. 40 and its IRR, any procurement, whether by public bidding or alternative method of procurement, to be made at this time shall be conducted according to the provisions of R.A. 9184 and its IRR-A.

Therefore, in order to validly enter into negotiated contract for the Project with a contractor, any of the following conditions provided in Section 53 of the IRR-A related to infrastructure projects shall have to be satisfied:

- a) Where there has been failure of public bidding for the second time as provided in Section 35 of the Act and this IRR-A;



⁵ Section 77.

- b) In case of imminent danger to life or property during a state of calamity, or when time is of the essence arising from natural or man-made calamities or other causes where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities. x x x;
- c) Take-over of contracts, which have been rescinded or terminated for causes provided for in the contract and existing laws, where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities; or
- d) Where the subject contract is adjacent or contiguous to an on-going infrastructure project: Provided, however, That (i) the original contract is the result of a Competitive Bidding; (ii) the subject contract to be negotiated has similar or related scopes of work; (iii) it is within the contracting capacity of the contractor; (iv) the contractor uses the same prices or lower unit prices as in the original contract less mobilization cost; (v) the amount involved does not exceed the amount of the ongoing project; and (vi) the contractor has no negative slippage: Provided, further, That negotiations for the procurement are commenced before the expiry of the original contract. x x x;

Without any of the afore-mentioned conditions, a contract for the Project cannot be validly entered into using negotiated procurement.

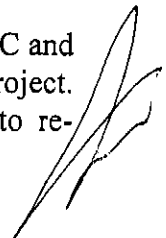
Based on your representation, it is our view that none of the above-mentioned conditions fall squarely with the circumstances attending the Project. Therefore, since negotiated procurement cannot be resorted, the procurement of the Project should be bid out.

Moreover, it is worthy to reiterate that as discussed earlier, the procuring entity cannot choose to revise the ABC and resort to negotiated procurement using the revised ABC. Under the present circumstances of the Project, if the procuring entity declares a failure of bidding and revises the ABC, the appropriate procurement method to be applied therefor is still public bidding not negotiated procurement.

Conclusion

In sum, the questions above-mentioned can be answered as follows:

1. DOTC cannot enter into contract with ECC under the revised ABC and using the modified terms, conditions, and specifications for the Project. Instead, a failure of bidding should be declared and proceed to re-bidding;



2. DOTC cannot conduct a re-bidding without re-advertisement using the provisions of E.O. 40 and its IRR. The re-bidding and all the processes involved shall have to be conducted in accordance with the provisions of R.A. 9184 and its IRR-A; and
3. DOTC cannot resort to negotiated procurement for the Project because the conditions attending the said project do not involve any of the conditions specified in Section 53 of the IRR-A of R.A. 9184.

This opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not necessarily be applicable upon a different set of facts or circumstances.

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director III

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January 11, 2005


CAPT. LINO H. DABI PCG
Assistant Director, PCG-PMO
Department of Transportation and Communications
Unit 103, 10/F The Columbia Tower,
Ortigas Avenue, Mandaluyong City

Dear Assistant Director Dabi:

With reference to your letter dated 10 January 2005, addressed to Executive Director Jose Martin C. Syquia, requesting clarification on Republic Act 9184 and its Implementing Rules and Regulations Part A, we are acknowledging receipt of the original copy of the said request on 11 January 2005.

We wish to inform you that in order to extend immediate assistance at the earliest possible opportunity we shall be responding to concerns/queries with established answers through phone. With respect to concerns/queries with no concrete or definitive answer, this office shall either issue a written opinion therefor or raise the same to the Government Procurement Policy Board for appropriate resolution should referral thereto becomes necessary.

Very truly yours,



MS. MARIA AGATHA D. SINDICO
Procurement Management Officer IV
Legal and Policy Group