

NPM No. 10-2006

April 10, 2006

MR. MARCIAL P. LICHAUCO JR.

President and General Manager

911 Alarm

2/F DPC Place Building, 2322 Don Chino Roces Ave.

1231 Makati City

Re : Correction of Arithmetical Errors in Computation and Remedies available to the bidder

Dear Mr. Lichauco:

This refers to your letter dated 11 March 2006 which we received on 14 March 2006 requesting clarification on the following issues:

1. Whether or not the Bids and Awards Committee (BAC) can do the correction on arithmetical errors in the computation of the NFCC as submitted by the bidders.
2. What constitutes the term "on-going contracts" in accordance with law?
3. Whether or not the BAC's decision of awarding the contract to the lowest calculated bidder, pending resolution of the Motion for Reconsideration filed by another bidder constitutes abuse of authority.

Correction of Arithmetical Errors

As can be readily seen from the expressed provision of Section 32.4.1 of the Implementing Rules and Regulations Part A (IRR-A) of Republic Act No. 9184 (R.A. 9184) the BAC can make corrections on arithmetical errors in the financial proposals of the bidders during the detailed evaluation of bids. Specifically, the pertinent provision is quoted hereunder, to wit;

- 32.4.1 To determine the Lowest Calculated bid for the procurement of goods and infrastructure projects, after the preliminary examination of bids, the BAC shall immediately conduct a detailed evaluation of all bids rated "passed" using a non-discretionary criteria, as stated in the Invitation to Apply for Eligibility and to Bid and the Instructions to Bidders, which shall include a consideration of the following:

- b) **Minor arithmetical corrections** to consider computational errors, omissions and discounts if allowed, in the bidding documents to enable proper comparison of all eligible bids. Any adjustment shall be calculated in the monetary terms to determine the calculated prices. (Emphasis supplied).

Based on the afore-quoted provisions, it is clearly within the ambit of the BAC's authority to make the necessary corrections on the bidder's financial proposals since the corrected computations by the BAC shall be the basis for the determination of the Lowest Calculated Bid.

Definition of "On-going Contracts"

One of the basic principles in statutory construction provides that where the law speaks in clear and categorical language, there is no room for interpretation or construction; there is only room for application¹.

Applying the aforementioned principle to the matter posed for resolution, it is evident in the language of the law that the term "on-going contracts" as used to describe the NFCC formula, shall be taken to mean or include all contracts that have been awarded to the contractor even those which are yet to be started. The extent of the term "on-going contracts" was further emphasized by the succeeding phrase in the provision quoted herein as "including awarded contracts yet to be started".

Verily, where the law explicitly and clearly provides for the parameters defining the extent or scope of the term used therein, another definition further clarifying the matter would be unnecessary, considering that its existence would only be a mere surplusage.

Corollary to this, the following formula for the computation of the NFCC as provided under Section 23.11.1 of IRR-A of R.A. 9184, shall be adopted:

NFCC = (Current assets minus current liabilities) (K)] minus the value of all outstanding projects under on-going contracts, including awarded contracts yet to be started.

Remedies of the Bidder

At the outset, it must be clarified that that the Government Procurement Policy Board (GPPB) has no jurisdiction to rule over actual controversies with regard to the conduct of the bidding process considering that it has no *quasi-judicial*² functions

¹ Statutes, Samson Alcantara, 1997 ed. , p. 36

² Quasi-judicial is defined as a term applied to the actions or discretions of public administrative officers or bodies required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature. (See Agpalo, *Philippine Administrative Law*, 1999 Ed., p. 216 citing *Lupangco v. CA*, 160 SCRA 848 [1988])

under the law. As such, it can neither ascertain the truth of the statements and facts given by the contending parties, nor the certainty of the issues to be determined and resolved. It does not adjudicate claims; neither is it the proper forum where government agencies and complaining bidders can contest and argue their conflicting positions on government procurement issues. Instead, it is merely granted with quasi-legislative or rule-making power primarily intended to determine policy directions in the area of public procurement.

Hence, with regard to the last issue, the GPPB cannot rule on the propriety of the action undertaken by the concerned BAC. However, it would be noteworthy to cite the following relevant provisions of the IRR-A of R.A. 9184 to provide proper guidance in resolving the matter:

23.3 The BAC shall inform an eligible prospective bidder that it has been found eligible to participate in the bidding. On the other hand, the BAC shall inform an ineligible prospective bidder that it has been found ineligible to participate in the bidding, and the grounds for its ineligibility. **Those found ineligible have seven (7) calendar days upon written notice or, if present at the time of opening of eligibility requirements, upon verbal notification, within which to file a request for a reconsideration with the BAC: *Provided, however, That the BAC shall decide on the request for reconsideration within seven (7) calendar days from receipt thereof.*** The BAC may request a prospective bidder to clarify its eligibility documents, if it is deemed necessary. The BAC shall not be allowed to receive, hold and/or open the bids of ineligible prospective bidders: *Provided, however, That if an ineligible prospective bidder signifies his intent to file a motion for reconsideration, the BAC shall hold the eligibility documents of the said ineligible prospective bidder until such time that the motion for reconsideration has been resolved.* Furthermore, for procurement of goods, the BAC shall hold the bid of the said ineligible prospective bidder unopened and duly sealed until such time that the motion for reconsideration has been resolved. (Emphasis supplied.)

x x x

55.1 **Decisions of the BAC with respect to the conduct of bidding may be protested in writing to the head of the procuring entity: *Provided, however, That a prior motion for reconsideration should have been filed by the party concerned within the reglementary periods specified in this IRR-A, and the same has been resolved. The protest must be filed within seven (7) calendar days from receipt by the party concerned of the resolution of the BAC denying its motion for reconsideration.*** A protest may be made by filing a verified position paper with the head of the procuring entity concerned, accompanied by the payment of a non-refundable protest fee. The non-refundable protest fee shall be in an

amount equivalent to no less than one percent (1%) of the ABC. (Emphasis supplied.)

x x x

57. In **no case** shall any **protest taken from any decision treated in this Rule stay or delay the bidding process**: *Provided, however,* That **protests must first be resolved before any award is made**. (Emphasis supplied.)

Accordingly, the foregoing provisions explicitly outlined the proper remedies available to any complaining bidder on issue or controversies involving the bidding process. Thus, any complaining bidder is advised to direct its complaint to the BAC which has the jurisdiction to decide on the matter. Subsequently, the said decision of the BAC may be the subject of a Motion for Reconsideration (MR) to be filed by the same bidder. Upon the denial of the MR, a valid protest in accordance with the requisites prescribed by law consists of the submission of verified position paper accompanied by the payment of a non-refundable protest fee equivalent to 1% of the ABC should be complied with by the bidder so that it may be properly acted upon by the BAC. In the absence of any formal complaint/protest filed regarding the questioned decision of the BAC, the award of the contract to the lowest calculated and responsive bidder shall not be interrupted nor stayed. Significantly, the corresponding reglementary periods for each of the said remedies must be strictly observed.

If after exhausting all the available administrative remedies, the complaining bidder is still unsatisfied with the outcome of his complaint, said bidder can always file an appropriate action in court.

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,


ESTANISLAO C. GRANADOS JR.
Executive Director IV