

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

Mezzanine 125, Mabini Hall, Malacañang, Manila
Telefax Nos. (02) 735-4962; (02) 736-5758

NPM No. 107 -2004

August 3, 2004

MR. EDGAR A. TIU

Owner
BM Marketing & Construction
116 Salazar St., Tacloban City

**Re : Conduct of Bidding for the Construction and Development of the
Balangiga Municipal Water Supply System Project by the
Municipality of Balangiga**

Dear Mr. Tiu:

This refers to your letters dated July 15, 20 and 23, 2004, which we received on July 16, 20 and 23, 2004 respectively. A reading of the said letters would summarize the issues to be resolved, to wit:

1. Whether or not the non-submission of a Special License issued by the Philippine Contractors' Accreditation Board (PCAB) for a Joint Venture (JV) is an act of misrepresentation, which is a ground to declare the prospective bidder ineligible, as contemplated under Section 23.4 of the Implementing Rules and Regulations Part A (IRR-A) of Republic Act No. 9184 (R.A. 9184);
2. Whether or not the procuring agency may increase the minimum eligibility requirements that a prospective bidder has to satisfy, specifically as regards the requirement on the "largest single completed contract;" and
3. Whether or not the term "protests" mentioned in the proviso under Section 57 of the IRR-A of R.A. 9184 include the possible court action as a consequence of an unsuccessful protest filed by a losing bidder, such that, said court action must first be resolved or decided upon by the court before the procuring agency may award the contract;

Note: Faxed to (053) 325 - 7228

& Picked-up by Ms. Melinda Alonzo dtl. 8/10/04 - Riza & Atk jr

These issues were raised in connection with the conduct of bidding for the construction and development of the Balangiga Municipal Water Supply System Project by the Municipality of Balangiga, Eastern Samar.

In response to these issues, we wish to inform you that we have conferred and addressed the same to the Bids and Awards Committee (BAC) of the Municipality of Balangiga through telephone on July 27, 2004 and accordingly, we gave our advices and recommendations in consonance with the applicable provisions of R.A. 9184 and its IRR-A.

Misrepresentation by the Prospective Bidder as a Ground for Ineligibility and Disqualification

Misrepresentation, in legal parlance as well as in its ordinary sense connotes misstatement or falsification; it is certainly associated with fraud, and implies an intent to cause deception. Under Philippine jurisprudence, misrepresentation is defined as a false representation of a material fact by one of the parties to the other, tending directly to induce the other to enter into the contract, or to do on less favorable terms to himself, when otherwise he might not enter into the contract at all, or might demand terms more favorable.¹

Based on these definitions, it may be difficult to interpret that the non-submission of a Special PCAB License by a prospective JV bidder constitutes an act of misrepresentation on the latter's status as a JV considering that neither the element of fraud nor the intent to cause deception is present. It may be observed that the non-submission or failure to submit any of the eligibility documents, as required, need not be construed as an act of misrepresentation to disqualify a failing bidder as it will per se, render the JV ineligible to participate in the bidding due to the non-discretionary "pass/fail" criteria prescribed under the IRR-A of R.A. 9184.

Largest Single Completed Contract as Eligibility Criterion in the Procurement of Infrastructure Projects

Section 23.11.2 (3) of the IRR-A of R.A. 9184 prescribes as one of the eligibility criteria in the procurement of infrastructure projects that the value of largest single completed contract of the bidder should be at least 50% of the approved budget of the contract (ABC) to be bid, to wit:

"The value of the prospective bidder's **largest single completed contract**, adjusted to current prices using the National Statistics Office consumer price indices available at the G-EPS website, and similar to the contract to be bid, must be at least fifty percent (50%) of the approved budget for the contract to be bid: *Provided however*, That in the case of a contractor under Small A and Small B categories without similar experience on the contract to be bid, he may be allowed to bid if the cost of such contract is not more than fifty

¹ Divinagracia v. American Home Assurance Co., 39990-R, October 2, 1974; 19 C.A.R. (2s) 1041

percent (50%) of the allowable range of contract cost of his registration. x x x" (Emphasis Supplied)

Based on the aforementioned provision, it is clear and emphatic that the requirement should be based on the prospective bidder's **largest single completed contract** only. The said provision requires only One (1) completed contract, that is similar to the contract to be bid and the value of which must be at least 50% of the ABC.

Although Section 17.3 of the IRR-A of R.A. 9184 allows the procuring agency to require additional document requirements or specifications such as summary of data, facilities and/or services from the prospective bidders to be included in their respective bids, we believe that such prerogative by the agency may only be exercised whenever necessary and applicable in consideration of the size, cost and type of project being bid out.

However, with regard to the requirement on the largest single completed contract, we are of the opinion that it is the spirit of the law to fix and define the minimum requirement that the prospective bidders will have to satisfy on the basis of such "single" completed contract in establishing its track record and capacity to perform contractual obligations. Otherwise stated, the procuring agency can only require a "single" largest completed contract from the prospective bidders as the basis for the eligibility criterion prescribed under Section 23.11.2 (3) of the IRR-A of R.A. 9184, however, the bidders may submit more than the said minimum requirements fixed by law.

Protests on the Decisions of the BAC vis-à-vis a Court Action lodged with the Regular Courts of Justice

As regards the third issue, we wish to inform you that the Protests allowed under Rule XVII of the IRR-A of R.A. 9184 are absolutely different from a court action that may be resorted to by the losing party after the protests have been completed as mentioned under Section 58 of the IRR-A of R.A. 9184.

While, the said Protest refers to a grievance before the head of the procuring entity on the decisions by the BAC in the conduct of bidding, which is administrative in nature and undertaken within the procuring agency only; A court action, on the other hand, is in the nature of a Petition for Certiorari under Rule 65 of the Revised Rules of Court², which shall be filed in the form of a verified petition in the proper court. This is judicial in nature and the case shall be tried in the proper regional trial court having jurisdiction over the head of the procuring entity concerned.

² Rule 65 of the 1997 Revised Rules of Court provides:

Section 1. Petition for certiorari. – When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of its or his jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

The petition shall be accompanied by a certified true copy of the judgment, order or resolution subject thereof, copies of all pleadings and documents relevant and pertinent thereto, and a sworn certification of non-forum shopping as provided in the paragraph of Section 3, Rule 46.

Furthermore, Section 58.1 of the IRR-A of R.A. 9184 is clear on this point:

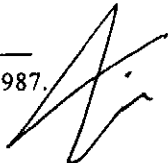
“Court action may be resorted to only after the protests contemplated in this Rule shall have been completed, i.e. resolved by the head of the procuring entity with finality. x x x (Emphasis Supplied)

Based on the above discussions, it can be clearly and logically understood that the “protests” mentioned in the proviso under Section 57 of the IRR-A of R.A. 9184 do not include or cover the possible court action that may be resorted to by the losing party since said court action may only be had after the protests have been resolved by the head of the procuring entity with finality. Evidently, a protest under R.A. 9184 and its IRR-A and a court action sanctioned by the Rules of Court, are two distinct and separate remedies, considering that an original action for certiorari is an independent action and not a continuation or part of the protest proceedings. Hence, we are of the opinion that the “protests” referred to in Section 57 of the IRR-A pertain only to protests decided by the head of the procuring entity with finality and not to court actions being tried in the regular courts. Accordingly, the contract shall be awarded after all the protests have been resolved with finality by the head of the procuring entity, and that a court action after the protest proceedings does not necessarily carry with it restraint on the head of the procuring entity in awarding the contract, save in cases where there is a temporary restraining order or injunctive relief granted by the court.

As regards the issue stated in your letter dated July 27, 2004, we want to clarify, as we did before, that considering that the IRR-B of R.A. 9184 for foreign assisted projects has not yet been promulgated and issued, loan agreements with International Financial Institutions (“IFIs”) take precedence over R.A. 9184 and its IRR-A, since they are treated as international agreements³ falling within the exception stated in Section 4. However, there are instances that such loan agreements specify that the particular procurement financed by the IFI concerned shall be governed by domestic or local procurement laws; in which case, R.A. 9184 and its IRR-A remain to be applicable. Hence, it can be gainsaid that whether a foreign assisted project is to be governed by the guidelines of the IFI concerned is dependent on the tenor of such agreement.

At this point, we would like to make it clear that the foregoing issues were resolved on the basis of questions raised in the abstract, without reference to particular facts and circumstances. Hence, matters resolved herein are advisory only on the questions of law raised and not conclusive on the facts to which such issues are associated. Time and again, we have made it clear that the Government Procurement Policy Board (“GPPB”) has no investigatory or adjudicatory powers and functions. Consequently, whatever may be the concerns of the B.M. Marketing and Construction on the bidding process conducted by the Municipality of Balangila on its Water Supply Project, properly pertains within the exclusive jurisdiction of its Bids and Awards Committee and local chief executive, since they are the ones competent and legally authorized to resolve the issues in the administrative level. Be that as it may, the foregoing elucidations may be used by the procuring entity concerned as a guide in resolving the contentious issues brought before it. For this purpose, the municipality

³ See DOJ Opinion 46 series of 1987.

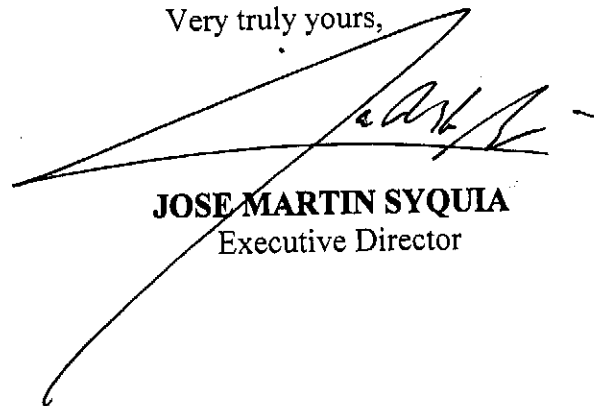


may also seek further guidance from our office on the proper interpretation of the established procurement rules and procedures under R.A. 9184 and its IRR-A.

In view of the foregoing, we respectfully advise the B.M. Marketing and Construction to refrain from further raising legal questions before the GPPB, which though theoretical at first glance, may be interpreted as a mode of obtaining a favorable opinion to strengthen its case in the protest proceedings. Inasmuch as we want to guide the private sector in their dealings with Government agencies, the GPPB, however, will not allow itself to be used to advance private interest, and it will always hesitate to render advisory opinion, on issues where substantive rights and questions of fact are involved. Besides, the GPPB was established first and foremost to determine policy directions in the area of government procurement and to guide procuring entities in the conduct of their biddings, for the proper implementation of R.A. 9184 and its IRR-A; but not to act as a general counsel of private individuals and entities with dealings in the Government.

We trust that this clarifies matters.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'Jose Martin Syquia', is written over the typed name and title.

JOSE MARTIN SYQUIA
Executive Director