

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

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NPM No. 113-2004

August 12, 2004

Mr. ARMANDO H. PAREDES
General Manager
Metropolitan Cebu Water District
M.C. Briones - P. Burgos St.
Cebu City

Re : **Procurement of Consulting Services for Power Management System**

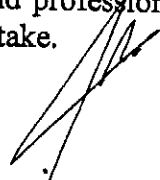
Dear Mr. Paredes:

This refers to your letter dated July 22, 2004, which we received on July 26, 2004, requesting for opinion on the planned engagement of the Metro Cebu Water District ("MCWD") of a private firm that will provide it with a cost-effective, reliable and innovative power management system.

Your query centers on the issue of whether or not the engagement of such private firm should be undertaken through competitive bidding, considering that the proposal is based on a "no cure, no pay" principle and that the power management system known as the Power Cost Reduction System ("PCRS") is a proprietary technology of such firm.

Engagement of Private Firm for the Application of the PCRS Classified as Consulting Services

Based on your representation, we have observed that the engagement of a private firm for the implementation of a cost-effective power management system is in a nature of procurement of consulting services, considering that the intended contract for such involves the review, assessment and determination of MCWD's power consumption status, preparatory and as a component part to the PCRS. To our mind, this is a form of a technical service and/or special study, a project that requires adequate external technical and professional expertise beyond the capability and/or capacity of the MCWD to undertake.



In view of this, we are of the opinion that the engagement of such firm is governed by Republic Act No. 9184 ("R.A. 9184"), otherwise known as the Government Procurement Reform Act," and its Implementing Rules and Regulations Part A ("IRR-A"). Although the engagement of the private firm has some peculiarities in the terms of the contract, such as the "no cure, no pay principle," which takes the form of a conditional obligation, it does not negate the fact that this is a form government procurement, falling within the specific definition of Section 5 (p) of the IRR-A of R.A. 9184, to wit:

Procurement. Refers to the acquisition of Goods, Consulting Services, and the contracting for Infrastructure Projects by the Procuring Entity. In case of projects involving mixed procurements, the nature of the procurement, *i.e.*, goods, infrastructure projects, or consulting services, shall be determined based on the primary purpose of the contract. Procurement shall also include the lease of goods and real estate. With respect to real property, its procurement shall be governed by the provisions of R.A. 8974 and other applicable laws, rules and regulations.

Verily, R.A. 9184 and its IRR-A does not limit its application for the procurement of goods, infrastructure projects and consulting services, which is to be covered by contracts characterized as pure obligation. The Government Procurement Act and its Implementing Rules are equally applicable to procurement contracts that are subject to conditions.

In the light of the foregoing, since the MCWD is to acquire the services of a private firm for the implementation PCRS, which obviously has to be paid through public disbursements though subject to some conditions, there is no doubt that this is a form of procurement in the strict sense of the word and; hence, subject to the established procurement rules and regulations.

Procurement of Consulting Services Undertaken through Competitive Bidding as a General Rule

With the application of R.A. 9184 and its IRR-A on the engagement of the firm for the adoption of the PCRS settled, MCWD should comply with the mandatory provisions of the law. Thus, for this type of procurement, it has to undertake competitive bidding, as this is the general mode of procurement prescribed by Section 10 of the IRR-A of R.A. 9184, viz:

All procurement shall be done through competitive bidding, except as provided in Rule XVI of this IRR-A.

On the other hand, if it is certified that the PCRS is a proprietary technology, we believe that the procurement of such consulting services may be undertaken through Limited Source Bidding under Section 49 of the IRR-A, as the technology would be a highly-specialized type of consulting services. But of course, resort to this alternative

method must be undertaken with prudence. Alternative methods of procurement are resorted only to promote economy and efficiency, and in all instances the procuring entity shall ensure that the most advantageous price for the Government is obtained.

Furthermore, if resort to Limited Source Bidding is justified, MCWD still has to follow the basic procedures in competitive bidding such as eligibility check, bid evaluation, negotiation, post-qualification, contract award, signing and approval of contract. There are also certain requirements under the IRR-A which should be complied in the conduct Limited Source Bidding such as, issuing a direct invitation to bid to a set of pre-selected prospective bidders with known experience and proven capability to provide the services required in the contract. This set of pre-selected prospective bidders should appear in the list of a relevant government authority that has expertise in the type of procurement concerned. In the absence of such list or relevant government authority, we strongly suggest that MCWD resort to competitive bidding in the hiring of consultant/s for the development of its power management system.

Special Conditions of the Contract for Consultancy Should be in Harmony with R.A. 9184 and its IRR-A

Based on the terms of the contract for the PCRS enumerated, we notice that some terms that run contrary to the principles under R.A. 9184 and its IRR-A. The following are our observations:

As to the advance fee that has to be paid by MCWD, this should not exceed fifteen percent (15%) of the contract amount and should be devoted only for the purpose of mobilization. This advance payment should be secured by an irrevocable standby letter of credit, acceptable to the procuring entity, in an amount equal to the advance payment. Furthermore, the advance payment shall be repaid by the hired consultant by deducting from his progress payments such sum as agreed upon during contract negotiations until fully liquidated within the duration of the contract.¹

With regard to the premium pay of seventy percent (70%) of the amount of power cost savings for the first twelve (12) months, and sixty percent (60%) for the succeeding years up to the fifth year, we are of the view that this would violate the fixed price requirement for bid prices mandated by the IRR-A of R.A. 9184. Section 61.1 thereof provides:

For the given scope of work in the contract as awarded, all bid prices shall be considered as fixed prices, and therefore not subject to price escalation during contract implementation, except under extraordinary circumstances and upon prior approval of the GPPB. All contracts shall be denominated and payable in Philippine currency, and this shall be stated in the bidding documents: *Provided, however,* That should the procuring entity receive bids denominated in foreign currency, the same shall be converted to Philippine currency based on the

¹ See Annex "F" of the IRR-A of R.A. 9184.

exchange rate prevailing on the day of the bid opening. (Emphasis supplied)

Considering that the premium pay is based on the power cost savings, the price that MCWD would have to pay is variable, which evidently transgresses upon the aforementioned provision. It must be noted that the fixed price requirement on bid prices under R.A. 9184 and its IRR-A is a stringent requirement that must be observed by procuring entities and bidders. Section 61 of R.A. 9184 presupposes that the bidders for a particular government project should submit a fixed bid price in its financial proposal for the project being bid out, which shall be treated as its offered price to the government. Furthermore, the fixed price requirement for bid prices in R.A. 9184 and its IRR-A cannot be compromised as it is the very basis for the exact comparison of bids. Additionally, if the premium pay would be based on the power cost savings, MCWD would not be able to fix beforehand its approved budget for the contract (ABC), which should be included in its Invitation to Apply for Eligibility and to Bid and contained in the agency's Annual Procurement Plan.

Lastly on the issuance of a letter of credit to the private firm to be hired for the PCRS, we are of the view that this is again violative of the IRR-A, specifically Section 42.5, which provides:

No procuring entity shall be allowed to issue a letter of credit in favor of a Philippine entity or to any of the latter's foreign manufacturers or suppliers, with respect to any procurement. (Emphasis supplied)

The rationale behind the proscription for the issuance of a letter of credit under this provision is couched on the fact that the same is treated as a form of advance payment; an eventuality frowned upon by Section 88 of Presidential Decree 1445.² Advance payment, except in cases allowed by the IRR-A for mobilization in the procurement of consulting services and infrastructure projects, is never countenanced for the simple reason that the government should not fund, directly or indirectly, the business endeavor of a bidder.³ It is in this context that letters of credit are prohibited to be issued to a Philippine entity.

In view of the foregoing elucidations, and considering that the procurement of consulting services for MCWD's power management system should be undertaken

² Section 88. *Prohibition against advance payment on government contracts.* - (1) Except with the prior approval of the President (Prime Minister) the government shall not be obliged to make an advance payment for services not yet rendered or for supplies and materials not yet delivered under any contract therefor. No payment, partial or final, shall be made on any such contract except upon a certification by the head of the agency concerned to the effect that the services or supplies and materials have been rendered or delivered in accordance with the terms of the contract and have been duly inspected and accepted.

(2) Notwithstanding the foregoing paragraph, any government agency, with the approval of the proper department head, may furnish supplies and materials to any party who has a contract with that agency if the supplies and materials are needed in the performance of the services being contracted for and the value thereof does not exceed in any one month ten percent of the value of the services already rendered due and unsettled as computed by the agency concerned.

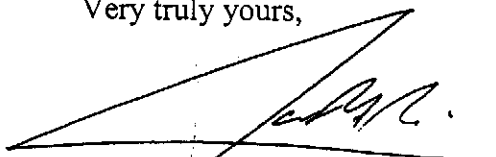
³ Bartolome C. Fernandez, *A Treatise on Government Contracts under Philippine Law*, p. 184 (2001).

through competitive bidding or limited source bidding, the foregoing provisions should not be included in the provisions of the contract for such consultancy services.

With the foregoing discussions, we hope that the issues and concerns of the MCWD have been properly addressed. Please note that this opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not be necessarily applicable upon a different set of facts or circumstances.

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director

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