

NPM No. 117-2015

3 November 2015

MR. MICHAEL FRANDY SALAZAR
OMNIPRIME MARKETING, INC.
1207-B, West Tower, Philippine Stock Exchange Centre
Exchange Road, Ortigas Center
Pasig City

Re: Joint Venture Participation; Written Queries


Dear Mr. Salazar:

This refers to your email requesting for an opinion on the following issues:

1. Whether Joint Ventures may be prohibited by the Procuring Entity (PE) to participate in a bidding process; and
2. Whether only the queries sent by prospective bidders who have purchased the bidding documents may be entertained by the PE.

At the outset, we wish to inform you that the Government Procurement Policy Board (GPPB) and its Technical Support Office (GPPB-TSO) only render policy and non-policy matter opinions, respectively, on matters purely pertaining to the interpretation of the procurement law and its associated rules and regulations. We have no jurisdiction to rule over actual controversies with regard to the conduct of bidding, since the office has no quasi-judicial functions or investigatory powers under the law. Moreover, we adhere to the position that apart from courts having actual jurisdiction over the subject matter of a case, we cannot, nor any other government agency, authority, or official, encroach upon or interfere with the exercise of the functions of the BAC, since these duties and responsibilities fall solely within the ambit of its authority and discretion sanctioned by law.¹ In this wise, we shall limit our discussion on the interpretation of relevant procurement laws, rules and regulations pertinent to the issue presented.

Joint Venture as Recognized Entity

Sections 23.5.1.1(e), 23.5.2.1(e), and 24.3.1(e) of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 particularly specify Joint Ventures as one of the entities that can participate in a bidding activity. 

¹ NPM No. 46-2013 dated 11 June 2013.

In *Information Technology Foundation of the Philippines. v. COMELEC*² citing *Kilosbayan v. Guingona*³, a joint venture was defined by the Supreme Court as follows:

[A]n association of persons or companies jointly undertaking some commercial enterprise; generally, all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and [a] duty, which may be altered by agreement to share both in profit and losses.

Accordingly, in the context of Philippine public procurement, parties to a Joint Venture form such association with the intention to submit a bid, and can be held jointly and severally responsible and liable before and after contract award. Moreover, forming a Joint Venture is considered to be the recourse for interested bidders who do not possess the minimum requirements⁴ to participate in the procurement opportunity. Individual bidders are allowed to partner with other persons/entities to satisfy the requirements provided by law and the qualifications necessary for the project. This encourages wider participation of prospective bidders, especially in industries, where there are limited qualified suppliers, contractors, or consultants, thereby enhancing competition.

In the procurement of goods and consulting services, bids from existing and prospective Joint Ventures shall be accepted by the PE, provided that Filipino ownership or interest in the Joint Venture shall be at least sixty percent (60%)⁵. In compliance with the rules on eligibility requirements, existing Joint Ventures are required to submit a valid Joint Venture Agreement (JVA), while prospective Joint Ventures shall submit a duly notarized statement from all the potential joint venture partners stating that they will enter into and abide by the provisions of the JVA in the instance that the bid is successful.⁶ In this case, a copy of the valid JVA shall be submitted to the PE within ten (10) calendar days from receipt by the bidder of the notice from the Bids and Awards Committee (BAC) that the bidder has the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid, as the case may be.⁷

In the procurement of infrastructure projects, only existing Joint Ventures are allowed to participate in accordance with GPPB Resolution No. 29-2014⁸, which amended Section 23.1(b) of the IRR pursuant to RA 4566⁹. In this regard, a duly notarized statement from prospective parties to a Joint Venture is no longer acceptable in lieu of a valid JVA. Nevertheless, the Joint Venture must still comply with the eligibility criterion that ownership or interest in the Joint Venture concerned shall be at least seventy-five percent (75%) Filipino owned. However, where the structures to be built require the application of techniques and/or technologies which are not adequately possessed by a person/entity meeting the seventy-five percent (75%) Filipino ownership requirement, Filipino ownership or interest shall not be less than twenty-five percent (25%).¹⁰

All told, we emphasize that RA 9184, its IRR and allied rules allow the participation of Joint Ventures. In order to address technical and financial eligibility limitations, the

² G.R. No. 159139, 13 January 2004.

³ 232 SCRA 110, 144, May 5, 1994.

⁴ NPM No. 105-2014, dated 4 November 2014.

⁵ Sections 23.5.1.1(e) and 24.3.1(e), IRR of RA 9184.

⁶ Sections 23.1(b) and 24.1(b), IRR of RA 9184.

⁷ Section 37.1.4(a)(i), IRR of RA 9184.

⁸ Issued on 5 December 2014.

⁹ Contractor's License Law.

¹⁰ Section 23.5.2.1(e), IRR of RA 9184.

establishment of Joint Ventures are even encouraged in consonance with the principle of competitiveness embodied in Section 3 of RA 9184 and its IRR.

Queries of Prospective Bidders

Section 22.3 of the IRR of RA 9184 gives the PE the option to allow only those who have purchased the Bidding Documents to participate in the pre-bid conference and raise or submit written queries or clarifications pertaining to the procurement activity. This rule is also contained in Item 6 of the Invitation to Bid (IB) contained in the standardized Philippine Bidding Documents. This policy was adopted to address the experience of PEs of having to respond to queries and requests for clarification during the pre-bid conference from entities that do not have any genuine intention to participate in the procurement activity.¹¹

Accordingly, the PE, through the BAC, is given the option to allow the participation of a prospective bidder, who has not purchased the bidding documents, and entertain the submission of written or verbal queries during the pre-bid conference. However, under the same rule, the PE may also limit the opportunity to participate and submit written queries or clarifications during the pre-bid conference to those prospective bidders who have purchased the Bidding Documents by clearly indicating the same in the IB.¹²

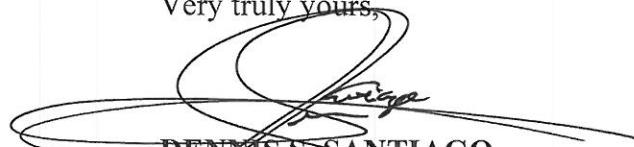
Summary

In view of the foregoing, we wish to clarify the following matters relative to your concerns:

1. Joint Ventures are expressly allowed to participate in bidding activities. It promotes competition as it provides a recourse for bidders who would otherwise fail to possess the minimum requirements. Hence, prohibiting Joint Ventures to participate is contrary to the provisions and spirit of the law; and
2. The PE has the option to limit the opportunity to participate and submit written queries or clarifications during the pre-bid conference to prospective bidders who purchased the Biding Documents provided that it is clearly stated in the IB.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is being issued on the basis of particular facts and situations presented, and may not be applicable given a different set of facts and circumstances. Should there be other concerns, please do not hesitate to contact us.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director V *MS*

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¹¹ NPM No. 132-2014, dated 18 November 2014.

¹² NPM 132-2014, dated 18 November 2014.