



Department of Budget and Management  
**GOVERNMENT PROCUREMENT POLICY BOARD**  
**TECHNICAL SUPPORT OFFICE**

**NPM No. 123-2012**

8 October 2012

**MR. ARNULFO H. DIVINA**

*Agent*

**UNITED COCONUT PLANTERS LIFE ASSURANCE CORP. (COCOLIFE)**  
8F Feliza Building, V.A. Rufino Avenue,  
Makati City

**Re: Various Issues on Republic Act (RA) 9184 and its Revised  
Implementing Rules and Regulations (IRR)**

Dear Mr. Divina:

This is in response to your letter dated 14 June 2012 requesting clarification on various issues involving RA 9184 and its IRR. As represented, the Department of Foreign Affairs (DFA) conducted bidding through Negotiated Procurement (Two Failed Bidding) on 28 February 2012 for its Global Health Insurance Coverage which was participated by Metlife/Delaware American Life Insurance Company (Metlife), Cigna Europe Insurance Company/Vanbreda (Cigna), and Cocolife. During the opening of the financial proposals on 11 April 2012, only Cocolife was declared compliant. However, during the evaluation of its eligibility and technical requirements, Cocolife was also declared ineligible for failure to comply with the required single largest completed contract (SLCC) requirement for two consecutive years where the value must each be at least 50% of the project.<sup>1</sup> Subsequently, the BAC revised the TOR on 18 April 2012, and instructed Metlife and Cigna to submit their respective financial proposals. The BAC consequently recommended the issuance of Notice of Award to Cigna. From the foregoing circumstances, Cocolife seeks clarification on the following:

1. Is private bidding sanctioned by RA 9184?
2. Is a health insurance contractor for thirty (30) years not compliant with the SLCC requirement if it does not have exactly the same insurance contract as the subject of the bidding?
3. Is non-compliance with the TOR a ground for disqualification of the bidder?
4. A "new" bidding was done without declaring a failure of bidding for the 28 February bidding, and without issuing a new Invitation to Bid (IB). Is this procedure compliant with the existing procurement rules?

<sup>1</sup> Based on the attached DFA BAC Resolution No. 72-12 dated 30 April 2012.

## **Private Bidding**

Private bidding, per your definition, is a bidding which is unpublished or not posted with a pre-disqualified bidder. We wish to inform you that for all competitive bidding activities, Section 21.2.1 of the IRR of RA 9184 requires advertisement and posting. However, for alternative methods of procurement, Section 54.2 of the IRR states that advertisement and posting as required in Section 21.2.1 may be dispensed with, except for Shopping under Section 52.1(b) and Negotiated Procurement (Two Failed Biddings) and Negotiated Procurement (Small Value Procurement). An exception to this exception is when the approved budget for the contract (ABC) is equal to PhP 50,000.00 and below, wherein advertisement and posting are no longer necessary.

It is represented by Cocolife that the purported private bidding was conducted under Negotiated Procurement (Two Failed Biddings) where the PE allegedly did not publish or post the bidding opportunity. However, Section 54.2 of the IRR of RA 9184 is clear that resort to Negotiated Procurement (Two Failed Biddings) still requires advertisement and posting as this negotiated modality is not among those excepted by the rules. Needless to say, failure to comply with the advertisement and posting requirements is contrary to RA 9184 and its IRR.

## **Compliance with SLCC**

As discussed in a previous opinion, the PE should be fully responsible in clarifying in the Bidding Documents what are similar projects that can be considered in the bidding, and/or the parameters for determining the same. In the end, it is entirely within the discretion of the PE whether to consider a project as being similar or not similar in nature and complexity to the project being bid out.<sup>2</sup>

For your guidance, a contract shall be considered "similar" to the contract to be bid if it involves goods or services of the same nature and complexity as the subject matter of the project being procured. This requirement should not be interpreted strictly as to unreasonably limit competition and inequitably bar participation of capable suppliers, manufacturers, distributors, and service providers; much more, to constrain PEs in the performance of their constituent and ministrant functions. Hence, similarity of contract should be interpreted liberally in the sense that it should not refer to an exact parallel but only to an analogous one of similar category.<sup>3</sup>

## **Non-compliance with the TOR**

Under Section 17.1 of the IRR of RA 9184, the Technical Specifications or the TOR form part of the Bidding Documents. The Bidding Documents refer to documents issued by the PE as the basis for bids, furnishing all information necessary for a prospective bidder to prepare a bid for the infrastructure projects, goods and/or consulting services required by the procuring entity (PE).<sup>4</sup> Evidently, the Bidding Documents contain all the specific requirements, limitations and parameters of the procurement at hand, as determined by the PE,<sup>5</sup> which bids will be compared and evaluated for determination of compliance or

<sup>2</sup> NPM No. 01-2009 dated 5 January 2009.

<sup>3</sup> NPM No. 20-2012 dated 6 February 2012 citing NPM No. 057-2004 dated 30 April 2004.

<sup>4</sup> Section 5(f) of the IRR of RA 9184.

<sup>5</sup> NPM No. 100-2012 dated 13 August 2012.

*[Handwritten mark]*

responsiveness. Thus, non-compliance by the bidder with the Technical Specifications or the TOR is a ground for disqualification.

### **Procurement Process**


Section 35.1<sup>6</sup> of the IRR of RA 9184 allows the BAC to declare a failure of bidding based on the grounds enumerated therein to pave the way for the conduct of mandatory review and evaluation of the terms, conditions, and specifications in the Bidding Documents. It is only upon compliance with all the requirements under Section 35 of the IRR that the PE may conduct a re-bidding with re-advertisement and/or posting as provided in Section 21.2 of the IRR.

When the second public bidding likewise fails, the PE has the option to conduct another public bidding or resort to Negotiated Procurement (Two Failed Biddings) under Section 53.1 of the IRR. However, it must be stressed that a failure of bidding should first be declared by the BAC for the second public bidding before the PE may continue its procurement through another competitive bidding, or negotiation under the Two Failed Biddings modality. A subsequent bidding conducted without declaration of failure of bidding for the previous bidding is not allowed under RA 9184 and its IRR.

All told, advertisement and posting of the procurement opportunity is a condition precedent for the conduct of Negotiated Procurement under the Two Failed Biddings modality. In addition, the PE, through the Bidding Documents, is fully responsible to clarify the coverage of similar projects that may be considered for the project, including the parameters for its determination. Moreover, non-compliance with the requirements of the Bidding Documents, including the Technical Specifications, is a ground for disqualification. Finally, the declaration of a failure of bidding is necessary in a two failed bidding scenario before the PE may conduct another competitive bidding or Negotiated Procurement under a Two Failed Bidding scenario.

We hope our advice provided sufficient guidance on the matter. Note that this opinion is being issued on the basis of facts and particular circumstances presented, and may not be applicable to a different set of facts and circumstances. Should you have further questions, please do not hesitate to contact us.

Very truly yours,

  
**DENNIS S. SANTIAGO**  
*Executive Director III*

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<sup>6</sup> a) No bids are received;  
b) All prospective bidders are declared ineligible;  
c) All bids fail to comply with all the bid requirements or fail post-qualification, or, in the case of consulting services, there is no successful negotiation; or  
d) The bidder with the Lowest Calculated Responsive Bid/Highest Rated Responsive Bid refuses, without justifiable cause, to accept the award of contract, and no award is made in accordance with Section 40 of the Act and this IRR.