

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

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NPM No. 013-2005

February 16, 2005

MR. ALAN T. ORTIZ, PH.D.
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National Transmission Corporation
Power Center, Quezon Avenue cor BIR Road
Diliman, Quezon City

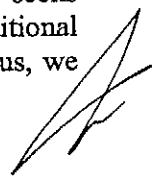
Re : Payment in foreign currency

Dear Mr. Ortiz:

This has reference to your letter dated 3 January 2003, addressed to the Honorable Secretary Emilia T. Boncodin as Chairperson of the Government Procurement Policy Board (GPPB), seeking clarification on whether National Transmission Corporation (TransCo) can pay in foreign currency those foreign entities¹ allowed under GPPB Resolution No 02-2004 to participate in public bidding.

The issue was first considered by this office in GPPB-TSO letter dated 09 December 2004, in response to TransCo's letter-query² putting forth similar question on the propriety and legality of paying foreign bidders in foreign currency. Therein, we have invoked and categorically stated the prescription of the Implementing Rules and Regulations Part A (IRR-A) of Republic Act No. 9184 (R.A. 9184) that procurement contracts shall be denominated and payable in Philippine currency. We have likewise opined that, contrary to the position of TransCo, GPPB Resolution 02-2004 is not diametrically opposed to Section 61.1 of IRR-A.

In the nature of a request for reconsideration, this instant query seeks clarification on the same issue previously raised, inviting attention on the additional arguments and/or justifications advanced in support of TransCo's position. Thus, we tackle the submissions of TransCo in the discourse following.



¹ Refers to foreign suppliers, manufacturers and/or distributors.

² Dated 01 December 2004.

Policy in Section 61 of R.A.9184 is detailed in IRR-A provision

As aptly posited, no clear-cut terms in R.A. 9184 express the requirement that payments for locally funded procurements shall be in Philippine currency. Interestingly, the same is a provision in the law's implementing rules and regulations and may accurately be said to be absent in the statute. This, however, is not fatal to the rule's legality and enforceability inasmuch as the provision is a valid implementing guideline for Section 61 of R.A.9184 that results from a lawful exercise of subordinate or quasi-legislation.³

R.A. 9184 has established the Government Procurement Policy Board – an administrative agency entrusted with the task of effectuating the purpose and intent of the Government Procurement Reform Act. It is a creature of law and sits as the sole administrative organ of the government endowed with the power and duty to administer and implement the reform policies in the spectrum of government procurement.

The GPPB has the delegated legislative authority to establish a pattern of conduct or guidelines to be followed while ensuring the execution and predominance of the legislative element or intent.⁴ It is involved in the task of adopting rules and regulations intended to carry out the provisions of law and to implement the legislative policy behind R.A. 9184. It supplements, by way of regulations, a statute by filling in the details of the law to carry out the legislative policy as set forth in the law.⁵

In this vein, Section 61 of R.A. 9184 is supplemented and its underlying policy enforced by the prescription in Section 61.1 of IRR-A. Thus, the statutory provision prescribing that contract prices are to be denominated and payable in Philippine currency is the facility determined by the GPPB to ensure that contract prices are not made subject to the impact of currency fluctuation during the contract implementation. On this respect, consequential is the concern of the GPPB on the stability of contracts and their incidents during implementation stage.⁶ Hence, the pertinent rule as embodied in Sec. 61 of IRR-A reads:

Sec. 61.1. For the given scope of work in the contract as awarded, all bid prices shall be considered as fixed prices,

³ The rule-making power of an administrative agency, that is, the power to make implementing or interpretative rules or regulations, is legislative in character and results in "delegated legislation." "Rule-making" is legislation on the administrative level, that is, legislation within the confines of the granting statute, as required by the Constitution and its doctrine of non-delegability and separability of powers. It is also called administrative legislation, delegated legislation, ordinance-making, and quasi-legislation. (De Leon and De Leon, Jr. ADMINISTRATIVE LAW: TEXT AND CASES, 2001 Ed., p. 77 citing 1 Am. Jur. 2d 891 and J. Hart, AN INTRODUCTION TO ADMINISTRATIVE LAW 311)

⁴ See De Leon and De Leon, Jr. ADMINISTRATIVE LAW: TEXT AND CASES, 2001 Ed., p. 79

⁵ See Suarez, Rolando, ADMINISTRATIVE LAW, 1st Ed., p.36, 37.

⁶ See however GPPB Resolution 07-2004 on allowable causes of contract price escalation and the conditions for their availability.

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 exchange rate prevailing on the day of the bid opening.

Requirement under Sec. 61.1 of IRR-A does not distinguish between local suppliers and foreign suppliers

It is posited by TransCo that the prescription under Section 61.1 of the IRR-A applies only to a Philippine entity or to any of its manufacturers or suppliers; and not to the foreign bidders allowed to participate in the biddings pursuant to GPPB Resolution 02-2004.⁷ This argument is premised on TransCos assumption that R.A. 9184 and its IRR-A govern only procurement of goods wherein the bidders are limited to Filipino citizens, domestic partnerships or corporations 60% of the interest⁸ belongs to citizens of the Philippines, or joint ventures of which Filipino ownership or interest is at least 60%.

Contrary to the foregoing contention, R.A. 9184 and its IRR-A is not limited to procurement affairs where only local suppliers participate. The IRR-A is explicit that when the goods to be procured are not available from local sources at the prescribed minimum specifications of the appropriate Government authority, as certified by the head of the procuring entity, or when there is a need to prevent situations that defeat competition or restrain trade, the procuring entity may invite foreign suppliers, manufacturers and/or distributors to participate in the procurement of said goods. Clearly, the law and its implementing rules contemplate procurement conditions where foreign suppliers may participate. Incidentally, there is nothing in the law that may be inferred as waiver to the application of other relevant provisions of the law.

Thus, Section 61.1 of IRR-A is not rendered mute or inoperative by GPPB Resolution 02-2004. While the latter is a provisional guideline to govern matters of eligibility of foreign suppliers under Section 23.11.1 of IRR-A, it does not contravene the requirement of payment in Philippine currency nor that of fixed contract prices. In no sense may they be construed to be diametrically opposed to each other.

The spirit of Section 61.1 of IRR-A is to ensure the stability of the contract and to steady the price against fluctuation during implementation; while GPPB Resolution 02-2004 purports to provide prior conditions for the allowable participation of foreign bidders. Otherwise put, the requirement that all contracts shall be denominated and payable in Philippine currency does not distinguish between

⁷ Resolution adopting the provisional guidelines for Section 23.11.1 of the IRR-A on eligibility of foreign suppliers to participate in procurement processes.

⁸ IRR-A refers to interest as "outstanding capital stock."

foreign and Filipino suppliers. The contract under any circumstance should be in Philippine currency.

Section 61.1 of IRR-A is undisturbed by Section 42.5

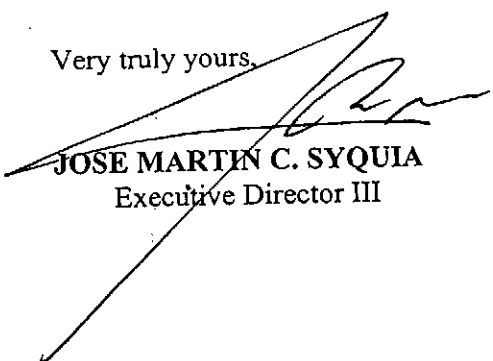
Insofar as the apparent support that Section 42.5 of IRR-A may provide to TransCos deduction that Section 61.1 to procurement contracts involving foreign suppliers, the provision may prove inconsequential to the requirement on payment in Philippine currency. Section 42.5 of IRR-A simply prohibits issuance of a letter of credit in favor of a Philippine entity or to any of the latter's foreign manufacturers or suppliers and in no wise may it be interpreted to create a similar distinction between foreign suppliers and local suppliers on matters of contract price. Hence, despite the permissible issuance of letters of credit to foreign suppliers, this sanction does not translate to an authority to denominate and pay the contract price in foreign currency; nor does it warrant a qualified application of the requirement under Section 61.1 of IRR-A.

GPPB Resolution

During the 1st GPPB Meeting held on January 24, 2005, the Members of the Board unanimously confirmed the prescription embodied in Section 61.1 of the IRR-A and agreed that prospective foreign bidders should consider foreign exchange fluctuations when participating in bidding for government projects, thus, incorporating allowances for such fluctuations in their bid prices. This resolution was made in response to the Inter-Agency Technical Working Group (IATWG) of the GPPB's proposal for revisions to Section 61. 1 of the IRR-A. In fine, the GPPB sustains the wisdom behind the prescription in the said provision.

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director III