



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

NPM No. 131-2012

19 October 2012

HON. ANGELO B. PALMONES
Representative, Agham Party List
HOUSE OF REPRESENTATIVES
Quezon City

Re: Single Largest Completed Contract (SLCC) requirement; Joint Venture (JV) Agreements; and Participation of a GPPB representative in the bidding process

Dear Congressman Palmones:

This is in response to your letter dated 24 July 2012, seeking our opinion on whether a contract may be awarded to a bidder who has passed product testing, but has not complied with the SLCC requirement, and whether the SLCC submission of a third party supplier may be credited in favor of JV partners. It is also inquired whether the GPPB can send representatives to aid in conducting the bidding process in Procuring Entity (PE).

It is represented that a government agency conducted competitive bidding for the procurement of equipment, which required product testing. After the opening of bids, several bidders questioned the compliance of a particular bidder, who offered a low bid, with the SLCC requirement. Instead of resolving the written objections of the bidders, the Bids and Awards Committee (BAC) proceeded with the product testing.

Opinion is now sought on whether the BAC is correct in proceeding as it did, without first resolving the issue on the SLCC requirement. Moreover, inquiry is made on whether the issue on SLCC requirement may be disregarded should the equipment pass product testing.

Requests for Reconsideration Must be Resolved Within Seven (7) Calendar Days

Indeed, Republic Act (RA) No. 9184 and its revised Implementing Rules and Regulations (IRR) mandate the BAC to resolve Requests for Reconsideration within seven (7) calendar days from receipt thereof.² However, although the current procurement rules are silent on the impact of the resolution of the Request for Reconsideration on the ongoing procurement activities, we opine that, as in the case of protests provided under Section 57 of the IRR, the bidding process and any of the procurement activities should not be interrupted by the filing of the Request for Reconsideration, but the BAC should resolve the request within the seven (7) calendar day period provided for in the rules.

² Section 55.1, Revised IRR of RA 9184.

We wish to clarify that the term "protest" in Section 57 includes all procedural and remedial processes mentioned in Section 55 of the revised IRR, such as the filing of a Request for Reconsideration, which is a pre-condition for the filing of a Protest. In this regard, as in the case of a Verified Position Paper protesting the decision of the BAC, a Request for Reconsideration that is validly filed should first be resolved before award of contract is made.

A Bidder Should First Pass the SLCC Requirement

The SLCC requirement for goods is provided under Section 23.5.1.3 of the IRR of RA 9184, which states that the bidder must have completed, within the period specified in the Invitation to Bid, a single contract that is similar to the contract to be bid, and whose value, adjusted to current prices using the National Statistics Office (NSO) consumer price indices, must be at least fifty percent (50%) of the Approved Budget for the Contract (ABC), or at least twenty five percent (25%) in the case of Expendable Supplies.

The SLCC is an eligibility requirement³ which cannot be dispensed with. The eligibility requirements marked out in R.A. 9184 and its IRR are minimum standards imposed to limit public procurement policy to those who are fit and capable to transact with the government.⁴ Through this, the Government is assured that it is not the first time that the prospective bidder will be required to accomplish such an undertaking, and therefore provides the Government a level of security that such bidder, if awarded the contract, will be able to fulfill the contract requirements⁵.

Under the rules, the SLCC documents should be placed by the bidder inside the first envelope together with the other eligibility requirements under Section 23.1 of the IRR of RA 9184, while the financial information/documents required in the Philippine Bidding Documents (PBDs) should be placed inside the second envelope. During eligibility screening, the BAC shall check the submitted documents of each bidder against the checklist of required documents to ascertain if they are all present, using a non-discretionary "pass/fail" criterion, as stated in the Instructions to Bidders.⁶ The "non-discretionary criterion"⁷ during the stages of eligibility check entails the presence or absence of a requirement provided for by law or in the bidding documents, such that a complete submission means the eligibility or qualification of the bidder, and the **absence of any of the requirements shall mean the automatic declaration of ineligibility or disqualification of the bidder**, as the case may be.⁸

A bidder who fails to submit any or all of the required eligibility requirements under the rules will be automatically declared ineligible and shall no longer be considered in the bid evaluation stage of bid evaluation. Thus, it is incumbent upon the BAC to first determine the eligibility of a bidder before proceeding with product testing, as this latter activity presupposes that the bidder has already been declared eligible.

Post-Qualification Includes Product Testing of the Bidder's Goods

Under Section 34 of the IRR of RA 9184, the Lowest Calculated Bid (LCB) shall undergo post-qualification in order to determine whether the bidder concerned complies with and is responsive to all the requirements and conditions as specified in the Bidding Documents. As stated in our previous opinion⁹, the objective of post-qualification is to determine whether the bidder

³ Section 23.5.1.3 of the IRR of RA 9184.

⁴ NPM 159-2004 dated 20 December 2004.

⁵ NPM 020-2005 dated 17 March 2005.

⁶ Section 30.1 of the IRR of RA 9184.

⁷ Section 30 of the IRR of RA 9184.

⁸ NPM 009-2003 dated 19 May 2003.

⁹ NPM 69-2007 dated 3 December 2007.

complies with and is responsive to all the legal, technical and financial requirements and conditions specified in the bidding documents. During post qualification, the PE verifies, validates and ascertains all statements made and the documents submitted by the bidder with the LCB or highest rated bid using non-discretionary pass/fail criterion as stated in the bidding documents.

These criteria shall consider the legal, technical and financial requirements, such as, but not limited to, the bidder's stated competence and experience, the availability and commitment, **and/or inspection and testing of the equipment units to be owned or leased by the bidder**, the performance of the bidder in its ongoing government and private contracts, the goods/product, after-sales and/or maintenance capabilities for the procurement of goods.¹⁰ Hence, the verification entailed under the post-qualification stage is not limited to the examination of documents submitted by the bidder, but includes inspection of the subject equipment *vis-à-vis* the technical specifications specified in the bidding documents.¹¹

Product testing is part of the post-qualification stage of the bidding process. Thus, before the BAC could even conduct the product testing, it should ensure that the bidder who will undergo post-qualification has submitted all the legal, technical and financial requirements and the LCB. Ultimately, the BAC is the proper authority to determine whether the bidder with the LCB passes or fails the criteria for post-qualification based on its responsiveness to the requirements and conditions as specified in the Bidding Documents.¹²


SLCC Track Record of a Third-Party Supplier Cannot be Credited in Favor of the JV

As regards your query on whether the SLCC submission of a third party European supplier may be credited in favor of JV partners (Hong Kong and Philippine corporations) and treated as compliance with Section 23.5.1.3 of the IRR of RA 9184, we answer in the negative.

Section 23.1(b) of the IRR of RA 9184 provides that each partner of the JV shall submit the legal eligibility documents but submission of technical and financial eligibility documents by any of the JV partners constitutes compliance. As previously¹³ discussed, the BAC may consider the individual experiences of the JV partners. Since the SLCC is a technical eligibility requirement under the IRR of RA 9184, any one of the JV partners may submit the same as part of the bidding documents.

The submission by one of the partners may be credited in favor of a JV and constitutes compliance with the SLCC requirement under Section 23.5.1.3 of the IRR of RA 9184. However, since a third party supplier is not a JV partner, its SLCC track record could not be credited in favor of the JV.

The SLCC Track Record of a Parent Company Cannot be Credited in Favor of a Subsidiary JV Partner

As regards your query on whether the SLCC track record of the third party European supplier may be credited in favor of the Hong Kong corporation if the former is also the parent company while the latter is a sister company or a subsidiary, we answer in the negative. 

¹⁰ *Id.* (emphasis supplied).

¹¹ NPM No. 64-2012 dated 25 May 2012.

¹² Section 34, IRR of RA 9184.

¹³ NPM No. 24-2012 dated 24 February 2012.

In the absence of anything to the contrary as to the character of a foreign law, it will be presumed to be the same as the domestic law on the same subject.¹⁵ Thus, under the *Doctrine of Processual Presumption*, in the absence of evidence to the contrary, foreign laws on a particular subject are presumed to be the same as those of the Philippines.¹⁶

In establishing its presence in the Philippines, a foreign corporation may choose to incorporate its own subsidiary as a domestic corporation, in which case, such subsidiary would have its own separate and independent legal personality to conduct business in the country. In the alternative, it may create a branch in the Philippines, which would not be a legally independent unit, and simply obtain a license to do business in the Philippines.¹⁷

The general rule is that as a legal entity, a corporation has a personality distinct and separate from its individual stockholders or members, and is not affected by the personal rights, obligations and transactions of the latter. The mere fact that a corporation owns all of the stocks of another corporation, taken alone is not sufficient to justify their being treated as one entity. If used to perform legitimate functions, a subsidiary's separate existence may be respected, and the liability of the parent corporation as well as the subsidiary will be confined to those arising in their respective business.¹⁸ The separate personality of the subsidiary may not be disregarded, unless the corporate vehicle is being used to defeat public convenience, justify wrong, protect fraud, or defend crime, which must be clearly and convincingly established and not merely presumed.

Thus, even if the European supplier is the parent company of the Hong Kong subsidiary corporation, the SLCC track record of the former may not be credited in favor of the latter as they have separate and independent legal personalities which must be respected.

The SLCC Track Record of a Branch Office May be Credited in Favor of a Corporation.

A foreign corporation may create a branch in the Philippines, which would not be a legally independent unit, and simply obtain a license to do business in the Philippines.¹⁹ Hence, a branch that is not separately incorporated is without a separate legal personality from its parent company.²⁰

Thus, if the Hong Kong entity, not separately incorporated, is merely a branch office of the European company, the former is regarded as an extension, and may be credited with the latter's SLCC track record. In such scenario, the Hong Kong entity may be treated as an Agent of the European company for the purpose of submitting a bid. Thus, the Hong Kong entity must be able to show that it has authority to submit the bid for and in behalf of its Principal, the European company.

Functions of the GPPB-Technical Support Office (TSO) vis-à-vis the BAC

In reference to your query on whether a GPPB representative may aid in the procurement process of a PE, please be informed that the functions of the GPPB, particularly, its Technical Support Office (TSO), has been laid down under RA 9184 and its Revised IRR, which involve providing research, technical and administrative support to the GPPB, including: research-based procurement policy recommendations and rule-drafting; development and updating of generic procurement manuals and standard bidding forms; management and conduct of training on

¹⁵ Lim and Lim vs. Collector of Customs, 36 Phil. 472.

¹⁶ Miciano v. Brimo, 50 Phil. 867.

¹⁷ Philippine Deposit Insurance Corporation vs. Citibank N.A. and Bank of America, S.T. & N.A., G.R. No. 170290 dated 11 April 2012.

¹⁸ Philippine National Bank vs. Ritratto Group, Inc, et. al., G.R. No. 142616 dated 31 July 2001.

¹⁹ *Supra* note 16.

²⁰ *Id.*

procurement systems and procedures; evaluation of the effectiveness of the government procurement system and recommendation of improvements in systems and procedures; monitoring the compliance to the Act and assisting PEs improve their compliance; monitoring the implementation and effectiveness of the Philippine Government Electronic Procurement System (PHILGEPS); and secretariat support²¹.

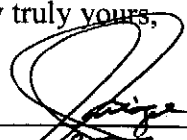
On the other hand, it is the BAC of the PE, which is mandated under procurement laws, specifically, under Section 12.1 of the Revised IRR of RA 9184, which has the sole function to undertake procurement process, and is responsible for ensuring that the PE abides by the standards set forth by the Act and this IRR²².

Hence, it is our position that the conduct of a bidding process is best left to the functions of the BAC, mandated under the law to undertake procurement functions. The GPPB-TSO upholds its mandate to provide support and assistance in the performance of the GPPB's duties and responsibilities specified in RA 9184 and its IRR, which, among others, involve ensuring the proper implementation by PEs of relevant rules and regulations pertaining to public procurement²³.

In sum, we are of the view that (i) filing of a Request for Reconsideration does not interrupt the bidding process, provided, however, that no contract shall be awarded until all Requests for Reconsideration and Protests are resolved; (ii) it is incumbent upon the BAC to first determine the eligibility of a bidder before proceeding with product testing, as this latter activity is part of the post-qualification process of the bidder that has already been declared eligible; (iii) the SLCC track record of a third party who is not a member or a partner to the JV cannot be credited in favor of the JV; (iv) the SLCC track record of the parent company cannot be credited in favor of its subsidiary since they each have a personality distinct from the other; (v) the SLCC of the principal company may be credited to its branch office provided that the latter is not separately incorporated and is authorized by the former as its agent to submit a bid; and (vi) the functions of the GPPB and the GPPB-TSO are limited to procurement policy-making and policy research/ secretariat support, respectively.

We hope that our advice provided sufficient guidance on the matter. Note that this opinion is being issued on the basis of the facts and particular situations presented, and may not be applicable given 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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²¹ Section 63.3 of the IRR of RA 9184.

²² Section 12.2 of the IRR of RA 9184.

²³ Section 63.1 of the IRR of RA 9184.