

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

*Unit 2506 Raffles Corporate Center, Emerald Avenue, Ortigas Center, Pasig City
Telefax Nos. (02) 900-6741 to 44*

NPM No.14-2005

February 22, 2005

HON. ROMULO L. NERI
Secretary of Socio-Economic Planning
National Economic and Development Authority
12 Blessed Josemaria, Escriva Drive,
Ortigas Center, Pasig City 1605

**Re : Downward Adjustment and Acceptance of Price
Offer for the Contract for Supply of Coal**

Dear Secretary Neri:

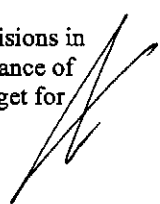
This refers to your letter dated 21 December 2004, addressed to the Honorable Secretary Emilia T. Boncodin of the Department of Budget and Management,¹ requesting clarification on whether or not the justifications advanced by National Power Corporation (NPC) in its letter² to the National Economic Development Authority (NEDA) are sanctioned by the provisions of Republic Act 9184 (R.A. 9184) and its Implementing Rules and Regulations Part-A (IRR-A).

The NPC procured for the supply and delivery of 130,000 MT +/- 10.0% of imported steaming coal to Pagbilao Coal-Fired Thermal Power Plant. It opened the project for public competition which, unfortunately, resulted to a failure in the bidding.

A second "selective bidding" was then conducted where only two (2) out of the five (5) suppliers invited tendered their bids. However, the bids of the two (2) responding suppliers were above the Approved Budget for the Contract (ABC). This eventuality prodded NPC to negotiate with PT Indominco Mandiri for the reduction of the latter's

¹ In her capacity as Chairperson of the Government Procurement Policy Board (GPPB)

² NPC letter to NEDA, dated 22 November 2004, providing clarifications as to which specific provisions in R.A. 9184 and its IRR-A NPC has adopted to support /justify the downward adjustment and acceptance of the price offer of PT Indominco Mandiri for the subject contract which is above the Approved Budget for the Contract (ABC)



charges on Cost and Freight (C&F).³ NPC, in justifying their recourse, posits the following:

- a) There is no provision in the IRR of R.A. 9184 on Limited Source Bidding or any alternative mode of procurement for that matter, prohibiting the agency from awarding the contract beyond the ABC or the ceiling price; and
- b) Because of the unique and abnormal characteristics of coal supply in the world market beginning on the last quarter of 2003 to beginning of 3rd quarter of 2004, triggered by supply shortage and high demand, prices have been too volatile. The ABC established (based on prevailing prices) one month before the actual bids submission became non-responsive on the bidding date itself which almost always caused failure of tenders.

Request for opinion is sought on the merit and validity of the foregoing justifications. This points us to the following substantive issue for consideration:

Whether or not the abovementioned reasons set by the NPC are valid in light of R.A. 9184 and its IRR-A

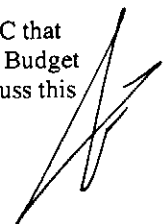
Ceiling for Bid Prices

The prohibition against awarding government contracts beyond the Approved Budget for the Contract (ABC) is not mute in those cases where alternative modes of procurement were resorted to. Contrary to the import of the justification of NPC, the provision in R.A. 9184 and its IRR-A on the matter of ABC is as applicable to contracts entered into by way alternative modes of procurement as it is to contracts entered into by way of public bidding. The provision is not limited to public bidding as the law does not create a distinction between public bidding and alternative methods of procurement on this respect. Witness Section 31 of R.A. 9184:

The approved budget for the contract under bidding shall be the upper limit or ceiling for acceptable bid prices. If a bid price, as evaluated and calculated in accordance with this IRR-A, is higher than the approved budget for the contract under bidding, the bidder submitting the same shall be automatically disqualified. There shall be no lower limit or floor on the amount of the award.

The reason underlying the provision is likewise present in the cases where alternative method of procurement was the facility for contract acquisition. The mandate

³ This opinion is being rendered also on the basis of the representation of the representatives of NPC that the contract was eventually awarded to PT Indominco Mandiri at a price higher than the Approved Budget for the Contract (ABC). Representatives from this office and NPC met on February 1, 2005 to discuss this matter upon request of NPC.



of the law is to identify, through judicious and deliberate effort, a definite expense ceiling for every procurement project to be undertaken by procuring entities. The wisdom in this is to ensure that all government undertakings, as in the case of procurement, are made and prosecuted pursuant to government budgetary and expenditure programs. Also, the prescription is calculated to forestall fraud and collusion, and serve as a deterrent to the execution of unjust and inequitable contracts to the prejudice not only of the government but the private parties as well.

To allow contract prices to exceed the ABC would amount to a circumvention of the statutory prescription that bids higher than the ABC are automatically disqualified. And even in cases where public bidding may be dispensed with, the procuring entity may not be allowed to negotiate contract price above the budget approved for that contract as a contrary action would render illusory the budgetary preparations of the entity. The amount that can be paid on such contract is thus limited by the corresponding appropriation for that budget. Until after the Procurement Project Management Plan (PPMP) and the Annual Procurement Plan are reviewed and revised accordingly and before any bidding process or negotiation is commenced, no contract shall be entered into on the basis of an adjusted ABC.

Volatility of coal prices not sufficient justification

While the circumstances surrounding NPC's procurement of coal are clear and its impact to NPC well recognized, the same hardly constitute sufficient justification for the negotiation of the contract at a price above the ABC. The law is categorical in its mandate and definitive in its policy. The ABC has to be maintained in pursuing government procurement contracts. What NPC could have done given the predicament of having to deal with increased coal prices is to have made the necessary adjustment in the PPMP or APP as sanctioned in Section 7 of R.A. 9184 and its IRR-A.

Please take note that this opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not necessarily be applicable upon a different set of facts or circumstances.

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director III

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January 10, 2005

HON. ROMULO L. NERI

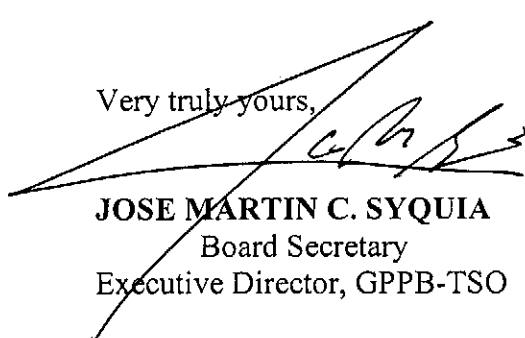
Secretary of Socio-Economic Planning
Vice Chairperson, NEDA Board
National Economic and Development Authority
NEDA sa Pasig, 12 Blessed Josemaria
Escriva Drive, Ortigas Center, Pasig City 1605

Dear Secretary Neri:

This is with reference to the Honorable Secretary's letter dated 21 December 2004, addressed to the Honorable Secretary Emilia T. Boncodin of the Department of Budget and Management in her capacity as Chairperson of the Government Procurement Policy Board (GPPB), referring the letter-reply of the National Power Corporation (NPC) stating its justification for the downward adjustment and acceptance of price offer for the contract for the Supply and Delivery of 130,000 MT +/- 10.0% of imported steaming coal to Pagbilao Coal-Fired Thermal Power Plant requested by the National Economic and Development Authority.

We wish to inform the Honorable Secretary that we shall respond to the concern at the earliest possible opportunity. At this point, we will be coordinating with NPC for any additional information necessary for the proper resolution of the issue on this matter.

Very truly yours,



JOSE MARTIN C. SYQUIA
Board Secretary
Executive Director, GPPB-TSO