

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. 140-2004

November 4, 2004

MR. EDGARDO A. HERRERA
President and General Manager
Alphaomega Integrated Corporation
Rm B-1 Bay Condominium
I Ubay St., Sta. Mesa Heights
Quezon City

Re : Request for Clarification on Some Procurement Policies Anent National Transmission Corporation's Bid Project

Dear Mr. Herrera:

This refers to your letter dated September 21, 2004, seeking the opinion of this office on some procurement issues anent National Transmission Corporation's (Transco) bid project. At focus in this query are some of the tender provisions of the bid project which, per your representation, you find unfair and deprives Filipino bidders a level playing field to compete with foreign contractors/suppliers. Apparently, issue is taken on Amendment No. 1 to the Eligibility and Tender Documents which provides: (a) for the direct participation of foreign suppliers/contractors; (b) that the contract price of a Filipino supplier/contractor shall be denominated and payable in Philippine Pesos; and (c) that the contract price of a foreign supplier/contractor shall be denominated and payable in currency of its bid.

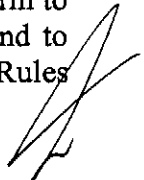
For consideration are the following issues:

- a. Whether or not foreign bidders may be allowed to be bid.
- b. Whether or not foreign bidders may be paid in foreign currency.

Participation of foreign bidders

It bears stressing at the outset that the present procurement rules are so crafted to conform to the Constitutionally-enshrined policy of the State regarding preferences given to Filipinos and to domestic materials and locally produced goods.¹ Thus, Section 23.11.1 of the Implementing Rules

¹ Section 12, Article XII, 1987 Constitution.



and Regulations-Part A (IRR-A) of Republic Act No. 9184 (R.A. 9184), prescribes Filipino ownership/equity requirement as one of the eligibility criteria for entities that wish to participate in public procurement. The same provision, however, allows foreign suppliers to participate in the procurement of goods under certain instances, as provided in the last paragraph thereof, to wit:

However, when the goods to be procured are not available from local sources, as provided in this Section, at the prescribed minimum specifications of the appropriate Government authority and/or ABC of the procuring entity, 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 said procuring entity may invite foreign suppliers, manufacturers and/or distributor to participate in the procurement of the said goods. The GPPB shall promulgate the necessary guidelines for this provision.

To this date, the Government Procurement Policy Board (GPPB) has yet to promulgate the implementing guidelines for Section 23.11.1. In the meantime provisional guidelines were promulgated by the GPPB on March 10, 2004 in view of the need to immediately address situations within the contemplation of Section 23.11.1. GPPB Resolution No. 02-2004 sets forth the rules as follows:

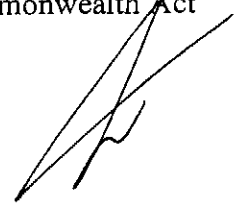
In the procurement of goods not available from domestic sources, the procuring entity may invite foreign suppliers, manufacturers and/or distributors to participate in the procurement process, provided that the following standards and conditions are observed:

- 1) The head of the procuring entity shall certify that the goods intended to be procured are not available from domestic sources;
- 2) The unavailability of the goods sought to be procured from domestic sources must be confirmed by the Department of Trade and Industry (DTI);
- 3) The procurement of the unavailable goods must be through a competitive or public bidding as prescribed by R.A. 9184 and its IRR-A; and
- 4) The foreign citizen/entity who wish to participate in the procurement of goods must prove that the laws, rules and regulations of his/its country of origin grants reciprocal rights and privileges to Filipino citizens with respect to the procurement of goods by its government, pursuant to Republic Act No. 5183 (R.A. 5183).

xxx

On the basis of the foregoing considerations, foreign suppliers are allowed to participate in public bidding, albeit limited and on the condition that the requirements as set forth in GPPB Resolution 02-2004 are complied with. The same being merely an exception to the general rule, the provision allowing participation of foreign bidders must be strictly construed, so as not to defeat the policy of granting preference to domestic bidders and entities as pronounced in Commonwealth Act 138² and reiterated in the 1987 Constitution.

Contracts should be denominated and payable in Philippine currency



² Otherwise known as The Flag Law.

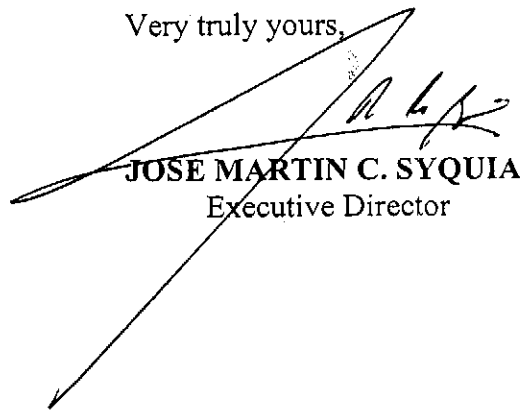
IRR-A is categorical with respect to bid currencies and currencies of payment. Thus, in Section 61.1 of the rules, all contracts shall be denominated and payable in Philippine currency, and this shall be stated in the bidding documents. Should the procuring entity receive bids denominated in foreign currency, the same shall be converted to Philippine currency based on the exchange rate prevailing on the day of the bid opening, for purposes of evaluation.

Hence, unequivocal is the rule that bids are payable in Philippine currency.

This opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not be necessarily applicable upon a different set of facts and circumstances.

We trust that this clarifies the matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director

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*Unit 2506 Raffles Corporate Center, Emerald Avenue, Ortigas Center, Pasig City
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September 22, 2004

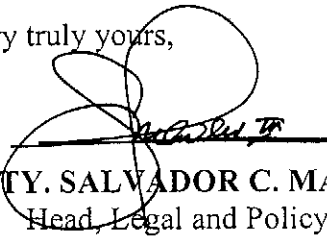
MR. EDGARDO A. HERRERA
President and General Manager
Alphaomega Integrated Corporation
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1 Ubay Street, Sta. Mesa Heights,
Quezon City

Dear Mr. Herrera:

This refers to your letter dated September 21, 2004, which we received on even date, addressed to the Department of Budget and Management through the Government Procurement Policy Board (GPPB), requesting for clarification on Republic Act 9184 and its Implementing Rules and Regulations Part A in relation to National Transmission Corporation's bidding for the supply and delivery of steel poles for calendar year 2004.

We wish to inform you that we shall respond to your concerns either through phone or in writing at the earliest possible opportunity, or raise the same to the GPPB for appropriate resolution should referral thereto becomes necessary.

Very truly yours,


ATTY. SALVADOR C. MALANA III
Head, Legal and Policy Group