

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*

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**NPM No. 016-2005**

February 28, 2005

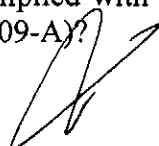
**MAJOR GENERAL REYNALDO D. RIVERA**  
Chief, AFP Modernization Program  
Camp General Emilio Aguinaldo,  
Quezon City

**Re : Clarification on GPPB Resolution No 02-2004**

Dear Major General Rivera:

This refers to your letter dated January 12, 2005 addressed to the Honorable Secretary Emilia T. Boncodin, which we received through facsimile on even date asking for clarification on the applicability and effectivity of Government Procurement Policy Board (GPPB) Resolution No. 02-2004 dated March 10, 2004. in relation thereto, the following issues need to be resolved:

1. When is the effectivity date of GPPB Resolution No. 02-2004?
2. What are "domestic sources" as contemplated under Republic Act No. 9184 (R.A. 9184)?
3. Does the term "domestic sources" pertain to manufacturers only or does it also include suppliers and distributors)
4. Can the Armed Forces of the Philippines (AFP) use alternative methods of procurement if it has complied with all the requirements under Executive Order No. 109-A (E.O. 109-A)?



## Effectivity of GPPB Resolution No. 02-2004

The principle is well entrenched that statutes, including administrative rules and regulations, operate prospectively, unless the legislative intent to the contrary is manifest by express terms or by necessary implication. Hence, GPPB Resolution No. 02-2004 is deemed to be the controlling law with regard to all procurement activities commenced after its effectivity date on October 5, 2004, the reckoning point being the date of advertisement of bids. Although the resolution was approved on March 10, 2004, it is deemed effective only upon its posting at the Government Electronic Procurement System (GEPS) website

## Domestic Sources

The term "domestic sources" in the context of Section 23.11.1 of IRR-A of R.A. 9184 shall be understood to mean Filipino suppliers. Specifically, Section 23.11.1 provides:

### 23.11.1. For the procurement of goods:

1. The following manufacturers, suppliers and/or distributors shall be eligible to participate in the bidding for the supply of goods:
  - a) Duly licensed Filipino citizens/sole proprietorships;
  - b) Partnerships duly organized under the laws of the Philippines and of which at least sixty percent (60%) of the interest belongs to citizens of the Philippines;
  - c) Corporations duly organized under the laws of the Philippines, and of which at least sixty percent (60%) of the outstanding capital stock belongs to citizens of the Philippines;
  - d) Manufacturers, suppliers and/or distributors forming themselves into a joint venture, *i.e.*, a group of two (2) or more manufacturers, suppliers and/or distributors that intend to be jointly and severally responsible or liable for a particular contract: *Provided, however*, That Filipino ownership or interest of the joint venture concerned shall be at least sixty percent (60%); or
  - e) Cooperatives duly registered with the Cooperatives Development Authority (CDA).

However, when the goods sought 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 distributors to participate in the procurement of the said goods. The GPPB shall promulgate the necessary guidelines for this provision.

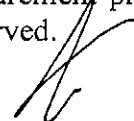
Based on the foregoing provision, the use of the term "local source" should be understood in the context of determining those who are considered as eligible suppliers under the R.A. 9184. The list provided herein are all considered as Filipino suppliers who are eligible to bid based on the sixty-forty (60-40) requirement under R.A. 9184. Hence, only those bidders falling under any of the categories mentioned in the list are considered as eligible bidders and Filipino suppliers. Accordingly, assuming that all the participating bidders passed the eligibility requirements, then the concept of domestic preference laid down in Commonwealth Act No. 138 (C.A. 138) finds application

On the other hand, R.A. 5183 which must be read in conjunction with R.A. 9184 discusses the reciprocity requirement before foreign bidders are allowed to bid and be eventually awarded the contract if it was determined to be the lowest calculated and responsive bid (LCRB). Corollarily, GPPB Resolution No. 02-2004 provided for interim guidelines to be followed by procuring entities in applying the provisions of R.A. 5183 and R.A. 9184. The pertinent provision of GPPB-Resolution No. 02-2004 dated March 10, 2004 is stated hereunder to wit:

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 good sought to be procured from domestic sources must be confirmed by the department of trade and Industry (DTI);
- 3) The procurement of unavailable goods must be through 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).

In fine, the general rule with regard to the matter is found in Section 23.11.1 of R.A. 9184. However, the exception therein is found under R.A. 5183, further qualified by GPPB Resolution No. 02-2004 which states that if the goods to be procured are 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 standards and conditions mentioned therein are observed.



In relation thereto, the procurement of major equipment or weapon system under the AFP Modernization Program operates as an exception to the exception which was elucidated in the foregoing discussion. The relevant provision of GPPB Resolution No. 06-2003 is stated hereunder to wit:

x x x Provided, even further, That in the case of procurement from foreign sources, no major equipment and weapons system shall be purchased if the same are not being used by the armed forces in the country of origin or used by the armed forces of at least two countries: Provided furthermore, **That only offers from suppliers who are themselves the manufacturers shall be entertained:** Provided, finally, That no supply contract shall be entered to unless such contract provides for, in clear and unambiguous terms, an after-sales services and the availability of spare parts; (Emphasis supplied).

Based on the aforesaid considerations, it may be conclusively inferred that under Republic Act No. 7898 (R.A. 7898) otherwise known as the AFP Modernization Law, major defense equipment or weapon systems may be procured from foreign sources provided that they themselves are the manufacturers. This may be considered as an exception to the exception because such provision applies regardless of whether the items to be procured are locally available or not.

As such, the term "domestic sources" may be understood to mean not only domestic or local manufacturers using local raw materials, but also includes suppliers and distributors who are domestic entities organized under the laws of the Philippines or foreign entities doing business in the Philippines.

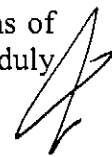
### **Domestic Preference**

The Supreme Court had the occasion of adequately expounding on the concept of "domestic preference" under C.A. 138 in the case of *Asbestos Integrated Manufacturing Inc vs. the Honorable Elviro L.Peralta, Metropolitan Waterworks and Sewerage System (G.R. No. L-45515. October 29, 1987.)* wherein it expressed the following pronouncement:

1. The Flag Law (CA 138) establishes only two types of preference:

(a) One in favor of unmanufactured articles, materials or supplies of the growth or production of the Philippines, and of manufactured articles, materials and supplies produced, made and manufactured in the Philippines substantially from articles, materials or supplies of the growth, production or manufacture of the Philippines (Secs. 1; 2(c) and (d); and (3);

(b) The other, in favor of domestic entities, that is, citizens of the Philippines or corporate bodies or commercial companies, duly



organized and registered under the laws of the Philippines, 75% of whose capital is owned by citizens of the Philippines, and who are habitually established in business engaged in the manufacture or sale of the merchandise covered by their bid (Secs. 1; 2(b); and (4).

Henceforth, it is clear that based on the above-quoted jurisprudence, the Flag Law or Commonwealth Act No. 138 gives preference to those articles which are either produced locally or manufactured articles from raw materials found locally.

Therefore, the term also includes those products produced by domestic entities or corporations organized under the laws of the Philippines or having capital stocks, seventy five percent of which are owned by Filipino citizens. The Flag Law also requires that to be a domestic entity, the bidder is not only a Filipino or Philippine owned entity, but also that he must have been habitually established in business and engaged in the sale of the commodity covered by his bid. Thus, he must be a bona fide businessman or entity engaged in the line of business covered by his bid. Moreover, such a Filipino bidder, being habitually engaged in the line of business covered by his bid, is entitled to as much protection as a Filipino manufacturer who bids directly or through a Filipino distributor."<sup>1</sup>

Additionally, it is also important to consider that in determining whether a bid is considered as a domestic or foreign bid, the materials used therein should be taken into consideration.. Meaning, if a foreign manufacturer uses raw materials from the Philippines, then such entity is deemed to have tendered a domestic bid, which must be accorded domestic preference during bid evaluation in accordance with the Flag Law. On the other hand, any domestic entity/manufacturer who manufactures and sells goods made from imported raw materials shall not be given domestic preference.

In view of the foregoing, it may be aptly deduced that the term "domestic preference" as understood under the Flag Law pertains to the premium given to domestic or foreign entities using locally produced goods from local raw materials when they are up against domestic entities or foreign suppliers using imported raw materials assuming that all the participating bidders concerned passed the eligibility requirements under R.A. 9184.

### **Alternative Methods of Procurement**

With regard to the use of alternative methods of procurement, the conditions mentioned under Section 48-53 of R.A. 9184 must be present. It is not enough that the conditions under E.O. 109-A are met in order to warrant exceptions to public bidding. In fact, Section 3 of E.O. 109-A made reference to the provisions of R.A. 9184 on the use of the alternative methods of procurement, thereby, in effect, reiterating its

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<sup>1</sup> [G.R. No. L-45515. October 29, 1987.]  
Asbestos Integrated Manufacturing, Inc. (AIMI), vs. Hon. Elviro L. Peralta.

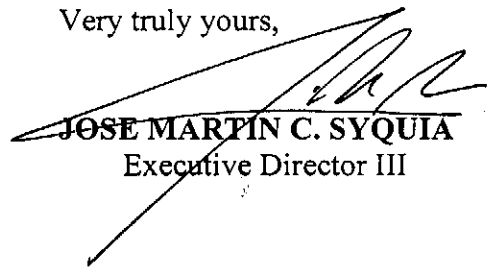


mandatory application. The provisions of E.O. 109-A must be read side by side with R.A. 9184 because the latter is not deemed to have repealed the former.

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,

A handwritten signature in black ink, appearing to read 'Jose Martin C. Syquia', is written over the typed name and title.

**JOSE MARTIN C. SYQUIA**  
Executive Director III

REPUBLIC OF THE PHILIPPINES  
**GOVERNMENT PROCUREMENT POLICY BOARD**  
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January 13, 2005

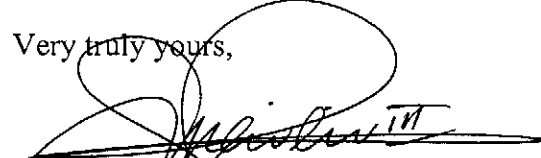
**MR. REYNALDO D. RIVERA**  
Major General  
Armed Forces of the Philippines  
Chief, AFP Modernization Program  
Management Office  
Camp General Emilio Aguinaldo,  
Quezon City

Dear Major General Rivera:

With reference to your letter dated 12 January 2005, 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), requesting clarification on Republic Act 9184 and its Implementing Rules and Regulations Part A, we are acknowledging receipt the facsimile copy of the said request on even date.

We wish to inform you that in order to extend immediate assistance at the earliest possible opportunity we shall be responding to concerns/queries with established answers through phone. With respect to concerns/queries with no concrete or definitive answer, this office shall either issue a written opinion therefor 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