

NPM No. 174-2015

29 December 2015

MS. PINKY TABIL-ENDOZO

Authorized Representative

**JOINT VENTURE OF PILIPINAS MICRO-MATRIX TECHNOLOGY INC.
AND PHILCOX PHILIPPINES INC.**

U2504 East Tower

Philippine Stock Exchange Center

Exchange Road, Ortigas Center

Pasig City

**Re: Tax Clearance; Bidding Documents; Failure of Bidding
under Section 41**

Dear Ms. Tabil-Endozo:

This refers to your letter seeking clarification on the proper conduct of public bidding for the *“Procurement of Consultancy Services, Software Components, Licenses and Professional Services to Implement the Cloud-Based Platform-As-A-Service Environment of the IGOV Government Common Platform”*.

Based on your representation, a Notice of Eligibility and Shortlisting was issued on 5 August 2015 in favor of Joint Venture of Pilipinas Micro-Matrix Technology Inc. and Philcox Philippines Inc. (The Joint Venture), being the only prospective bidder that passed the eligibility requirement in the aforementioned procurement. Other rival bidders were disqualified and declared ineligible in view of their failure to submit acceptable Tax Clearance Certificates required under Section 12.1 (iii) of the revised Implementing Rules and Regulations IRR of Republic Act (RA) No. 9184. However, on 07 August 2015, the ICT Office Bids and Awards Committee for Integrated Government Philippines (BAC41GOV) headed by Chairperson Dennis F. Villoriente, issued Resolution No. B-2015-041 recommending that the Executive Director of the ICT Office should declare a first failure of bidding on the ground that the template document for eligibility documents used by BAC41GOV did not reflect the Tax Clearance Certificate requirement under Section 24.1(a) of the IRR of RA 9184.

It is in this context that you are specifically asking for the GPPB-TSO’s opinion on the following issues:

- 1) Whether or not BAC41GOV acted with grave abuse of discretion amounting to lack or excess of jurisdiction in recommending to declare a failure of bidding despite the amendment introduced in GPPB Resolution No. 21-2013;

TMH

- 2) Whether or not the members of the BAC41GOV are guilty of discriminating against a particular bidder- the Joint Venture, for recommending a failure of bidding at a time when a Notice of Eligibility had already been granted to it;
- 3) Whether or not the BAC41GOV, in declaring a failure of bidding, is giving a previously disqualified and ineligible bidder any unwarranted benefits, advantage or preference in the bidding process by allowing it to re-bid.

At the outset, we wish to stress that the Government Procurement Policy Board and its Technical Support Office (GPPB-TSO) have no jurisdiction to rule over actual controversies with regard to the conduct of bidding by procuring entities through its since it has no quasi-judicial functions under the law.¹ Thus, the decision whether or not to award the contract nor to declare a failure of bidding lies within the authority and jurisdiction of the procuring entity. The GPPB through its TSO only renders policy and non-policy opinions, respectively, on issues pertaining to the interpretation and application of our procurement laws, rules and regulations. Moreover, we adhere to the position that apart from courts having actual jurisdiction over the subject matter of a case, we cannot, nor any other government agency, authority, or official, encroach upon or interfere with the exercise of the functions of the BAC, since duties and responsibilities fall solely within the ambit of its authority and direction as sanctioned by law.²

Nonetheless, for proper guidance, we discuss the pertinent procurement rules and procedures relative to your concerns.

Tax Clearance Requirement

Pursuant to GPPB Resolution 21-2013, Tax Clearance per Executive Order 398, Series of 2005, as finally reviewed and approved by the BIR,³ is now one of the Class "A" documents under Section 24.1(a) of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 for purposes of determining the eligibility and short list of bidders in accordance with Sections 24.4 and 24.5 of the IRR of RA 9184. Relative to this, the procuring entity cannot add to or remove from the list of minimum eligibility documents contained in Section 24.1 of the IRR of RA 9184 as this has already been streamlined/simplified, such that only those requirements are necessary for purposes of determining bidder's eligibility, to allow greater participation, enhance competition among prospective bidders, and reduce transaction costs.⁴ Thus, the Tax Clearance should be included by the PE from in list of eligibility documents to be submitted by the bidder.

Moreover, the requirement to submit the bidder's Tax Clearance is based on Executive Order (EO) No. 398. Section 1 of EO 398 requires the submission of Tax Clearance issued by the BIR to prove full and timely payment of taxes of all persons desiring to enter into or participate in any contract with government. Tax Clearance as defined under BIR RR No. 3-2005 refers to the clearance issued by the Accounts Receivable Monitoring

¹ NPM 045-2014, dated 13 October 2014.

² NPM 111-2014, dated 7 November 2014.

³ Amended through GPPB Resolution 21-2013, dated 30 July 2013, published in Malaya Business Insight on 21 March 2014.

⁴ NPM 91-2014, dated 28 October 2014.

may

Division (ARMD) attesting that the taxpayer has no outstanding Final Assessment Notice and/or delinquent account.

As such, we have previously opined⁵ that since the Tax Clearance is now included as part of the Class "A" legal eligibility documents, its non-submission is a ground for ineligibility, and the eventual disqualification of the bidder.

Bidding Documents

An essential element of a publicly bid contract is that all bidders must be on equal footing. Not simply in terms of application of the procedural rules and regulations imposed by the relevant government agency, *but more importantly, on the contract bidden upon. Each bidder must be able to bid on the same thing.*⁷ Thus, the BAC shall furnish in the bidding documents⁸, particularly the Invitation to Bid, all information on the project necessary for the prospective bidders to properly prepare their bids in order to give fair and equal opportunity to bid.⁹

Evidently, the bidding document issued by the procuring entity contains all the specific requirements, limitations and parameters of the procurement at hand, as determined by the procuring entity.¹¹ Consequently, the BAC determines the eligibility of the prospective bidders based on their compliance with the eligibility requirements set forth in the bidding documents and their submission of the legal, technical and financial documents required under the IRR of R.A. No. 9184.¹²

Based on the foregoing, the bidders would necessarily refer to the bidding documents for information on the preparation of their bids, which includes any mistakes committed by the BAC in the list of eligibility documents contained in the bidding documents.

Failure of Bidding under Section 41

The Head of the Procuring Entity (HOPE) reserves the right to reject any and all bids, declare a failure of bidding, or not award the contract in the situations provided in Section 41¹³ of RA 9184 and its revised IRR. Accordingly, if the HOPE determines that any of the

⁵ NPM 129-2014, dated 17 November 2014.

⁷ *Commission on Audit v. Link Worth International, Inc.*, G.R. No. 182559, 13 March 2009, citing *Agan Jr. v. PIATCO*, 450 Phil 744 (2003).

⁸ Bidding documents refer to the documents issued by procuring entity as the bases for bids, furnishing all information necessary for a prospective bidder to prepare a bid for the infrastructure projects, goods, and/or consulting services required by the procuring entity.⁸

⁹ *Philippine Sports Commission v. Dear John Services, Inc.*, G.R. No. 183260, 4 July 2012.

¹¹ NPM 004-2006, 17 March 2006

¹² *COA v. Carpio, et. al.*, G.R. No. 182559, 13 March 2009

¹³ Section 41. The Head of the Procuring Entity reserves the right to reject any and all bids, declare a failure of bidding, or not award the contract in the following situations:

- a) If there is prima facie evidence of collusion between appropriate public officers or employees of the procuring entity, or between the BAC and any of the bidders, or if the collusion is between or among the bidders themselves, or between a bidder and a third party, including any act which restricts, suppresses or nullifies or tends to restrict, suppress or nullify competition;
- b) If the BAC is found to have failed in following the prescribed bidding procedures; or
- c) For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the GOP, as follows: (i) if the physical and economic conditions have significantly changed so as to render the project no longer economically, financially, or technically feasible, as determined by the Head of the Procuring Entity; (ii) if the project is no longer necessary as determined by the Head of

grounds is present in the conduct of the procurement activity, such as when the BAC failed to follow the prescribed bidding procedures, which include the list of minimum eligibility requirements under Sections 24.1 of the IRR of RA 9184, the HOPE has the right to reject any and all bids, declare a failure of bidding or not award the contract, in accordance with Section 41 of the IRR of RA 9184.¹⁴

The Supreme Court in *National Power Corporation v. Philipp Brothers Oceanic, Inc.*¹⁵ held that:

[w]here the right to reject is so reserved, the lowest bid or any bid for that matter may be rejected on a mere technicality. And where the government as advertiser, availing itself of that right, makes its choice in rejecting any or all bids, the losing bidder has no cause to complain nor right to dispute that choice unless an unfairness or injustice is shown. Accordingly, a bidder has no ground of action to compel the Government to award the contract in his favor, nor compel it to accept his bid. Even the lowest bid or any bid may be rejected.

Summary

In sum, the Tax Clearance is now included as part of the Class "A" legal eligibility document and non-submission of which is a ground for ineligibility, and the eventual disqualification of the bidder. Nonetheless, bidders shall refer to the bidding documents, particularly the Invitation to Bid, for information on the preparation of their bids, which may include erroneous provisions caused during its preparation, specifically the list of eligibility documents, following the principle that all bidders must bid in equal footing. Consequently, the HOPE may declare a failure of bidding or not award the contract in accordance with Section 41 of RA 9184 and its revised IRR when the BAC failed to follow the prescribed procurement procedures, which include the preparation of an accurate list of minimum eligibility requirements mandated under Section 24.1 of the IRR of RA 9184.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is issued on the basis of particular facts and situations presented, and may not be applicable given a different set of facts and circumstances. Should there be other concerns, please do not hesitate to contact us.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director V

the Procuring Entity; and (iii) if the source of funds for the project has been withheld or reduced through no fault of the procuring entity.

¹⁴ NPM 45-2014, dated 13 October 2014

¹⁵ National Power Corporation v. Philipp Brothers Oceanic Inc., G.R. No. 1262014, 20 November 2001.