



TECHNICAL SUPPORT OFFICE

Unit 2506 Raffles Corporate Center,
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NPM No. 030-2005

June 21, 2005

MS. NORLINDA S. PLAZO
Assistant Vice President
General Services Department
Land Bank of the Philippines
1598 M.H. del Pilar cor.
Dr. J. Quintos Streets, Malate, Manila

Dear Ms. Plazo:

This refers to your letter dated 08 June 2005, which we received on 09 June 2005, requesting for a written response on the legality of the action of your Bids and Awards Committee (BAC) on the procurement of a contract for a Two-Year Lease Rental of Thirty Three (33) Brand New Copier Machines for Head Office Units (hereinafter the "Project") of Land Bank of the Philippines (LBP). This issue was earlier raised with our office through the letter of Mr. Conrado B. Roxas dated 09 May 2005.

In the interest of time and with the objective of immediately addressing your concern, this office has verbally communicated with your office on several occasions, the earliest of which was on 24 May 2005, in order to advise you of the specific provision of Republic Act 9184 (R.A. 9184) and its Implementing Rules and Regulations Part A (IRR-A) that may guide your BAC in taking the most appropriate action.

As represented in Mr. Roxas's letter of 09 May 2005, the LBP-BAC clarified during the pre-bid conference "that the largest single contract requirement would refer to contracts to supply photocopiers through lease or rental, and that contracts for outright sale of photocopiers would not be considered." In addition, the following circumstances allegedly transpired during the submission and opening of bids conducted for the Project on 09 March 2005:

Upon examination of the documents submitted by both bidders, the BAC Secretariat found out that the completed/on-going contracts submitted by e-Copy Corporation were for the outright purchase of photocopiers, and not for lease or rental.

The matter was referred to the Bid and Awards Committee. Meanwhile, the bid envelopes of both bidders were not opened.

The Bid and Awards Committee called the representatives of the two bidders to a conference. The e-Copy Corp. representative was asked to describe his company, the nature of the company's business and prove its capability that they could service the requirements of the Bank. Both the U-Bix and the e-Copy representatives were allowed to air their respective views.

During the deliberation that followed, the BAC members were convinced of e-Copy's capability to deliver/perform the services required as stated in the bidding documents. The BAC also considered that at least two bidders, instead of only one, would give them the latitude of choosing which will be the most advantageous to the Bank. It is in this spirit that the BAC allowed the acceptance of the bid documents of e-Copy, and BAC subsequently ruled that the outright sale of photocopiers was deemed satisfying the "largest single contract" requirement of the Bank.¹

Notably, the LBP-BAC has not issued a Supplemental/Bid Bulletin clarifying the interpretation of a largest single contract similar to the Project and neither was the same included in the minutes of the pre-bid conference.

Based on the foregoing circumstances, this office has determined the sole substantial issue to be addressed herein, to wit:

Whether contracts for outright purchase may be considered similar to lease or rental contracts in light of Section 23.6(f.2) of the Implementing Rules and Regulations Part A (IRR-A) of Republic Act 9184 (R.A. 9184).

Interpretation of Similar Contract

Section 23.6 of the IRR-A of R.A. 9184 requires from the prospective bidder a statement whether an ongoing, completed, or awarded contract engaged by him, if any, is similar or not similar in nature and complexity to the contract to be bid. The basis in determining for purposes of eligibility, the veracity of said statement is provided in Section 23.11.1.2 of the said IRR-A, to wit:

For the procurement of goods, a contract shall be considered "similar" to the contract to be bid if it involves **goods or related services of the same nature and complexity** as those which are the subject of the public bidding concerned.²

¹ LBP letter dated 09 May 2005.

² Emphasis supplied.

The Project involves the lease or rental of several brand new copying machines which undertaking is properly considered as procurement of goods under R.A. 9184. Lease contracts strictly involve rendition or use of services rather than the transfer of goods. In contrast, procurement of tangible goods where the intention is to acquire a specific item for use or consumption involves the purchase of certain items of supplies, materials, or equipment. Without an express qualification, one cannot be considered as similar from the other. Thus, we are of the opinion that contracts for outright purchase cannot be considered as similar in nature and complexity to lease or rental contracts. The nature or complexity of lease or rental services necessarily differs from sale or purchase inasmuch as the objects of both contracts are not the same.

However, it should be noted that this opinion does not effectively prohibit the LBP-BAC from exercising discretion and opting to consider contracts of outright purchase as similar to contracts of lease or rental; provided, such decision should be clearly provided in the bidding documents or identified through a supplemental/bid bulletin in accordance with the IRR-A.

Moreover, based on the facts presented, we have noticed several lapses by the LBP-BAC in following the rules and procedures for public bidding laid down in the IRR-A of R.A. 9184, particularly, (i) failure to use non-discretionary "pass/fail" criteria during the eligibility check; and (ii) failure to put in writing through the minutes and/or a supplemental/bid bulletin clarifications made during the pre-bid conference. Please be reminded that the conference held by the LBP-BAC for purposes of clarifying the nature of each bidders' company in aid of the determination of eligibility goes against the rule requiring the use of non-discretionary "pass/fail" criteria. In addition, while the LBP-BAC may qualify during the pre-bid conference what types of contract will be considered similar to the contract to be bid, such clarification – or any other clarification that tend to modify the bidding documents – should be identified in writing through the minutes or a supplemental/bid bulletin in order to be binding upon the procuring entity and the prospective bidders.

Lastly, considering that the LBP-BAC has failed to follow the rules and procedures provided in the IRR-A of R.A. 9184, we are of the opinion that it may declare a failure of bidding under Section 41.1(b) of the said IRR-A.

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