



## TECHNICAL SUPPORT OFFICE

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**NPM No. 41-2005**

September 20, 2005

**HON. NILO C. JATICO**  
Assistant Secretary  
Air Transportation Office  
Department of Transportation and Communication  
MIA Road, Pasay City, Metro Manila 1300

**Re: Clarification on the provisions of Republic Act 9184 (R.A. 9184) and its Implementing Rules and Regulations Part A (IRR-A)**

Dear Asec. Jatico:

This refers to the Honorable Assistant Secretary's letter, dated 29 July 2005, concerning the implementation of Republic Act No. 9184 (R.A. 9184) and its Implementing Rules and Regulations Part A (IRR-A). The letter inquires whether or not the Air Transportation Office (ATO) may deviate from certain provisions of the IRR-A of R.A. 9184, hereafter identified as discussed.

### **Largest Single Completed Contract as Eligibility Criterion in the Procurement of Goods Mandatory**

The Air Transportation Office-Bids and Awards Committee (ATO-BAC) encountered situations where no prospective bidder qualifies with the fifty percent (50%) requirement provided under Section 23.11.1.2 of the IRR-A of R.A. 9184 due to the very limited market for the goods sought to be procured. This being the situation, the ATO-BAC, in view of implementing its projects without any delay or legal impediments seeks to be clarified as to whether the requirements under Section 23.11.1.2 of the IRR-A can be waived.

It must be stressed that compliance with the subject eligibility criterion is a condition *sine qua non*, an imperative, for a prospective bidder to be declared eligible to participate in the bidding proper, such that failure to conform thereto leaves the procuring entity with no other recourse but to declare the prospective bidder ineligible. This acceptance is clear and stated in Section 23.6 of the IRR-A of R.A. 9184, viz:

The **determination of the eligibility** shall be based on the submission of the following documents to the BAC, utilizing the forms prepared by the BAC and **using the criteria stated in Section 23.11** of this IRR-A: (Emphasis supplied)

As Section 23.6 of the IRR-A of R.A. 9184 is clear and emphatic on the bases of the eligibility of a prospective bidder, it is mandatory for a prospective bidder to show that the value of its largest single completed contract similar to contract to be bid is at least 50% of the approved budget for the contract to qualify it to bid in such project. Thus, this eligibility criterion cannot be dispensed with or compromised as this is one of the minimum requirements that a prospective bidder has to satisfy to establish its track record and capacity to perform contractual obligations.

It must be noted also that although the GPPB acts as an agent of the legislature insofar as it is authorized to promulgate rules and regulations in the exercise of its quasi-legislative functions or rule-making power, R.A. 9184 did not grant the GPPB the authority to determine some facts or state of things upon which the enforcement of law depends, much less the authority to waive the application of a particular provision of R.A. 9184 or its IRR-A for the benefit of a particular government agency, private sector or individual. Upon the effectivity of R.A. 9184 and its IRR-A, the inevitable legal consequence is its enforcement and implementation according to its mandate.

Thus, while we are cognizant of the present predicament of ATO in the procurement of government projects, the GPPB cannot simply act beyond the statutory limits of its conferred authority. It must not be forgotten that the GPPB as an agent of the legislature is limited to the jurisdiction and powers expressly granted to it or necessarily implied from the provisions of R.A. 9184, which created such body.<sup>1</sup> It must strictly perform its legal mandate through sound policy formulation within the limits of its delegated quasi-legislative authority, and enforce the mandatory provision of R.A. 9184 and its IRR-A. Thus, it has been the consistent position of the GPPB not to grant any exemption from the application of procurement laws, rules and regulations in favor of procuring entities, suppliers, manufacturers, consultants and contractors, nor waive any of the provisions of R.A. 9184 and its IRR-A.

### **Prohibition on Reference to Brand Names**

The ATO-BAC also inquires as to the propriety of indicating the brand names or part numbers in the purchase of equipment and spare parts for use as backup/spares. The act, as so done, allegedly considers the uniformity and commonality of equipment and the integration of equipment to already existing equipment.

This notwithstanding, the rule with regard to the reference to brand names under R.A. 9184 is absolute. In specifying the goods sought to be procured, reference to brand names is prohibited. The prohibition is absolute in its terms and bars any exception as it is restrictive or preventive of any healthy competition. What a procuring entity may

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<sup>1</sup> RCPI v. NTC, 215 SCRA 455.

prudently do is to judiciously prepare its "technical specifications" so that it is instead bound by the technical nature of the item to be procured rather than by its brand.

### **Eligibility Check of Foreign Entities**

The ATO-BAC intends to purchase goods directly from a foreign manufacturer which has no legal distributor/representative. It is inquired whether or not procurement of these items may be made from the manufacturer, despite the participation of a local company which is not the authorized distributor/representative of the manufacturer.

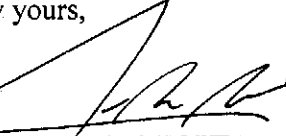
In the procurement of goods as a rule, only Filipino citizens, partnerships and corporations, sixty percent (60%) of the interest or capital of which belongs to citizens of the Philippines are eligible to participate in the bidding for the supply of goods.<sup>2</sup> However, when the goods to be procured are not available from local sources, when there is a need to prevent situations that defeat competition or restrain trade<sup>3</sup>, or when foreign nationals are otherwise declared eligible to participate in public procurement under the principle of reciprocity with other nations, foreign suppliers are allowed to participate.

At this juncture we would like to inform your good office that the Government Procurement Policy Board last 12 September issued GPPB Resolution No. 018-2005, Guidelines in the Determination of Eligibility of Foreign Suppliers, Contractors, and Consultants to Participate in Government Procurement Projects which now clarifies under what conditions foreign nationals may participate in the public procurement of goods, infrastructure projects and consultancy services. The said resolution is hereby attached for the Honorable Assistant Secretary's perusal.

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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<sup>2</sup> See Section 23.11.1, IRR-A; see also R.A. 5183 on the award of government contract to Filipinos

<sup>3</sup> See Section 23.11.1 of the IRR-A of R.A. 9184 The Government Procurement Policy Board shall promulgate the necessary guidelines for this provision.