



TECHNICAL SUPPORT OFFICE

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NPM No. 044-2005

October 13, 2005

MS. CORAZON P. CARPIO
Business Unit Manager-CSS
PRONET Systems Integrated Network Solution, Inc.
LCN Bldg., #24 Kabignayan St., Corner Banawe St., Q.C.

Re : Rating system in the procurement of goods

Dear Ms. Carpio:

This refers to your letter, dated 27 September 2005,¹ requesting that opinion be rendered on certain issues involved in the procurement undertaking of the Lung Center of the Philippines (LCP) where PRONET Systems Integrated Network Solution, Inc (PRONET) was a bidder.

The subject procurement activity involves the bidding for the supply of one (1) hospital integrated information system for the Lung Center of the Philippines. While a number of questions were raised for our opinion, we shall tackle only that which involves a policy consideration in the spectrum of procurement or that which requires the interpretation of the provisions of the present procurement rules and regulations.

Issues involving the determination of the legality of certain official conduct or action and the validation of the existence or non-existence of facts relative to the prosecution of a procurement activity are outside the purview of the given authority of this office. Hence, with deep regret, this office declines to comment on the questions raised which are of this nature.

Although the GPPB is the sole administrative body imbued with quasi-legislative or rule-making power² to determine policy directions in the area of public procurement, such authority is limited only to supplementary or detailed³ and

¹ Received by this office on same date.

² Rule-making power of administrative agencies refers to the power to issue rules and regulations which result from delegated legislation in the administrative level. (See Appalo, *Philippine Administrative Law*, 1999 Ed., p.137)

³ Supplementary or detailed legislation pertains to rules promulgated by an administrative body which is intended to fill in the details of the law and "to make explicit what is only general." Its purpose is to enlarge upon a statute, subject only to the standards fixed therein, to ensure its effective enforcement in accordance with the legislative will. (See Cruz, *Philippine Administrative Law*, 1998 Ed., p. 33)

interpretative legislations.⁴ Moreover, R.A. 9184 did not intend that the GPPB act as a quasi-judicial body.⁵ As such, it has no investigatory or adjudicatory powers and functions.

The foregoing considered, the lone issue is as follows:

Whether or not a point allotment system may be employed during the evaluation and/or post-qualification of bids in the procurement of goods.

In the letter-query, it is stated that the Bids and Awards Committee (BAC) of the LCP used a discretionary criteria to rate the bidders during the Bid Evaluation and Post-Qualification stages of the bidding process and allowed the assignment of weights to certain criteria determined by it. In a letter⁶ by the BAC Chairman of the BAC-LCP, in response to the contentions of PRONET, it was argued that the Lowest and Calculated and Responsive Bid is not only determined by the lowest bid price; but the same should satisfactorily comply with all requirements identified for post-qualification purposes.

The issue lies on the question of whether a procuring entity may employ discretionary criteria in the evaluation and post-qualification of bids; and, therefore, may not award the contract to the Lowest Calculated and Responsive Bid on grounds that after post-qualification it has not garnered the highest rating in the point allotment/rating system.

Non-discretionary pass/fail criteria

The rules are clear as to the policy under the present procurement law to employ non-discretionary pass/fail criteria in the eligibility check and in the evaluation and post-qualification of bids. The intention is to lessen the discretion of the BAC in the bidding process and, instead, encourage the judicious planning of the procurement, including the setting out of the required minimum technical parameters of the bidding at the onset. The criteria reflective of the requirements of the procuring entity should have already been considered in the preparation of the legal and technical specifications and contained in the bidding documents; and, any bidder who meets the said criteria is deemed responsive. In fact, offers which provide for superior specifications and/or better terms and conditions are not given any bonus, credit or premium.⁷ This is the reason why the rules, as it currently stands, do not permit the formulation of a separate criteria or a point/grading system for the evaluation and post-qualification of bids.

⁴ Interpretative legislation is also known as rule-making by the construction and interpretation of a statute being administered and is intended to interpret a particular law being enforced. (See De Leon and De Leon, Jr., *Administrative Law: Text and Cases*, 2001 Ed., p. 81).

⁵ A quasi-judicial body is an organ of government other than a court and other than a legislature, which exercises adjudicative power affecting the rights of private persons. It is its basic function to adjudicate claims and/or determine rights, and unless its decision is reasonably appealed to the proper reviewing authority, the same attains finality and becomes executory. (See Agpalo, *Philippine Administrative Law*, 1998 Ed., p. 216 citing Presidential Anti-Dollar Salting Task Force v. CA, 171 SCRA 348 [1989].)

⁶ Letter of Joseph Z. Obusan, M.D., FPCR, dated 26 September 2005 as attached to the letter-query subject of this opinion.

⁷ Section 17.4 of the Implementing Rules and Regulations Part of RA 9184.



It may be well to emphasize the rules relevant to the issue. Upon the determination of the eligibility of a prospective bidder, a preliminary examination of its bid shall be made. For this purpose, the BAC shall check the submitted documents of each bidder against a checklist of required documents to ascertain if they are all present, using a non-discretionary "pass/fail" criteria. In case one or more of the above required documents in the first envelope of a particular bid is missing, incomplete, or patently insufficient, the BAC shall rate the bid concerned as "failed." Otherwise, the BAC shall rate the said first bid envelope as "passed."

As can be gleaned from the provisions of R.A. 9184 and its IRR-A, bid evaluation for the procurement of goods is for the sole determination and identification of the Lowest Calculated Bid. This shall be done by arranging the calculated bid prices arranged from lowest to highest. Clearly, no rating system may be employed by the BAC during bid evaluation since it is only in the procurement of consulting services where the ranking of bids shall be based on merits under a point/grading system.

We quote herein the pertinent provisions of the IRR-A as follows:


Section 32.1. For the procurement of goods and infrastructure projects, the purpose of bid evaluation is to determine the Lowest Calculated Bid. This bid shall be subject to post-qualification in accordance with Rule X of this IRR-A to determine its responsiveness to the eligibility and bid requirements. If after post-qualification the Lowest Calculated Bid is determined to be post-qualified it shall be considered the Lowest Calculated Responsive Bid and the contract shall be awarded to the bidder.

Section 32.2. For the procurement of goods and infrastructure projects, the Lowest Calculated Bid shall be determined in two steps:

- a) The detailed evaluation of the financial component of the bids, to establish the correct calculated prices of the bids; and
- b) The ranking of the total bid prices as so calculated from the lowest to the highest. The bid with the lowest price shall be identified as the Lowest Calculated Bid.

To add, Section 32.4.4 of the IRR-A provides:

Based on the detailed evaluation of bids, those that comply with the abovementioned requirements shall be ranked in the ascending order of their total calculated bid prices, as evaluated and corrected for computational errors, discounts and other modifications, to identify the Lowest Calculated Bid. Total calculated bid prices, as evaluated and corrected for computational errors, discounts and other modifications, which exceed the approved budget for the contract, shall not be considered.



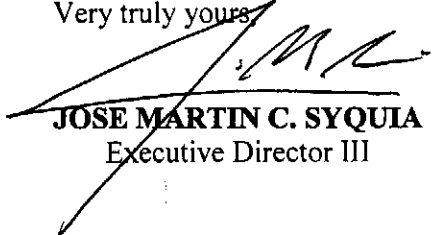
Also worthy of mention is the intent underlying the procedure on Post-Qualification of Bids. Section 34 of the IRR-A provides that the post-qualification shall verify, validate and ascertain all statements made and documents submitted by the bidder with the Lowest Calculated Bid/Highest Rated Bid⁸, using non-discretionary criteria, to determine whether the bidder concerned complies with and is responsive to all the requirements and conditions for eligibility.

Clearly, nothing in the rules sanction the use of additional criteria during the evaluation and/or post-qualification of bids which were not set out at the beginning and were not provided in the bidding documents. Moreover, the point allotment system is directly contrary to the provisions of the law specifically in the procurement of goods and infrastructure. The law intends the employment of a non-discretionary mechanism in these kinds of procurement.

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

⁸ The Highest Rated Bid applies to procurement of consultancy services.