

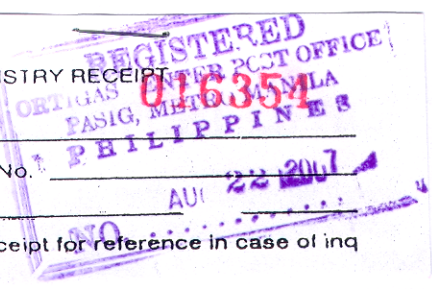


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NPM No. 44-2007

13 August 2007

MR. ISRAEL G. ESTRELLA

Chairman, Bids and Awards Committee

PHILIPPINE CHARITY SWEEPSTAKES OFFICE

PCSO Complex, E. Rodriguez Sr. Avenue
Quezon City

Re: Eligibility Requirements for Joint Ventures

Dear Mr. Estrella:

We respond to your letter dated 4 August 2006 requesting for opinion on the following issues:

1. Whether every party to a Joint Venture Agreement is mandated to submit all documents in the eligibility requirement under the Implementing Rules and Regulations Part A (IRR-A) of Republic Act No. 9184 (R. A. 9184);
2. Whether the required percentage of Filipino and foreign ownership, participation or interest for a Joint Venture is mandatory;
3. Whether the non-inclusion of the financial eligibility documents in the eligibility envelope but was otherwise included in the technical proposal envelope constitutes compliance with the eligibility requirement.

Eligibility Requirement for Joint Ventures

As recognized in this jurisdiction, a Joint Venture is generally understood to mean an organization formed for some temporary purpose. It has no precise definition. In a joint venture, there is community of interest in the business, sharing of profits and losses, and a mutual right of control (*Aurbach v. Sanitary Wares Manufacturing Corporation*, 180 SCRA 131 [1989]). Filipino entrepreneurs in their desire to develop the industrial and manufacturing capacities of a local firm are constrained to seek the technology and marketing assistance of huge corporations usually of the developed world (*Ibid*). In connection therewith, the Securities and Exchange Commission (SEC)

has consistently ruled that two (2) or more corporations may enter into a Joint Venture through an agreement if the nature of the venture is in line with the business authorized by their charters (SEC Opinions dated 26 January 1961, 29 February 1980, 29 April 1985, and 18 March 1993).

In order to give local firms an opportunity to participate in Government procurement and consistent with the intent of R. A. 9184, this Office has ruled in Non-Policy Matter (NPM) Opinion No. 18-2005 as follows:

“For this reason, the requirement for submission of legal documents should mean the individual submission of all the entities comprising the joint venture. On the other hand, because usually joint ventures have become a remedy to augment on the capability of smaller enterprises to participate in competition and to eventually perform the contract, the submissions of financial and technical documentary requirements by any of the entities constitute compliance.”

Consequently, we reiterate our ruling that **each member of the Joint Venture shall submit the Legal Documents¹ under the eligibility requirements.** This is to ensure that all the parties in the Joint Venture have the requisite legal personality to conduct business.

The Government, however, recognizes the need to encourage small and medium businesses, which are unable, either technically or financially, to carry out a business undertaking on its own, to solicit the assistance of capable or bigger businesses through a Joint Venture. Thus, it is sufficient that **the Technical Documents and the Financial Documents under the eligibility requirements should be complied with by at least one of the members of the Joint Venture** for purposes of determining the joint venture's eligibility.

Percentage of Filipino and Foreign Participation

In case prospective bidders form a Joint Venture, Filipino ownership or interest of the joint venture concerned, as a general rule, shall be at least sixty percent (60%), in

¹ Legal Documents

- a) Department of Trade and Industry (DTI) business name registration or Securities and Exchange Commission (SEC) registration certificate, whichever may be appropriate under existing laws of the Philippines;
- b) Valid and current Mayor's permit/municipal license;
- c) Taxpayer's Identification Number;
- d) Statement of the prospective Bidder that it is not "blacklisted" or barred from bidding by the Government or any of its agencies, offices, corporations or LGUs, including non-inclusion in the Consolidated Blacklisting Report issued by the GOP;
- e) Other appropriate licenses as may be required by the procuring entity concerned.

case of procurement of goods and consultancy, or seventy five percent (75%) Filipino ownership or interest, in case of procurement of infrastructure projects (Section 23.11.1 [d], Section 24.1.1 [e], and Section 23.11.2 [d], IRR-A).

However, when the goods to be procured are not available from local sources as certified by the head of the procuring entity, or when there is a need to prevent situations that defeat competition or restrain trade, said procuring entity may invite foreign suppliers, manufacturers and/or distributors (Section 23.11.1, IRR-A). Foreign consultants forming a joint venture may also qualify for consulting services subject to the conditions provided in Section 24.1.2 of the IRR-A. On the other hand, joint ventures in which Filipino interest is less than 75% may be eligible for infrastructure projects if the structures to be built require the application of techniques and/or technologies provided Filipino ownership or interest shall not be less than 25% (Section 23.11.2 [d], IRR-A).

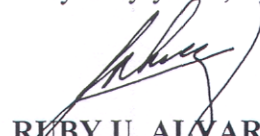
Non-Inclusion of Financial Eligibility Documents in the Eligibility Envelope

Under the IRR-A, the Bids and Awards Committee (BAC) shall determine if each bidder is eligible to participate in the bidding by examining the **completeness** of each eligibility requirements or statements against a checklist of requirements using a non-discretionary "pass/fail" criteria. Thus, if the eligibility documents are incomplete for failure to include the financial documents, the BAC is constrained to inform the bidder that it has been found ineligible to participate in the bidding, and the grounds for its ineligibility. The BAC shall not be allowed to receive, hold, and/or open the technical proposal of ineligible bids. If the ineligible bidder signifies its intent to file a motion for reconsideration, the BAC shall hold the bid of said ineligible bidder unopened and duly sealed until such time that the motion for reconsideration has been resolved. (Section 23.3, IRR-A; Section 24.13, IRR-A)

In sum, the non-inclusion of the financial eligibility documents in the eligibility envelope would result to the bidder being declared "ineligible" due to the absence of such financial document. The BAC shall not be allowed to receive and open the Technical Proposal envelope of the ineligible bidder until such time that the motion for reconsideration, if any, has been resolved.

We hope to have clarified the matter. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,


RUBY U. ALVAREZ
Executive Director III