

REPUBLIC OF THE PHILIPPINES  
**GOVERNMENT PROCUREMENT POLICY BOARD**

*Mezzanine 125, Mabini Hall, Malacañang, Manila  
Telefax Nos. (02) 735-4962; (02) 736-5758*

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**NPM No. 51-2004**

April 16, 2004

**MS. ROWEENA G. BASA**  
Procurement Officer  
Government Arsenal  
Department of National Defense

**Re : Issuance of Letter of Credit and other Matters**

Dear Ms. Basa:

This refers to your letter dated November 10, 2003 which we received on November 11, 2003 wherein you raised the following queries, to wit:

1. For foreign importations where there are local suppliers with foreign manufacturers, who will be evaluated in the eligibility check?
2. Section 61.1 states that all contracts shall be denominated and payable in Philippine currency. With this, are suppliers allowed to quote in foreign currency?
3. Section 42.5 states that no procuring entity shall be allowed to issue a letter of credit in favor of a Philippine entity or to any of the latter's foreign manufacturers or suppliers, with respect to any procurement. Since the goods are imported are we allowed to issue foreign letters of credit ("LC's") to foreign manufacturers?
  - a) If we are allowed to issue foreign LC's should foreign currency rates change during contract implementation, which rate will prevail?
  - b) If the rate at the bidding date prevails, a discrepancy will arise at the time of the application for foreign LC. Since Land Bank, the issuing bank, will of course go with the



prevailing rate at the time of application, what will be our recourse?

4. Since Government Arsenal ("GA") is a manufacturing plant with equipments (sic) sourced from various manufacturers and branded chemical supplies that had been tested as adaptable and acceptable for our operations and equipments (sic), are we now exempted from Section 18 which prohibits the use of brand names?
5. In the use of brand names, GA also maintains a hospital for its employees, we procure branded medicines mainly for maintenance purposes. If we are limited by this provision, we will be procuring medicines not suitable to the needs requirement of our employees.
6. For our Petroleum Oil and Lubricant Products ("POL") products, we do a one time bidding with delivery on a staggered basis. The concern is, prices of petroleum products are subject to change. Is this allowed?

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

Generally, in the procurement of goods, certain nationality requirements have to be complied with by prospective bidders as part of the eligibility criteria under Section 23.11.1 of the IRR-A of R.A. 9184 pursuant to the Filipino first policy enshrined in the 1987 Constitution<sup>1</sup> and in consonance with the statutory requirement of Republic Act No. 5183 ("R.A. 5183")<sup>2</sup> for the award of government contracts. In other words, 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.

However, there are instances when the IRR-A of R.A. 9184 and R.A. 5183 allow the participation of foreign entities in the procurement of goods, such as when the goods to be procured are not available in local sources, when there is a

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<sup>1</sup> See Section 12, Article 12 of the 1987 Constitution.

<sup>2</sup> Section 1 of R.A. 5183 provides:

No contract either through a public bidding or negotiated contract for the supply to, or procurement by, any government-owned or controlled corporation, company, agency or municipal corporation of materials, equipment, goods and commodities shall be awarded to any contractor or bidder who is not a citizen of the Philippines or which is not a corporation or association at least sixty percent of the capital of which is owned by Filipino citizens, except as to a citizen, corporation or association of a country the laws or regulations of which grant similar rights or privileges to citizens of the Philippines. In the latter case the Flag Law shall continue to be applicable.

need to prevent situations that defeat competition or restrain trade<sup>3</sup>, or when there is reciprocity. Furthermore, Section 21 of R.A. 9206<sup>4</sup> or the General Appropriations Act allows the importation of goods from foreign sources such as when the goods to be procured cannot be obtained locally.

Thus, in the foregoing cases allowed by law, it is the foreign entity that should be subjected to eligibility check notwithstanding the presence of its local agent in the Philippines, since such foreign entity is the prospective bidder that would have to satisfy the eligibility requirements. The Philippine agent merely acts as a representative in the business transactions of its principal as it may be authorized, with separate and distinct personality.

### **Bids Denominated in Foreign Currency**

Section 61.1 of the IRR-A of R.A. 9184 specifically provides:

All contracts shall be denominated and payable in Philippine currency, and this shall be stated in the bidding documents: Provided, *however*, That should the procuring entity receive bids denominated in foreign currency, the same shall be converted to Philippine currency based on the exchange rate prevailing on the day of the bid opening. (Underscoring supplied)

Apparently, based on the foregoing provision, although the IRR-A of R.A. 9184 mandates that all government contracts shall be denominated and payable in Philippine currency, it allows bids for such contracts to be denominated in foreign currency, provided that such shall be converted to Philippine currency at the prevailing rate on the day of the bid opening.

### **Issuance of Letter of Credit**

A reading of Sec. 42.5 of IRR-A of R.A. 9184<sup>4</sup> will reveal that a letter of credit is not allowed to be issued either in favor of the following: (i) a Philippine entity; or (ii) any of a Philippine entity's foreign manufacturers or suppliers. Thus:

No procuring entity shall be allowed to issue a letter of credit **in favor of a Philippine entity** or to **any of the latter's foreign manufacturers or suppliers**, with respect to any procurement. (Emphasis supplied)

The prohibition against the issuance of a letter of credit in favor of a Philippine entity's foreign manufacturer or supplier contemplates a situation where the Philippine entity acts as the distributor or local supplier of the foreign

<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.

<sup>4</sup> Reenacted in 2004.

manufacturer or supplier, which directly participates in the bidding process and in whose name the contract is awarded.

However, the issuance of a letter of credit in favor of a foreign manufacturer or supplier in whose name the contract is awarded is not prohibited, what the provision disallows is the issuance of a letter of credit in favor of a foreign manufacturer or supplier of a Philippine entity.

However, as regards the issue of the exchange rate to be used in the issuance of a letter of credit, whether the prevailing rate at the time of bid opening or the rate at the time of the application of the letter of credit, the Government Procurement Policy Board-Technical Support Office ("GPPB -TSO") cannot provide you with an immediate response at this point, since the matter has to be raised to the GPPB for resolution considering that such entails further construction of the procurement rules through a policy resolution from the GPPB.

### **Reference to Brand Names**

The rule with regard to the reference to brand names under R.A. 9184 is absolute. For this reason, the fourth and fifth issues should be addressed in the negative. Reference to brand names is not allowed as enunciated in Section 18 of the IRR-A of R.A. 9184 as follows:

Specifications for the procurement of goods shall be based on relevant characteristics and/or performance requirements. Reference to brand names shall not be allowed.

Based on the afore-mentioned proviso, the prohibition against reference to brand names is absolute since the law does not provide for any exception. Accordingly under the principle of statutory construction, "where the law speaks in clear and categorical language, there is no room for interpretation or construction; there is only room for application"<sup>5</sup> In addition, reference to brand names is prohibited by law because it restricts competition.

Moreover, the prohibition against reference to brand names applies to all kinds of procurement. Stress must be made that in the present state of the law, procurement must be based on specifications and not in a particular brand. For this reason, the procuring entity must be able to prepare its own "technical specifications" for the goods it desires to procure.

### **Procurement of POL Products**

Generally, all bid prices are fixed and are not subject to change at any stage of the procurement process or contract implementation. Specifically, the first sentence of Section 61.1 of the IRR-A of R.A. 9184 provides as follows:

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<sup>5</sup> Alcantara, Statutes, 1997, p. 32

For the given scope of work in the contract as awarded, **all bid prices shall be considered as fixed prices, and therefore not subject to price escalation during contract implementation**, except under extraordinary circumstances and upon prior approval of the GPPB. x x x (Emphasis supplied).

On the basis of the afore-cited provision, it can be deduced that all bid prices are to be considered as fixed prices and cannot be altered or changed except under extraordinary circumstances to be determined by the GPPB. In this light, despite the fact that the price of POL products is unstable and highly dependent on prevailing market conditions, such circumstance does not justify price escalation since it is not an extraordinary circumstance contemplated by the IRR-A of R.A. 9184.

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