

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

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NPM No. 56-2004

April 30, 2004

Mr. ARISTEDES M. AQUINO

President

Lehrmeister-Faktor Phils., Inc.

10/F Medical Plaza Bldg., 25 San Miguel Avenue

Ortigas Center, Pasig City

Re : **Eligibility Criterion on Net Financial Contracting Capacity under Executive Order No. 40 and Republic Act No. 9184**

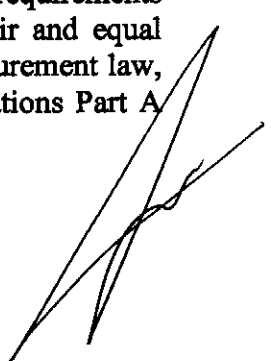
Dear Mr. Aquino:

This refers to your letter dated March 23, 2004 addressed to Hon. Emilia T. Boncodin as Chairperson of the Government Procurement Policy Board ("GPPB"), which was referred to our office on April 13, 2004 requesting for an opinion on the financial stability of a bidder as a prequalification requirement for bidding under Executive Order No. 40 ("E.O. 40"). Your query centers on this issue:

Whether or not a bidder with a negative Php 2.89 Billion Net Financial Contracting Capacity ("NFCC") can be prospectively considered as being financially stable by merely obtaining a bank guarantee of Php 40.8 Million, equivalent to 10% of the approved budget for the contract ("ABC").

Eligibility Criterion on Net Financial Contracting Capacity

The Implementing Rules and Regulations ("IRR") of E.O. 40 prescribes the eligibility criteria which a prospective bidder must satisfy to be eligible to participate in a particular procurement. Such criteria establish the status of a bidder in relation to its legal, technical and financial competence to comply with the requirements of the contract to be bid, as shown by eligibility documents submitted to and checked by the Bids and Awards Committee ("BAC"). The eligibility of bidders is determined by their compliance with the eligibility requirements prescribed using a non-discretionary "pass/fail" criteria, thus providing for fair and equal access to all prospective bidders. The same rule is observed under the new procurement law, Republic Act No. 9184 ("R.A. 9184") and its Implementing Rules and Regulations Part A ("IRR-A").



As part of the eligibility criteria for the procurement of goods, supplies, materials, and related services, as well as for civil works under the IRR of E.O. 40, specifically Sections 16.2.1(3) and 16.2.2 (4) thereof, prospective bidders are mandated to comply with the NFCC requirement, such that it is imperative that their NFCC, based on their net working capital, must be at least equal to the approved budget for the contract to be bid. Should the prospective proponent fail to satisfy the NFCC requirement, it will be declared ineligible to participate in the ensuing public bidding. The disqualification in case of failure to satisfy the NFCC requirement is brought about by the use of the non-discretionary pass/fail criteria sanctioned by Section 16.4 of the IRR of E.O. 40, to wit:

In relation to Section 18 on submission of bids, and subject to the provisions of Section 14.6 of these IRR, the BAC shall determine if each prospective bidder is eligible to participate in the bidding by examining the completeness of each prospective bidder's eligibility requirements or statements against a checklist of requirements, **using a non-discretionary "pass/fail" criteria**, as stated in the Invitation to Apply for Eligibility and to Bid, and shall be determined as either "eligible" or "ineligible" x x x (Emphasis supplied)

The inclusion of the NFCC as an eligibility criteria under E.O. 40 and its IRR was intended to determine at the earliest opportunity the financial capacity of the bidder to perform or deliver the project being bid out, such that if it is determined at the outset that the bidder has no financial capacity or would have possessed such capacity were it not for the fact that it has spread its resources to cover numerous on-going contracts, it will not be allowed to participate in the bidding process.

Section 16.2.1 and Section 16.2.2 of the Implementing Rules and Regulations ("IRR"), Executive Order No. 40, series of 2001 ("E.O. 40"), provide as follows:

NFCC = [(Current assets minus current liabilities) multiplied by (K)] minus the value of all outstanding works or projects under ongoing contracts, including awarded contracts yet to be started.

Where:

K = 10 for a contract duration of one year or less, 15 for a contract duration of more than one year up to two years, and 20 for a contract duration of more than two years.

However, with the enactment of R.A. 9184 otherwise known as the Government Procurement Reform Act which took effect on January 26, 2003, and the subsequent passage of its IRR-A, which became effective on October 8, 2003, it can be readily observed that the new law has become more liberal as far as the financial capacity of a prospective bidder is concerned. Our new procurement law, rules and regulations now grant the prospective bidders alternative recourse if they fail to comply with such eligibility criterion. Sections 23.11.1 (3) and 23.11.2 (5) of the IRR-A of R.A. 9184, provides:

The prospective bidder must present a commitment from a licensed bank to extend to it a credit line if awarded the contract

to be bid, or a cash deposit certificate in an amount not lower than that set by the procuring entity in the Bidding Documents, which shall be at least equal to ten percent (10%) of the approved budget for the contract to be bid; or must have a NFCC at least equal to the budget for the contract to be bid, calculated as follows:

NFCC = [(Current assets minus current liabilities) multiplied by (K)] minus the value of all outstanding works or projects under ongoing contracts, including awarded contracts yet to be started.

Where:

K = 10 for a contract duration of one year or less, 15 for a contract duration of more than one year up to two years, and 20 for a contract duration of more than two years. (Emphasis supplied)

Hence, under the foregoing provision, if the prospective bidder's NFCC is not sufficient to comply with the requirements of the IRR-A, he is allowed submit in lieu thereof, a commitment from a licensed bank to extend to it a credit line if awarded the contract to be bid; or a cash deposit certificate, in an amount not lower than that set by the procuring entity in the bidding documents, which shall be at least equal to ten percent (10%) of the ABC.

In the light of the foregoing discussions, your query may be answered either in the affirmative or in the negative, depending on the date when the advertisement or invitations for bids were issued for the Light Rail Transit (LRT) Line 1 Maintenance Contract, to which your concern relates. This is the determinative factor, whether or not Joint Venture of Genials Trading and Contracting Company/Summa Kumagai, Inc/Systra Philipines, Inc. is actually eligible to bid in such project, since the date of advertisement or invitations for bids establishes the law applicable to such procurement activity. This is in view of the transitory clause stated in Section 77 of the IRR-A of R.A. 9184, which explicitly provides:

In all procurement activities, if the advertisement or invitation for bids was issued prior to the effectivity of the Act, the provisions of E.O. 40 and its IRR, P.D. 1594 and its IRR, R.A. 7160 and its IRR, or other applicable laws, as the case may be, shall govern.

In cases where the advertisements or invitations for bids were issued after the effectivity of the Act but before the effectivity of this IRR-A, procuring entities may continue adopting the procurement procedures, rules and regulations provided in E.O. 40 and its IRR, P.D. 1594 and its IRR, R.A. 7160 and its IRR, or other applicable laws, as the case may be.

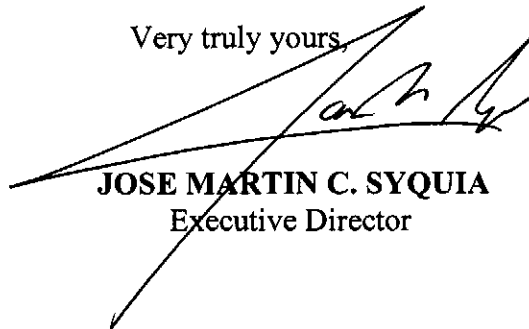
Accordingly, if the advertisement or invitations for bid for the LRT Line 1 Maintenance Contract was issued prior to October 8, 2003, the date of effectivity of the IRR-A of R.A. 9184, then the strict NFCC eligibility criterion of the IRR of E.O. 40 shall apply. Hence, a prospective bidder with a negative NFCC should be declared ineligible to bid in such project under the non-discretionary pass/fail criteria sanctioned by the IRR of E.O. 40. However, if the advertisement or invitations for bid for such project was issued after the

effectivity of the IRR-A of R.A. 9184, the financial requirement under the IRR-A shall apply in the eligibility check of prospective bidders for such project. In this case, a prospective bidder is allowed to submit in lieu of its NFCC, a commitment from a licensed bank to extend to it a credit line if awarded the contract to be bid not lower than that set by the procuring entity in the bidding documents, which shall be at least equal to ten percent (10%) of the ABC.

Please note that 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 and circumstances.

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director