

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office
Mezzanine 125, Mabini Hall, Malacañang, Manila
Telefax Nos. (02) 735-4962; (02) 736-5758

NPM No. 066-2004

Mr. MANUEL A. SANDOVAL
President
Philippine Shipbuilders and Repairers Association
Room 303 PPL Building
UN Avenue, Ermita Manila, Philippines

May 13, 2004
REGISTERED
REGISTRY RECEIPT
MALACANANG POST OFFICE 451
MANILA
Post Office
Letter/Package No.
Posted on MAY 13 2004 19
Preserve this receipt for reference in case of inquiry
Postmaster/Teller

Re : **Request for Exemption from the Largest Single Contract Criterion Under Section 23.11.1(2) of the Implementing Rules and Regulations Part A ("IRR-A") of Republic Act No. 9184 ("R.A. 9184")**

Dear Mr. Sandoval:

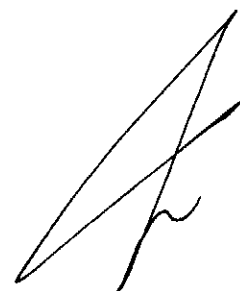
This refers to your letter dated March 12, 2004 addressed to Secretary Emilia T. Boncodin, Chairperson of the Government Procurement Policy Board ("GPPB"), which was referred to our office on March 22, 2004 for appropriate action.

Through your letter, the Philippine Shipbuilders and Repairers Association ("PHILSAR") is requesting the GPPB to exempt it or waive in its favor the provision of Section 23.11.1 (2) of the IRR-A of R.A. 9184, which provides for the largest single contract criterion. This request is anchored on the argument that such provision in the IRR-A defeats competition, indirectly gives preference to foreign entities and unreasonably bars local shipbuilders to participate in the procurement of large government projects, such as those undertaken by the Armed forces of the Philippines ("AFP").

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

Section 23.11.1(2) of the IRR-A of R.A. 9184 prescribes as one of the eligibility criteria in the procurement of goods that the value of largest single completed contract of the bidder should be at least 50% of the approved budget of the contract to be bid, to wit:

The value of the prospective bidder's largest single contract, adjusted to current prices using the wholesale consumer price index, completed within the period specified in the invitation to Apply for Eligibility and to Bid, and similar to the contract to be bid, must be at



least fifty percent (50%) of the approved budget for the contract to be bid.

It must be stressed that compliance with the above-cited 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, as sanctioned by Section 63 of R.A. 9184, such authority is limited only to *supplementary or detailed*¹ and *interpretative legislations*.² R.A. 9184 did not grant the GPPB the quasi-legislative authority of *contingent legislation* or the power to determine some facts or state of things upon which the enforcement of law depends, much more the authority to waive the application of a particular provision of the 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 of which is enforcement and implementation without exceptions.

Thus, while we are cognizant of the present predicament of PHILSAR and our local shipbuilders in their participation in the procurement of government projects, the GPPB cannot simply act beyond the statutory limits of its conferred authority to protect local industries. 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.³ 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,

¹ 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)

² 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).

³ RCPI v. NTC, 215 SCRA 455.

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.

In view of the foregoing, our local shipbuilders have to abide by the strict and mandatory eligibility criteria prescribed by the IRR-A in government procurement. We believe that our local shipbuilders are not without recourse to participate in large government contracts since it may utilize legal means to qualify in such projects. Joint venture is a viable mode by which our local shipbuilders may compete in the multi-million government projects, considering that it is an effective means of technology transfer and capability-building as each joint venture partner has a stake and therefore shares in all the risks and responsibilities for the entire project, including claims and damages arising from defects or failure of the project. Thus, joint ventures are highly encouraged in government projects as it benefits both the contractor and the government.

Nevertheless, we would like to inform you that we have noted the issue that you raised concerning the wisdom of Section 23.11.1 (2) of the IRR-A as it tends to indirectly undermine the Filipino-first policy enshrined in the Philippine Constitution, which is also enunciated in a number of statutes such as Commonwealth Act No.138 ("C.A. 138"), giving native products and domestic entities preference in government purchases and Filipino contractors a fifteen percent advantage in government contracts, and Republic Act No. 5183 ("R.A. 5183"), mandating the award of government contracts to Filipino citizens and entities. We assure you that this will be included in the areas of reform that we have to consider when the GPPB introduces amendments to the IRR-A of R.A. 9184.

In this regard, we appreciate your efforts in bringing to our attention a provision of the IRR-A which in your opinion needs modifications to conform to our laws. As procurement policies under the mantle of R.A. 9184 are yet evolving, you may find solace in the fact that private sectors, as stakeholders in the reformation of our procurement system, are not proscribed from recommending amendments to the IRR-A of R.A. 9184. Thus, should PHILSAR come up with a feasible and legally acceptable proposal as an alternative to the largest single completed contract under Section 23.11.1 (2) of the IRR-A, which is an eligibility criterion in government procurement, measuring a bidder's track record and capacity to perform contractual obligations, please do not hesitate to convey the same to our office and we will gladly raise the same to the GPPB for deliberation.

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director