

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. 071-2004

Mr. DOMINADOR S. GEONZON
Chairman, Bids and Awards Committee
National Transmission Corporation
Power Center, Quezon Avenue,
Diliman, Quezon City

May 18, 2004

REGIS. NO. 1673

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**Re : Procurement of Equipments under Section 23.11.1 of the
Implementing Rules and Regulations Part A ("IRR-A") of
Republic Act No. 9184 ("R.A. 9184")**

Dear Mr. Geonzon:

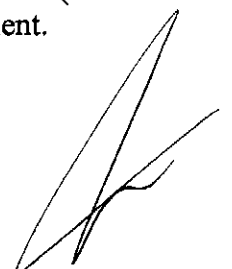
This refers to your letter dated May 12, 2004 addressed to Secretary Emilia T. Boncodin, Chairperson of the Government Procurement Policy Board ("GPPB"), which was forwarded to our office on May 17, 2004, seeking for guidance on this issue:

Whether or not the National Transmission Corporation ("TransCo") may invite foreign entities to participate in the procurement of its needed equipments under Section 23.11.1 of the IRR-A of R.A. 9184

This concern was raised in connection with TransCo's intended procurement of equipment for the upgrading of its various substations and grid system, which are to be acquired from foreign sources due to their unavailability in the local market.

Participation of Foreign Entities in Government Procurement

Section 12 of Article XII of the 1987 Constitution now enshrines in our fundamental law the Filipino-first policy enunciated in a number of statutes, such as: Commonwealth Act No. 138, otherwise known as the "Flag Law", dated November 7, 1936, giving native products and domestic entities preference in government purchases and Filipino contractors a fifteen percent advantage in government contracts; Republic Act No. 912, dated June 30, 1953, prescribing the use of Philippine-made materials; Republic Act No. 5183 ("R.A. 5183"), dated September 8, 1967, governing procurement contracts of the government.



Accordingly, in conformity with the Constitutional mandate and laws giving predilection to Filipinos, Section 23.11.1 of the IRR-A of R.A. 9184, prescribes Filipino ownership/equity requirement as one of the eligibility criteria for entities that wish to participate in the procurement of goods by the government, to wit:

For the procurement of goods:

1. The following manufacturers, suppliers and/or distributors shall be eligible to participate in the bidding for the supply of goods:
 - a) Duly licensed Filipino citizens/sole proprietorships;
 - b) Partnerships duly organized under the laws of the Philippines and of which at least sixty percent (60%) of the interest belongs to citizens of the Philippines;
 - c) Corporations duly organized under the laws of the Philippines, and of which at least sixty percent (60%) of the outstanding capital stock belongs to citizens of the Philippines;
 - d) Manufacturers, suppliers and/or distributors forming themselves into a joint venture, *i.e.*, a group of two (2) or more manufacturers, suppliers and/or distributors that intend to be jointly and severally responsible or liable for a particular contract: *Provided, however*, That Filipino ownership or interest of the joint venture concerned shall be at least sixty percent (60%); or
 - e) Cooperatives duly registered with the Cooperatives Development Authority (CDA).

It can be observed, however, that Section 23.11.1 of the IRR-A of R.A. 9184 was not crafted in such a way as to restrict competition. The provision does not intend to shut out foreign investments, goods and services in the area of Government procurement. Thus, an innovative provision was incorporated therein which allows the participation of foreign entities in the procurement of goods, though in a limited extent, thus:

However, when the goods to be procured are not available from local sources, as provided in this Section, at the prescribed minimum specifications of the appropriate Government authority and/or ABC of the procuring entity, or **when there is a need to prevent situations that defeat competition or restrain trade, the said procuring entity may invite foreign suppliers, manufacturers and/or distributor to participate in the procurement of the said goods. The GPPB shall promulgate the necessary guidelines for this provision.** (Underscoring and emphasis supplied

Nonetheless, it must be noted that aforementioned provision is not a self-executing one, as it needs the prescribed standards that will provide the necessary guiding principles to carry this provision into effect. Hence, with respect to the issue of whether or not foreign entities may be allowed to participate in the procurement of the needed equipments for the upgrading of your various substations and grid system, we are of the opinion that TransCo cannot rely upon the aforementioned provision in Section 23.11.1 of the IRR-A of R.A. 9184, considering that said proviso cannot be put into operation in the absence of implementing guidelines that would implement such.

The GPPB, however, is conscious of the fact that the consequent dormancy of said provision in Section 23.11.1 due to absence of the implementing guidelines would be detrimental to public service as this would unduly hamper the operations of government agencies, particularly those which are confronted with the situation of unavailability of necessary goods in the domestic market. Thus, to address this predicament of government agencies, we would like to inform you that the GPPB, during its 1st Meeting on January 29, 2004, resolved to issue the provisional guidelines for Section 23.11.1 of the IRR-A of R.A. 9184 for the participation of foreign suppliers, manufacturers and distributors in Government procurement. Accordingly, a resolution was issued prescribing the interim standards, parameters and conditions that should be observed in the application of said provision in a situation where the goods to be procured by government agencies are not available from local sources. Said resolution is now routed for signature to the members of the GPPB and would soon be promulgated.

In this regard, we shall inform your office at the soonest possible time upon the release of said resolution providing for the interim guidelines for Section 23.11.1 of the IRR-A of R.A. 9184 allowing foreign entities' participation in Government procurement.

We trust that this clarifies matters.

Very truly yours,


JOSE MARTIN SYQUIA
Executive Director

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May 13, 2004

MR. DOMINADOR S. GEONZON
Vice President, Project Management
Chairman, Bids and Awards Committee
National Transmission Corporation
Power Center, Quezon Avenue cor.
BIR Road, Diliman, Quezon City

Dear Mr. Geonzon:

This refers to your letter dated May 12, 2004, which we received through facsimile on May 13, 2004, addressed to the Honorable Secretary Emilia T. Boncodin as Chairperson of the Government Procurement Policy Board (GPPB), requesting for clarification on Republic Act 9184 and its Implementing Rules and Regulations Part A.

We wish to inform you that we shall respond to your concerns either through phone or in writing at the earliest possible opportunity, or raise the same to the GPPB for appropriate resolution should referral thereto becomes necessary.

Very truly yours,


ATTY. REYNALDO H. BICOL JR.
Procurement Management Officer V