



TECHNICAL SUPPORT OFFICE

Unit 2506 Raffles Corporate Center
F. Ortigas Jr. Road, Ortigas Center
Pasig City, Philippines 1605

NPM No. 78-2007

3 December 2007

ATTY. ARNEL A. ZAPATOS
Provincial Legal Officer
PROVINCE OF SARANGGANI

**Re : Clarification of Certain Provisions of Republic Act No. 9184
and its Implementing Rules and Regulations Part A**

Dear Atty. Zapatos:

We respond to your letter dated 14 July 2006 raising several queries on the implementation of Republic Act No. 9184 (R. A. 9184) and its Implementing Rules and Regulations Part A (IRR-A), as follows:

Who has the authority to determine what items are to be procured?

Section 7 of the IRR-A provides that no procurement shall be undertaken by the procuring entity unless it is in accordance with an approved Annual Procurement Plan (APP). Accordingly, each procuring entity must judiciously and meticulously prepare, maintain and update an APP which shall include, for each individual project, a Project Procurement Management Plan (PPMP).

The preparation and updating of the PPMPs shall be the responsibility of the respective Project Management Offices or the end-user units of the procuring entity. The consolidation of these PPMPs into an APP shall be lodged with the Secretariat of the Bids and Awards Committee (BAC) of the procuring entity (Section 7.4, IRR-A).

Can a bidder insist on its qualifications and its product, even if it did not conform to the specifications provided by the procuring entity?

Section 17 of the IRR-A provides that the specifications and other terms in the bidding documents shall reflect minimum requirements or specifications required to meet the needs of the procuring entity in clear and unambiguous terms. The BAC shall examine the technical components of the bids using the "pass/fail" criteria to determine whether all required documents are present. Only bids that are determined to contain

all the bid requirements of the bid component shall be considered for opening and evaluation of their financial component.

Hence, the bidder cannot insist on its specification especially if said specification is inconsistent with those stated in the bidding documents.

Can a post-disqualified bidder be declared as qualified for failure of the procuring entity to rule on the motion for reconsideration or protest within the seven (7) calendar days upon verbal notification or receipt of the decision of the BAC? When is there undue delay?

After being post-disqualified, an aggrieved bidder has three (3) calendar days from receipt of notice to request the BAC for a reconsideration of said decision. The IRR-A requires the head of the procuring entity to decide said protest within seven (7) calendar days from receipt thereof. (Section 34.4, IRR-A)

Failure to decide on the protest within the prescribed seven (7) calendar day period, does not result in the automatic qualification of an ineligible bidder nor in the curing of any defect found in its bid. The head of the procuring entity may, however, be held administratively and/or criminally liable in case there is undue delay to observe such period (Section 65.1, IRR-A). There is undue delay in case the failure to observe the periods prescribed under R. A. 9184 and its IRR-A is without justifiable cause, without basis and arbitrary.

Hence, the post-disqualified bidder cannot be awarded the contract by mere failure of the head of the procuring entity to resolve or rule on the motion for reconsideration or protest. This is without prejudice to whatever sanctions that may be imposed upon the head of the procuring entity if there is delay without justifiable cause.

How do we construe the three (3)-month period for the bidding process vis-à-vis a protest filed beyond said three (3)-month period?

Decisions of the BAC with respect to the bidding may be protested in writing to the head of the procuring entity. The protest must be filed within seven (7) calendar days from receipt of the party concerned of the resolution of the BAC denying its motion for reconsideration (Section 55.1, IRR-A).

There may be some instances when the procurement process exceed the three (3) month period under Section 38.1 of the IRR-A. However, it will not preclude any bidder to file a protest in accordance with Section 55.1 of the IRR-A.

When is there a perfected contract?

The contract is perfected upon the signing thereof by the parties in accordance with existing laws, rules and regulations, and upon approval by the head of the procuring entity or his duly authorized representative, when further approval of higher

authority is required, and submission of all the documentary requirements to perfect the contract (Section 37.4, IRR-A).

Does a post-disqualified bidder have the legal standing to question the approved budget for the contract (ABC)?

Inasmuch as there is no specific provision in IRR-A which specially prohibits a post-disqualified bidder to question the procuring entity's ABC, it may be presumed that the said bidder may probe into the propriety of the ABC.

When is the remedy of arbitration allowed?

Under Section 59 of IRR-A, any and all disputes arising from the implementation of a contract shall be submitted to arbitration in the Philippines in accordance with Republic Act No. 876, otherwise known as the Philippine Arbitration Law. The process of arbitration shall be incorporated as a provision in the contract that will be executed pursuant to the provisions of R. A. 9184 and its IRR-A. By mutual agreement, the parties may agree in writing to resort to other alternative modes of dispute resolution.

What is the role of the GPPB in case of an appeal to the Regional Trial Court?

Please be advised that the Government Procurement Policy Board (GPPB) is an administrative body imbued with quasi-legislative or rule-making power¹ to determine policy directions in the area of public procurement. It has no jurisdiction to rule over actual controversies with regard to the conduct of the bidding process considering that it has no *quasi-judicial*² functions under the law.

We trust that this clarifies matters. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,


RUBY U. ALVAREZ
Executive Director III

¹ Rule-making power of administrative agencies refers to the power to issue rules and regulations which result from delegated legislation in the administrative level. (See Agpalo, *Philippine Administrative Law*, 1999 Ed., p.137).

² Quasi-judicial is defined as a term applied to the actions or discretions of public administrative officers or bodies required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature. (See Agpalo, *Philippine Administrative Law*, 1999 Ed., p. 216 citing *Lupangco v. CA*, 160 SCRA 848 [1988]).