

NPM No. 83-2007

7 December 2007

MS. AMELIA S. TANSINSIN
Officer-in-Charge-AGM Marketing
PHILIPPINE CHARITY SWEEPSTAKES OFFICE
PCSO Complex, E. Rodriguez Sr. Avenue
Quezon City

Re: Clarification on Certain Provisions of Republic Act No. 9184

Dear Ms. Tansinsin:

We refer to your letter dated 31 August 2006 requesting for clarification on certain provisions of Republic Act No. 9184 (R. A. 9184) and its Implementing Rules and Regulations (IRR-A). You wish to clarify the following issues:

1. Will the publication of the Invitation to Apply for Eligibility and to Bid (IAEB) and posting thereof be sufficient for purposes of Section 23.11 of the IRR-A or is there a need to send out individual letters of invitation to the different foreign suppliers, manufacturers or distributors?
2. Is the filing of a motion for reconsideration in Sections 23.3, 30.3 and 34.4 of the IRR-A a matter of right such that an ineligible bidder is granted the option to submit a written waiver to file a motion for reconsideration? Can the Bids and Awards Committee (BAC) outrightly deny the verbal request for reconsideration of said bidder, without having to wait for the three (3) calendar day period granted to the bidder to file a motion for reconsideration?
3. Is it mandatory for each member of the joint venture to submit the Class A documents consisting of the Legal, Technical, and Financial Documents? Would the submission of the Technical Proposal and Financial Proposal envelopes by any of the parties comply with the requirements under Section 23.6 of the IRR-A?
4. Under Section 35.2 of the IRR-A, in case the first bidding has been declared as failed, is a bidder who has been declared ineligible barred from participating in the second bidding/re-bidding?

5. Is the "Swiss Challenge" principle which gives losing bidders the chance to match the winning bidder limited to provincial bidders of provincial projects?

6. If the procurement is through repeat order, should the procuring entity and the previous winning bidder execute a formal written contract (duly acknowledged before a notary public)? Will a mere letter of the procuring entity informing the supplier of the repeat order, duly conformed by the supplier be sufficient?

7. When does the task of the BAC for a particular project end? Is it after the issuance by the head of the procuring entity of the Notice to Proceed? Who will then request for repeat order and the extension of the contract?

Individual Invitations to Foreign Bidders

In cases where goods sought to be procured are not available from local sources as provided in Section 23.11 of the IRR-A, the advertisement and the posting of the IAEB in accordance with Section 21.2.1 of the IRR-A are sufficient.

Sending individual IAEB to foreign bidders is not prohibited under R. A. 9184 and its IRR. Thus, the procuring entity may, at its option, send the IAEB to individual foreign bidders. However, the procuring entity must ensure compliance with the mandatory requirements under Section 21.2.1 of the IRR-A.

Filing of a Request for Reconsideration

Sections 23.3, 24.13, 30.3 and 34.4 of the IRR-A provide that a bidder may file a request for reconsideration on the decision of the Bids and Awards Committee (BAC) and the procedure thereof.

The purpose of review is prevention quite as much as correction of mistakes. It involves matters of concern both to the parties and to the public.¹ The right to appeal if allowed by law is a matter of right and becomes part of due process.² It is a statutory privilege and may be exercised in the manner and in accordance with the provisions of the law.³

Based on the foregoing, since the IRR-A provides the bidder the right to file a request for reconsideration and the procedure thereof, the bidder cannot be unduly deprived of its right to file a request for reconsideration except through a valid waiver.

In the instant case, the BAC cannot outrightly deny the verbal request for reconsideration of the bidder. A bidder is given a prescribed period (3 calendar days or 7 calendar days, as applicable) from the date of verbal notification of the decision of the BAC

¹ Salaveria v. CA, 131 SCRA 527.

² Mirales v. Oro, 136 SCRA 526; Ong v. Tating, 149 SCRA 265.

³ Victorias Milling Co., Inc. v. Office of the Presidential Assistant for Legal Affairs, 153 SCRA 317.

to file a request for reconsideration. The BAC shall decide on the request for reconsideration within seven (7)calendar days from receipt of such request.

Requirements for Joint Ventures

As regards your first query, each member of the Joint Venture shall submit the Legal Documents under the eligibility requirements (GPPB Non-Policy Matter Opinion No. 18-2005). This is to ensure that all the parties in the Joint Venture have the requisite legal personality to conduct business.

The Government also recognizes the need to encourage small and medium businesses which are unable, either technically or financially, to carry out a business undertaking on its own, to solicit the assistance of capable or bigger businesses through a Joint Venture, thus, it is sufficient that the Technical Documents and the Financial Documents under the eligibility requirements should be complied with by at least one of the members of the Joint Venture for purposes of determination of its eligibility (*Ibid*).

The Technical Proposal and Financial Proposal envelopes shall be submitted in the name of the joint venture by its authorized representative.

Ineligible Bidders Not Barred From Joining

Section 35.2 of the IRR-A provides that “[a]ll bidders who have initially responded to the Invitation to Apply for Eligibility and to Bid **and** have been declared eligible in the first bidding shall be allowed to submit new bids.”

Under the afore-quoted provision, the conjunctive word “and” does not signify that the second bidding/re-bidding shall be limited to those who are eligible in the first bidding. It means that previously declared eligible bidders must submit new bids to become eligible for the second bidding/re-bidding.

After a declaration of failure of the first bidding by the BAC, any re-bidding to be conducted is to be taken as a new bidding. The re-bidding must be re-advertised and posted in accordance with Section 21 of the IRR-A. Ineligible bidders in the first bidding are not prohibited to participate in the re-bidding.

Swiss Challenge

Under Section 45.1 of the IRR-A, a contractor who participates in the bidding of provincial priority programs and infrastructure projects, whose principal office is within the same province, and who submits the lowest bid among the provincial bidders which is higher than the Lowest Calculated Bid made by the contractor with principal office outside of said province shall be given 48 hours from receipt of written notice from the BAC to match in writing the Lowest Calculated Bid. If the provincial bidder is able to match the submitted Lowest Calculated Bid within the specified period, he shall be awarded the contract provided he passes the post-qualification.

Under R. A. 9184 and its IRR-A, the right to match is limited to the bidding of provincial projects as described above.

Formal Contract for Repeat Order

Pursuant to the Generic Procurement Manuals, after the head of the procuring entity approves the recommendation of the BAC, the latter through its Secretariat shall confirm the repeat order with the previous supplier, and proceed with the preparation of the supplemental contract or purchase order, after which it shall proceed with contract signing, and contract implementation.

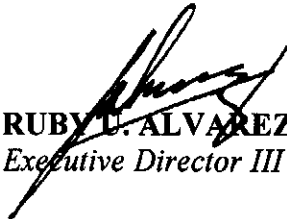
Termination of Responsibility of the BAC

All members of the BAC shall be on a "jury duty" type of assignment until a Notice of Award is issued by the head of the procuring entity in order to complete the entire procurement process at the earliest possible time (Section 38.1, IRR-A).

Whenever justified by the conditions provided for under Section 52 of the IRR-A, the BAC shall recommend to the head of the procuring entity the use of repeat order (Section 12, R. A. 9184 and Section 48, IRR-A). After the head of the procuring entity approves the recommendation of the BAC, the latter through its Secretariat shall confirm the repeat order with the previous supplier. The end-user unit shall prepare the contract or purchase order.

Should you have additional questions, please do not hesitate to contact us.

Very truly yours,



RUBY U. ALVAREZ
Executive Director III