



Republic of the Philippines  
**GOVERNMENT PROCUREMENT POLICY BOARD**  
**TECHNICAL SUPPORT OFFICE**



**NPM No. 03-2016**

18 March 2016

*PEPITO PADILLA*  
*RECEIVED*  
*3/18/2016*

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**Re : Joint Ventures' (JVs) Technical Requirements**

Dear [REDACTED]

This refers to your letter dated 22 January 2016, requesting our opinion relative to the compliance of a JV with the technical requirements in public bidding as provided for under Republic Act (RA) No. 9184 and its Implementing Rules and Regulations (IRR).

It is represented that NIA conducted public biddings for the *Construction of Balog-Balog Dam Diversion Tunnel and Repair and Upgrading of Tarlac Diversion Dam Ogee #2 and Broad Crested Weir under the Balog-Balog Multipurpose Project-Phase II*. In both procurement activities, A.M. Oreta and company, Inc./ Northern Builders JV were declared by NIA Bids and Awards Committee-A (NIA BAC-A) as the bidder that submitted the lowest calculated bid and was subjected to the post-qualification process.

The results of the post-qualification for both biddings show that Northern Builders, as one of the JV partners, did not disclose an on-going contract with the Department of Public Works and Highways (DPWH), which has a negative slippage of fifty-two percent (52%). Consequently, the JV was post-disqualified and the corresponding notices were issued to the authorized managing officers of the JV. The JV submitted letters of reconsideration arguing that the negative slippage was not attributable to them but due to right-of-way (ROW) related problem which is covered by an approved suspension orders issued by DPWH, and the non-disclosure was not deliberate but was omitted through inadvertence.

It is in this context that the Honorable Administrator would like to be clarified whether the non-disclosure by a JV partner of an ongoing government contract would affect compliance with the technical requirements of the bidding by the JV itself, notwithstanding the fact, that the other partner was found to have already submitted/complied with such requirement.

We wish to note that the Government Procurement Policy Board (GPPB) and its Technical Support Office (TSO) only render policy and non-policy opinions respectively, on issues purely relating to the interpretation and application of our procurement laws, rules and regulations. It has no jurisdiction to rule over actual controversies with regard to the conduct of the bidding since it has no quasi-judicial functions under the law. Hence, this office has

consistently refrained from passing upon decisions of the Bids and Awards Committee or even by the Head of the Procuring Entity pertaining to the determination of compliance with RA 9184 or its IRR. In this regard, we shall limit our discussion on the relevant provisions of the procurement law, rules and regulations pertinent to the issues presented.

### **Statement of Ongoing Contracts**

Section 23(a)(iv) of the IRR of RA No. 9184, as amended by GPPB Resolution No. 16-2014,<sup>1</sup> provides that one of the eligibility requirements for the procurement of goods and infrastructure projects is a Statement of the prospective bidder of all its ongoing government and private contracts, including contracts awarded but not yet started, if any, whether similar or not similar in nature and complexity to the contract to be bid. Moreover, GPPB Resolution No. 29-2012<sup>2</sup> provides that the failure to include an immaterial ongoing contract or failure to disclose complete information in the statement of all ongoing contracts shall result in the “disqualification of the bidder for non-compliance with the eligibility requirement under Sections 23.1 or 24.1 of the revised IRR of RA 9184.” Hence, the statement of ongoing government and private contracts to be submitted by the bidder should include **all** of its ongoing government and private contracts, even if they are immaterial or dissimilar to the contract to be bid.

### **Compliance with Section 23.1(a)(iv)<sup>3</sup> of the Revised IRR of RA 9184**

Since Section 23.1(a)(iv) categorically mandates that the bidder’s statement of ongoing government and private contracts should include **all** of its ongoing government and private contracts, we wish to emphasize that compliance with such requirement should be full and complete. Thus, if the bidder fails to submit a statement of all its ongoing government and private contracts, or the same is incomplete or patently insufficient for failure to include immaterial or dissimilar contracts *vis-à-vis* the contract to be bid, the bid shall be considered as “failed” under the rules; otherwise, the BAC shall rate the said bid as “passed”.

As this office previously opined,<sup>4</sup> the same level of compliance, *i.e.*, full and complete compliance, is required of prospective JV bidders. However, since one of the primary reasons for entering into joint venture agreements (JVAs) is for joint venture partners to pool their resources together, the concept of “collective compliance” is used for the joint venture to be considered technically and financially compliant and capable of undertaking a specific government project. Allowing “collective compliance” relative to the technical and financial eligibility requirements of joint venture bidders is consistent with the policy that the government 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.<sup>5</sup>

The submission of legal documents by all members of the JV is mandatory, while the submission of technical and financial eligibility documents by any member of the JV constitutes compliance.<sup>6</sup> Consequently, since the statement of all ongoing government and

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<sup>1</sup> Dated 20 June 2014.

<sup>2</sup> Dated 23 November 2012.

<sup>3</sup> As amended by GPPB Resolution No. 16-2014.

<sup>4</sup> NPM 08-2014.

<sup>5</sup> Section 23.1(b) of the IRR of RA 9184 and ITB Clause 24.6 of the PBDs for Infrastructure Projects.

<sup>6</sup> NPM No. 62-2009 dated 27 November 2009.

private contracts is a technical eligibility requirement, the compliance by one JV partner shall render the JV fully and completely compliant with the technical requirement based on the concept of collective compliance. However, if both JV partners submitted their technical eligibility documents, it shows that the intention of both partners to the JV is to submit such documents for purposes of eligibility determination. In such a situation, the BAC should subject and consider all the technical eligibility submissions of the JV partners pursuant to the requirements under the rules, specifically Section 23.1(a)(iv) of the IRR of RA 9184.

### **Non-Disclosure of an On-going Contract**

As already adverted to, in case both JV partners submitted a Statement of all its ongoing contracts, such Statements submitted shall form part and parcel of the JV's bid documents, and shall comply with the requirements of Section 23.1(a)(iv). These Statements, altogether, are subject to verification, validation and ascertainment during post-qualification, including, among others, the checking of the bidder's performance in its ongoing government and private contracts.

Additionally, Section 23.7 of the IRR of RA 9184 states that:

Notwithstanding the eligibility of a prospective bidder, the procuring entity concerned reserves the right to review the qualifications of the bidder at any stage of the procurement process if the procuring entity has reasonable grounds to believe that a misrepresentation has been made by the said prospective bidder, or that there has been a change in the prospective bidder's capability to undertake the project from the time it submitted its eligibility requirements. Should such review uncover any misrepresentation made in the eligibility requirements, statements or documents, or any changes in the situation of the prospective bidder which will affect the capability of the bidder to undertake the project so that it fails the eligibility criteria, the procuring entity shall consider the said prospective bidder as ineligible and shall disqualify it from obtaining an award or contract, in accordance with Rules XXI, XXII, and XXIII of this IRR.

Thus, if the procuring entity uncovers any misrepresentation<sup>7</sup> made in the eligibility requirements, statements or documents, or any change in the situation of the prospective bidder, which will affect the capability of the prospective bidder to undertake the project, it shall consider the prospective bidder ineligible and shall disqualify it from obtaining an award of contract, notwithstanding an earlier determination of eligibility.

All told, failure to include all ongoing contracts in the Statements submitted by the JV partners may be a ground for disqualification on the basis of misrepresentation or change in the bidder's capability. In both instances, the determination of the existence of the circumstances lies with the BAC and the procuring entity.

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<sup>7</sup> Misrepresentation is defined as a false statement about material fact in any contract or other transaction that misleads the party to whom it is made. (Armando F. Bernardo vs. Court of Appeals, Civil Service Commission and Land Bank of the Philippines, G.R. No. 124261, May 27, 2004).

**Summary**

In sum, we wish to clarify the following:

1. The statement of all ongoing government and private contracts is a technical eligibility requirement, the compliance by one joint venture partner shall render the joint venture fully and completely compliant with the technical requirement based on the concept of collective compliance. However, if both JV partners submitted their respective technical eligibility documents, that includes the Statement of all ongoing contracts, the BAC shall consider all Statements for eligibility checking and post-qualification purposes; and
2. The Statement of all ongoing government and private contracts shall include **all** ongoing contracts, including contracts awarded but not yet started, if any, whether similar or not similar in nature and complexity to the contract to be bid, within the relevant period as provided in the Bidding Documents. The submission by both JV partners of their respective Statements of all ongoing contracts as technical eligibility documents shall form part of the bid and shall be considered during eligibility checking and post-qualification.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is issued on the basis of particular facts and situations presented, and may not be applicable given a different set of facts and circumstances. Should there be other concerns, please do not hesitate to contact us.

(sgd.)

**DENNIS S. SANTIAGO**  
*Executive Director V*

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