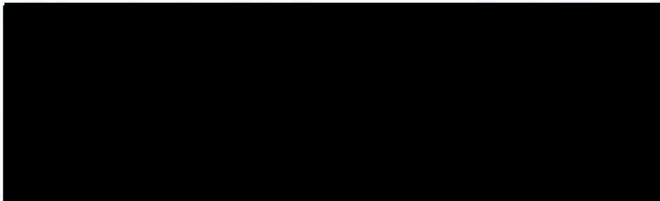


NPM No. 68-2015

12 October 2015



Re: Domestic Preference

Dear [REDACTED]:

This refers to your letter seeking clarification on the following issues:

1. Whether Domestic Preference is also applicable to procurement of services, i.e. Operation and Maintenance Service Contract;
2. With respect to Domestic Entities claiming preference under Clause 27.2¹ of the Instruction to Bidders (ITB), Philippine Bidding Documents for Goods:
 - a. What is the reckoning point of the five (5)-year period?
 - b. How to determine the shareholder percentage to comply with the seventy-five percent (75) equity requirement?

Repeal of Preference to Domestic Entities

Prior to RA 10667, otherwise known as the Philippine Competition Act, the procuring entity is allowed to give preference Domestic Bidders² and Domestic Entities³. Consequently, under Section 43.1.2 of the IRR of RA 9184, the award shall be

¹ A Bidder may be granted preference as a Domestic Entity subject to the certification from the DTI (in case of sole proprietorships), SEC (in case of partnerships and corporations), or CDA (in case of cooperatives) that the (a) sole proprietor is a citizen of the Philippines or the partnership, corporation, cooperative, or association is duly organized under the laws of the Philippines with at least seventy five percent (75%) of its interest or outstanding capital stock belonging to citizens of the Philippines, (b) habitually established in business and habitually engaged in the manufacture or sale of the merchandise covered by his bid, and (c) the business has been in existence for at least five (5) consecutive years prior to the advertisement and/or posting of the Invitation to Bid for this Project. (Emphasis supplied)

² Under Section 5(j) of the IRR of RA 9184, a Domestic Bidder refers to any person or entity offering unmanufactured articles, materials or supplies of the growth or production of the Philippines, or manufactured articles, materials, or supplies manufactured or to be manufactured in the Philippines substantially from articles, materials, or supplies of the growth, production, or manufacture, as the case may be, of the Philippines.

³ Under Section 5(k) of the IRR of RA 9184, a Domestic Entity refers to an individual or a sole proprietor who is a citizen of the Philippines or a partnership, corporation, cooperative, or association duly organized under the

made to the lowest Domestic Bidder or lowest Domestic Entity, provided his bid is not more than fifteen percent (15%) in excess of the lowest Foreign Bid.

Due to a recent legislative policy shift, however, we note that Section 55 of the Philippine Competition Law repealed Section 4⁴ of Commonwealth Act (CA) No. 138 or the Flag Law that grants preference to Domestic Entities. Witness Section 4 of CA 138, thus:

Whenever several bidders shall participate in the bidding for supplying articles, materials, and equipment for any dependencies mentioned in section one of this Act for public use, public buildings, or public works, **the award shall be made to the domestic entity making the lowest bid, provided it is not more that fifteen per centum in excess of the lowest bid made by a bidder other than a domestic entity, as the term “domestic entity” is defined in section two of this Act.** (Emphasis supplied)

With the repeal of Section 4 of CA 138, discussion on domestic entity and its preferential entitlement becomes moot and academic, because preference to a “domestic entity” can no longer be invoked by bidders and provided by the procuring entity. On the other hand, notwithstanding the above-mentioned repeal, preference to “Domestic Bidders” remains valid and effective.

Domestic Preference Rule does not apply to services

Section 43 of Republic Act No. (RA) 9184 provides for preference to procurement of domestically-produced and manufactured goods, supplies and materials, thus:

SEC. 43. Procurement of Domestic and Foreign Goods. – Consistent with the country’s obligations under international treaties or agreements, Goods may be obtained from domestic or foreign sources and the procurement thereof shall be open to all eligible suppliers, manufacturers and distributors. However, in the interest of availability, efficiency and timely delivery of Goods, **the Procuring Entity may give preference to the purchase of domestically-produced and manufactured goods, supplies and materials that meet the specified or desired quality.** (Emphasis ours)

While Section 5(r) classifies general support services as part of Goods procurement, this does not mean that the Domestic Preference rule is likewise applicable to services. The law clearly provides that a bidder can only claim Domestic Preference in case it is offering domestically produced and manufactured *goods, supplies and materials*. Notably, Section 43 of RA 9184 is based on CA 138, which grants preference to articles, materials and supplies produced, made, and manufactured in the Philippines. Accordingly, general support services are excluded from the ambit of the Domestic Preference Rule.

laws of the Philippines and of which at least seventy five percent (75%) of the interest or outstanding capital stock belongs to citizens of the Philippines, habitually established in business and habitually engaged in the manufacture or sale of the merchandise covered by his bid, and the business has been in existence for at least five (5) consecutive years prior to the advertisement and/or posting of the Invitation to Bid.

⁴ Whenever several bidders shall participate in the bidding for supplying articles, materials, and equipment for any dependencies mentioned in section one of this Act for public use, public buildings, or public works, the award shall be made to the domestic entity making the lowest bid, provided it is not more that fifteen per centum in excess of the lowest bid made by a bidder other than a domestic entity, as the term “domestic entity” is defined in section two of this Act.

Summary

In view of the foregoing, we wish to clarify the following:

1. Due to the repeal of Section 4 of CA 138 by the Philippine Competition Act, preference can no longer be extended to Domestic Entities; and
2. Domestic Preference Rule does not apply to services. It can only be availed by a Domestic Bidder offering goods, supplies and materials that are produced and manufactured in the Philippines.

We hope 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 you have further questions, please do not hesitate to contact us.

(sgd.)

~~DENNIS S. SANTAGO~~
Executive Director V 