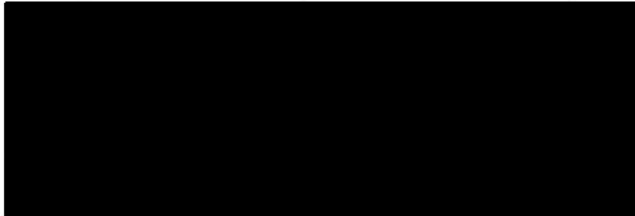


NPM No. 165-2015

22 December 2015



Re: Technical Eligibility; Foreign Bidders; and Joint Ventures

Dear 

This refers to your electronic mail (e-mail) seeking our opinion on various procurement-related matters relative to the implementation of your project entitled "Design, Build, Operate a Complete Cloud Solution for the Philippine Government Agencies".

As represented, IBM Philippines, Inc. (IBMP) is a 100% foreign owned company that is registered with the Philippine Securities and Exchange Commission (SEC) and licensed to do business in the Philippines. Legal ownership of 100% of IBMP's stock is with IBM World Trade Corporation, a US company, (IBM US) while beneficial ownership rests with IBM Products Holding B.V., a Netherlands company. As further represented, IBM US has successfully implemented a cloud solution for the California State Government and in several countries around the world. Since IBM is a globally-integrated enterprise, technical expertise and support are shared globally among all IBM entities in every country. As the IBMP intends to participate in the above-mentioned project of DOST-ICTO, you are requesting clarification on the following:

1. If IBMP will act as a subcontractor to a third party bidder, whether the latter can use the technical credentials of the former to meet the technical eligibility requirements stated in the bidding documents;
2. If IBMP will participate as a bidder to the project, whether it will be considered as a local bidder or a foreign bidder;
3. Whether IBMP is eligible to participate in the procurement project considering that it is registered with the SEC, or IBM US is required to participate as the bidder with IBMP as the company representative;
4. Whether IBMP, either acting as the bidder or subcontractor of a third party bidder, can use the technical credentials of its affiliates in other countries such as IBM US;

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5. Whether an unincorporated Joint Venture (JV) is allowed to participate as a bidder to procurement projects;
6. Whether an unincorporated JV is required to be legally incorporated after award of contract; and
7. How is the 60% Filipino interest computed in an unincorporated JV?

Considering that the nature of procurement was not mentioned, we would assume, for purposes of confining the scope of our opinion, that the project involves the procurement of consulting services. Thus, we shall focus our discussion on the rules pertaining to the procurement of consulting services.

Technical Eligibility Requirements for Consultants

We wish to clarify that under Section 24 of Republic Act (RA) No. 9184, eligibility of prospective bidders for the procurement of consulting services shall be determined by **their compliance with the eligibility requirements** prescribed for the competitive bidding concerned. Accordingly, under Section 24.1 of the revised Implementing Rules and Regulations (IRR) of RA 9184, as incorporated in Clause 2.1.(iv) and (v) of the Philippine Bidding Documents (PBD) for the Procurement of Consulting Services, bidders are required to submit the following technical documents for purposes of determining the technical eligibility of bidders, thus:

“iv) Statement of the prospective bidder of **all its ongoing and completed 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, within the relevant period as provided in the Bidding Documents. The statement shall include all information required in the PBDs prescribed by the GPPB.

v) Statement of the consultant specifying its nationality and confirming that those who will actually perform the service are registered professionals authorized by the appropriate regulatory body to practice those professions and allied professions, including their respective curriculum vitae.” (Emphasis supplied).

The foregoing provisions are anchored on the principle of competitiveness. That is, extending equal opportunity to **eligible and qualified private contracting parties** to participate in the procurement opportunity. This means that bidders are required to submit their own technical eligibility documents for purposes of complying with the eligibility requirements. They cannot rely on the technical credentials of their subcontractors or any other bidder. The bidders, upon their own credentials, shall be technically eligible to participate in any government procurement. In like manner, subcontractors shall also be eligible to act as such by complying with the eligibility criteria and the documentary requirements set for subcontractors as specified in the Bid Data Sheet (BDS).

In this regard, a third party bidder cannot use the technical credentials of IBMP if the latter will act as subcontractor of the former, unless they are participating under a Joint

Venture Agreement. Similarly, IBMP and any other third party bidder cannot use the technical credentials of other contractors such as the IBM US. To reiterate, the bidder themselves shall be technically, as well as legally and financially, eligible to participate in public bidding.

Foreign Consultants

Section 3.1 of the *Guidelines in the Determination of Eligibility of Foreign Suppliers, Contractors, and Consultants to Participate in Government Procurement Projects*¹ defines a foreign consultant as an individual, sole proprietorship, partnership, corporation or joint venture other than those provided under Section 24.3.1² of the IRR of R.A. 9184. This means that a corporation that failed to comply with the requirements of being 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 shall be considered as a foreign consultant for purposes of applying the provisions of RA 9184 and its IRR.

In relation to participation in public bidding, the general rule is that only Filipino consultants identified under Section 24.3.1 of the IRR of RA 9184 may participate. By way of exception, foreign consultants may be hired in the event Filipino consultants do not have the sufficient expertise and capability to render the services required under the project, as determined by the Head of the Procuring Entity (HOPE).³ Their participation, however, is subject to the following qualifications:

- a) must be registered with the SEC and/or any agency authorized by the laws of the Philippines; and
- b) when the types and fields of consulting services in which the foreign consultant wishes to engage involve the practice of regulated professions, the foreign consultant must be authorized by the appropriate GOP professional regulatory body to engage in the practice of those professions and allied professions.⁴

Based on your representation, 100% of IBMP's stock is fully owned by a US company while beneficial ownership rests with a Netherlands company. Applying the provision of Section 24.3.1 of the IRR of RA 9184, IBM shall be considered as a foreign consultant. Consequently, despite the fact that it is a domestic entity registered with the SEC, it has to comply with the 60% Filipino ownership requirement to be able to participate in the procurement of consulting services. In addition, assuming it may participate, its participation in public bidding is still contingent upon the determination of the HOPE that Filipino

¹ Issued through GPPB Resolution 18-2005, dated 12 September 2005.

² The following persons/entities shall be allowed to participate in the bidding for consulting services:

- 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) Cooperatives duly organized under the laws of the Philippines, and of which at least sixty percent (60%) belongs to citizens of the Philippines; or
- e) Persons/entities forming themselves into a joint venture, i.e., a group of two (2) or more persons/entities that intend to be jointly and severally responsible or liable for a particular contract: Provided, however, That Filipino ownership or interest thereof shall be at least sixty percent (60%). For this purpose, Filipino ownership or interest shall be based on the contributions of each of the members of the joint venture as specified in their JVA.

³ Section 24.3.3 of the IRR of RA 9184.

⁴ *Ibid.*

consultants do not have the sufficient expertise and capability to render the services required under the project, subject to the above-mentioned qualifications. The same rule shall apply to IBM US, being a foreign owned company.

Unincorporated Joint Venture

Under Section 24.3.1(e) of the IRR of RA 9184, persons/entities forming themselves into a joint venture, *i.e.*, a group of two (2) or more persons/entities that intend to be jointly and severally responsible or liable for a particular contract shall be allowed to participate in the bidding for consulting services. It mandates, however, that Filipino ownership or interest in the joint venture shall be at least sixty percent (60%), which ownership or interest shall be based on the contributions of each of the members of the joint venture as specified in their Joint Venture Agreement (JVA).

For purposes of determining the eligibility of the joint venture as a bidder, Section 24.1(b) requires the submission of a valid joint JVA, in case a joint venture is already in existence, or in the absence of a JVA, a duly notarized statements from all the potential joint venture partners stating that they will enter into and abide by the provisions of the JVA in the instance that the bid is successful. For purposes of award, however, potential joint venture partners should actually submit their JVA upon receipt of the Notice of Award (NOA)⁵. Nothing in the procurement law and its associated rules require that the joint venture must be incorporated first before it can participate in a government procurement opportunity, more so, no such requirement is mandated after award of contract.

As early as 2005, we have opined⁶ that the requirement for registration in the SEC is not necessary to make a JV valid in light of RA 9184. We explained that what is mandated under the procurement law and rules is the validity of the JVA between persons and companies and not the creation of a new juridical entity, and once the validity of the agreement of the JV partners is established, the requirement under the procurement law and rules is satisfied.

In another opinion⁷, we had the opportunity to differentiate an unincorporated JV from an incorporated JV. We stated that an unincorporated JV does not have a legal personality distinct and separate from its partners while an incorporated JV possesses such separate and distinct legal personality, and is treated for all intents and purposes as a corporation and not merely a JV. Consequently, a joint venture relationship loses its character as such joint venture the moment that it incorporates and registers with the SEC, as it will now be a separate juridical entity and treated as a corporation. Thus, for purposes of satisfying the requirements under the RA 9184 and its IRR, an incorporated JV shall submit all the eligibility, technical and financial requirements in its own name as a corporate joint venture.

Relative to the computation of Filipino interest in a JV, we previously clarified⁸ that the determination of the required 60% Filipino participation may be made by examining the terms and conditions of the Joint Venture Agreement and other supporting financial documents submitted by the joint venture. Thus, the partners shall reflect in the JVA their

⁵ Section 37.1.4(a)(i) of the IRR of RA 9184.

⁶ NPM No. 04-2005, dated 19 January 2015.

⁷ NPM No. 89-2012, dated 16 July 2012.

⁸ NPM No. 02-2007, dated 12 January 2007.

respective contributions, which may be in the form of monetary contribution to the capital alone. JV partners may likewise contribute property or industry with appropriate and identified valuation to determine the extent of the contribution of each partner *vis-à-vis* their ownership or interest in the JV entity.⁹

Summary

All told, we wish to clarify the following matters relative to your concerns:

1. Bidders are required to submit their own technical eligibility documents for purposes of complying with the eligibility requirements. They cannot merely rely on the technical credentials of their subcontractors or any other bidder. The bidders, on their own credentials, shall be technically eligible to participate in any government procurement, unless the bidder is a joint venture where the technical and financial capacity of one joint venture partner shall be considered as the technical and financial capacity of all joint venturers;
2. A corporation that failed to comply with the requirements of being 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, shall be considered as a foreign consultant;
3. Participation of a foreign consultant to public bidding is contingent upon the determination of the HOPE that Filipino consultants do not have the sufficient expertise and capability to render the services required under the project, subject to the qualifications under Section 24.3.3. of the IRR of RA 9184;
4. Registration with the SEC is not necessary to make a JV valid in light of RA 9184; once the validity of the agreement of the JV partners is established, the requirement under the procurement law and rules is satisfied; and
5. The partners shall reflect in the JVA their respective contributions, which may be in the form of monetary, property or industrial contribution; the determination of the required 60% Filipino participation may be made by examining the terms and conditions of the Joint Venture Agreement and other supporting financial documents submitted by the joint venture.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is being 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.

Very truly yours,

(sgd.)

 **DENNIS S. SANTIAGO**
Executive Director V



⁹ NPM No. 20-2011, dated 11 November 2011.