

Government Procurement Policy Board (GPPB)

CALENDAR YEAR – 2003

For the Month of June

POLICY MATTERS

Name of Agency	Date Received by GPPB	Date Released by GPPB	Issues/ Concerns/ Queries	Brief Conclusion of the Reply of GPPB
1. National Power Corporation (NPC)	03/05/03	06/26/03 (PM No. 02-2003)	Re: Exemption of the Coal Procurement of the National Power Corporation from the Filipino Ownership/ Equity Requirement Provided under Executive Order No. 40, Series of 2001, its Implementing Rules and Regulations, and Republic Act No. 5183 <ul style="list-style-type: none">• Whether or not NPC can be exempted from the 60/40 Filipino ownership/ equity requirement provided under E.O. 40 and its IRR, as well as R.A. 5183, in the conduct of its coal procurement.	Exemption from the Applicability of the 60/40 Filipino Ownership/Equity Requirement: In fine, considering that the exceptions to the Filipino ownership/equity requirement found in Section 1 of R.A. 5183 and Section 21 of R.A. 9162, respectively, are meant to address different contingencies in Government procurement, the former addressing the principle of reciprocity among States, and the latter addressing availability of local goods, we are of the opinion that the said provisions

				may be applied alternatively, depending on the contingency sought to be addressed. As such, we confirm that the exception provided in R.A. 9162 may be used by NPC, thereby dispensing with the reciprocity requirement under R.A. 5183.
2. National Power Corporation (NPC)	04/03/03	06/26/03 (PM No. 03-2003)	<p>Re: Exemption of the Oil Procurement of the National Power Corporation from the Filipino Ownership/ Equity Requirement Provided under Executive Order No. 40, Series of 2001, its Implementing Rules and Regulations, and Republic Act No. 5183</p> <ul style="list-style-type: none"> • Whether or not NPC can be exempted from the 60/40 Filipino ownership/ equity requirement provided under E.O. 40, its IRR, and R.A. 5183, in the conduct of its oil-based procurement, on the basis that only one supplier meets the nationality requirement. 	<p>Exemption from the Applicability of the 60/40 Filipino Ownership/Equity Requirement:</p> <p>The relevant provisions of R.A. 5183 and R.A. 9162 only allow exceptions from the sixty percent (60%) Filipino ownership/equity requirement to address the principle of reciprocity among States and the availability of local goods, respectively. However, the reason of NPC in declaring a failure of bidding and requesting for an exception is the fact that only one supplier can comply with the Filipino ownership/equity requirement, which according to NPC, defeats the purpose of competition.</p>

				<p>When this matter was raised during the 3rd GPPB meeting, the members unanimously agreed that the GPPB cannot grant exemptions from the Filipino nationality requirement over and above those provided in existing laws, such as, R.A. 5183 and R.A. 9162.</p> <p>In view of the foregoing, we suggest that NPC still pursue the conduct of a public bidding and, should it decide to open the same to foreign suppliers, these foreign suppliers must comply with Section 1 of R.A. 5183, which would necessarily require a certification from the foreign bidder's country of origin that its laws or regulations grant similar rights or privileges to citizens of the Philippines.</p>
3. National Power Corporation (NPC)	04/01/03	06/26/03 (PM No. 04-2003)	<p>Re: NPC's Exercise of Option for the Supply and Delivery of Additional 2 x 65, 000 MT +/-7% Cargoes of Datong Coal under the NPC/ Shanzi Coal Supply Contract (Batch 3)</p> <ul style="list-style-type: none"> • Whether or not E.O. 40 and its IRR apply to the Contract. 	<p>Applicability of E.O. 40 and its IRR to the Contract</p> <p>It is a general rule that laws are to be given and are presumed to have a prospective</p>

				<p>operation, in the absence of an express provision to the contrary or unless the contrary can be clearly implied. Thus insofar as there is neither an express provision nor a mere implication that the provisions of E.O. 40 and its IRR may be applied retroactively, we are of the opinion that the same cannot be made to apply to the implementation contracts entered into as a result of the application of prior procurement laws, rules and regulations.</p>
			<ul style="list-style-type: none"> • Whether or not NPC has a vested right to exercise the option for the supply of additional coal as provided in the Contract. 	<p>Vested Right of NPC to Exercise the Option for the Supply of Additional Cost</p> <p>To ascertain the right of NPC it must first be determined whether the exercise of the option for additional supply of coal as provided in the Contract is absolute, complete, unconditional, and independent of a contingency. Considering that Article III of the Contract categorically grants NPC the right to avail of option cargoes, it appears that the said right cannot be merely inchoate.</p> <p>In fine, we confirm that E.O. 40 and its IRR, particularly its provisions on the nationality requirement, does not affect NPC's right in the Contract to avail of option coal cargoes, considering that the said right is expressly provided in Article III of the same Contract.</p>
4. Fifth (5 th) District, Pangasinan, House of	06/02/03	06/02/03	Re: Allowable Methods of Procurement in case of an	

Representatives		(PM No. 05-2003)	Emergency: <ul style="list-style-type: none"> • What are the allowable methods of procurement in case of emergency? 	<p>Although R.A. 9184 took effect on January 26, 2003, its provisions on Alternative Methods of Procurement cannot be fully implemented until its IRR is finally approved by the President and become effective. As such, the provisions on Alternative Methods of Procurement embodied in E.O. 40 and its IRR are still applicable until the IRR of R.A. 9184, takes effect. In this regard, Section 35.1.5 and Sec. 35.2 of the IRR of E.O. 40 which deal with Negotiated Procurement of goods and civil works respectively, may be applied. Thus, under E.O. 40, the applicable law on the matter, Negotiated Procurement may be resorted to in case of an emergency, provided that the situation is such that goods would have to be procured to avoid any detriment to public service, or a civil works project would have to be undertaken by virtue of calamity, where immediate action is necessary to prevent imminent loss of life and/or property or to restore vital public service, infrastructure and utilities.</p>
-----------------	--	-------------------------	---	--