

**Government Procurement Policy Board (GPPB) – Technical Support Office (TSO)
CALENDAR YEAR – 2003**

For the Month of May

NON-POLICY MATTERS

Name of Agency	Date Received by GPPB-TSO	Date Released by GPPB-TSO	Issues/ Concerns/ Queries	Brief Conclusion of the Reply of GPPB-TSO
1. Department of Trade and Industry (DTI)	04/24/03	05/15/03 (TSO NPM No. 08-2003)	<p>Re: Applicable Procurement Procedure Pending Approval of the IRR of R.A. 9184</p> <ul style="list-style-type: none"> Which law shall be followed pending the finalization of the new Implementing Rules and Regulations (IRR) of Republic Act No. 9184 (R.A.9184), otherwise known as the "Government Procurement Reform Act?" 	<p>Pursuant to Section 78 of R.A. 9184 which provides for the date of its effectivity, it took effect on January 26, 2003, or fifteen (15) days following its publication. However, although there are self-executing provisions in R.A. 9184, the same cannot be fully implemented until the IRR is finally approved by the President and published for dissemination. The procedures embodied in Executive Order No. 40, Series of 2001 (E.O. 40), and its IRR shall still apply until the IRR of R.A. 9184 shall have been finally approved, provided that the provisions of the former law are not in direct conflict with the clear self-executing provisions of the latter law.</p>

			<ul style="list-style-type: none"> • If ever the IRR of R.A. 9184 would become final, what law shall govern an on-going procurement activity, if the advertisement of the Invitation to Apply for Eligibility and to Bid is issued prior to the effectivity date of the new IRR? 	<p>All on-going procurement activities, including those for which the Invitation to Apply for eligibility and to Bid were already advertised prior to the effectivity of the IRR of R.A. 9184, shall be governed by the laws, rules and regulations applicable at that time, i.e. E.O. 40 and its IRR, except where these are contrary to the clear self-executing provisions of R.A. 9184. This is in consonance with the language of Article 4 of the Civil Code of the Philippines. Furthermore, since nothing in R.A. 9184 expressly provides for the retroactive application of its provisions, the general rule shall be reckoned with, that is, its provisions shall be applied prospectively. Statutory construction dictates that statutes are not to be construed to have a retroactive effect so as to affect pending projects or endeavors, unless such intent is expressly declared or clearly and necessarily implied from the language of the legislative enactment.</p>
2. Land Bank of the Philippines (LBP)	03/28/03	05/19/03 (TSO NPM No. 09-2003)	<p>Re: Request for Clarification on Sec. 23.4.1 & Sec. 30.4 of the IRR of E.O. 40</p> <p>1. Section 23.4.1 of the IRR of E.O. 40:</p>	

			<p>a) If Section 23.4.1 of the IRR of E.O. 40 shall use the non-discretionary criteria, why is there a need to include consideration provisions (a) to (d)?</p>	<p>The “non-discretionary criteria” during the stages of eligibility check and preliminary examination entails the presence or absence of a requirement provided for by law or in the bidding documents, such that a complete submission means the eligibility or qualification of the bidder, and the absence of any of the requirements shall mean the automatic declaration of ineligibility or disqualification of the bidder, as the case may be.</p> <p>Emphasis must be made that subsection (a), (b), (c) and (d) of Section 23.4.1 are the minimum points or factors to consider in the conduct of the detailed evaluation of bids that have passed the eligibility check and preliminary examination. Section 23.4.1 merely enumerates the minimum criteria to be used in evaluating bids, and it further requires that the evaluation should be conducted in a “non-discretionary” manner, so that if a bid does not meet any of the set criteria, the BAC would not be allowed to rate it as “passed” in that regard.</p>
			<p>b) How do we qualify minor from major deviations? Are the two (2) phrases (non-discretionary criteria and consideration</p>	<p>There appears to be no contradiction in Section 23.4.1 of the IRR of E.O. 40. Minor deviations are those which will not vary or change the conditions,</p>

			<p>provisions) contrary to each other when the latter is already subjective?</p>	<p>requirements and specifications of the project to be bid out, it is a mere correction for computational errors, omissions and discounts. Accordingly, only corrections which do not affect the conditions, requirements and specifications of the project to be bid are considered minor deviations, all other deviations are considered “major.” Section 26 of the IRR of E.O. 40 provides for the examples of major deviations, to wit</p> <ol style="list-style-type: none"> 1. Failing to respond to the contract plans and specifications, by offering a different design or work item; 2. Stipulating a price adjustment; 3. Subcontracting beyond allowable limits; and 4. Taking exception to critical provisions or setting conditions to the bidders, such as applicable laws, taxes, duties, and dispute resolution procedures.
			<p>2. Section 30.4 of the IRR of E.O. 40:</p> <p>a) Is the approval of the contract by the head of the agency still necessary when the two (2) parties already signed the contract and perfected the same?</p>	<p>Section 30.4.1 of the IRR of E.O. 40 provides that “[T]he contract shall be approved in accordance with existing laws, rules and regulations, as soon as possible, but not later than fifteen (15) days from the date the winning bidder or</p>

				<p>its duly authorized representative shall have signed the contract with the agency concerned and submitted all documentary requirements to perfect the contract.”</p> <p>This contemplates a situation where the contract approving authority of the head of a particular office is still subject to a higher level of approval. This specific situation takes place when a law, Administrative Order, Circular, Executive Order or even a Department Order provides for it.</p>
			<p>b) Who shall approve the contract? How is it approved?</p>	<p>With the passage of Republic Act No. 9184 (R.A. 9184), it appears that the contract approval process embodied in Section 7 of Executive Order No. 109, Series of 2002 (E.O. 109), in so far as GOCCs are concerned, such as Land Bank, may have been implicitly repealed. Article XI of R.A. 9184 entitled “Award, Implementation and Termination of the Contract,” covers Section 7 of E.O. 109.</p> <p>With respect to GOCCs, Section 7(b) of E.O. 109, which conjunctively requires approval of the Department Secretary, directly conflicts with the third paragraph of Section 37 of R.A. 9184, which only requires board approval. Moreover, Section 8 of E.O. 109, which grants the Department Secretary authority to</p>

				<p>delegate the approval of contract involving an amount below Three Hundred Million Pesos (P300 Million), whether publicly bid or excepted from public bidding, seem to run counter to R.A. 9184, which grants the governing boards of GOCCs the full authority to approve and sign all contracts. It is significant to stat that under R.A. 9184, the governing boards of GOCCs have full responsibility and accountability for all their contracts, regardless of amount.</p>
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