

NPM No. 005-2018

30 January 2018

ENGR. MANUAL S. AVILA
OIC-Chief, Procurement Division 2
PROCUREMENT SERVICE
DEPARTMENT OF BUDGET AND MANAGEMENT (DBM-PS)
RR Road, Cristobal Street, Paco, Manila

Re: Non-Compliance with the Advertisement Requirement -

Dear Engr. Avila:

This refers to your letter requesting for clarification on the advertisement requirement for procurement of common-use supplies and equipment (CSE) conducted through Public Bidding as provided in Section 21.2.1 of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, the Government Procurement Reform Act; and the effect of the failure to advertise the Invitation to Bid (IB) or Request for Expression of Interest (REI) in a newspaper of general nationwide circulation where the Purchase Order (PO) and Notice of Award (NOA) were already issued to the winning bidders.

It is represented that the DBM-PS Bids and Awards Committee (BAC) 2 undertook the procurement of *Supply and Delivery of Office Supplies and Paper Products for the Procurement Service* through Public Bidding, with four (4) lots at an aggregate Approved Budget for the Contract (ABC) of PhP 25,022,689.50. Per representation, Lot Nos. 1 and 2 were successfully completed with the issuance of a Notice of Award and Purchase Order to the winning bidders; while there was a declaration of failure of bids for Lot Nos.3 and 4. However, as mentioned in your letter, it was found out that the advertisement in the newspaper was not made for the said procurement. Hence, this query.

Advertisement and Posting by DBM-PS is Mandatory -

As a general rule, advertisement in a newspaper of general nationwide circulation and posting in the Philippine Government Electronic Procurement System (PhilGEPS) website, the Procuring Entity's (PE) website, and in certain cases, the website prescribed by the foreign government/foreign international financing institution, are mandatory and important to ensure transparency of the procurement process; widest possible dissemination of information to increase the number of prospective bidders; and, strengthened competition for the procurement activity or project. Strengthened competition, in turn, coupled with transparency and openness, will ensure that the government, in general, and the PE, in particular, will get the best quality goods and services at the best price.

Section 21.2.1¹ of the 2016 IRR of RA No. 9184 provides the rules on posting of the Invitation to Bid (IB) and the Request for Expression of Interest (REI), including the advertisement thereof in a newspaper of general nationwide circulation depending on the ABC. In this regard, we wish to clarify that the phrase **“Except as otherwise provided in Section 54.2 of this IRR and for the procurement of common-use goods and supplies”** embodied in Section 21.2.1 of the 2016 IRR pertains to: a) the rule that PEs may dispense with advertisement in the newspaper, and posting requirement for alternative methods of procurement, unless otherwise required²; and b) the exception of advertisement or posting for the procurement of common-use goods and supplies from the DBM-PS; which means that procuring entities are not required to advertise or post its IB when procuring their CSEs from the DBM-PS, which is mandated to conduct a centralized procurement of CSEs for purchase by government agencies.

Pointedly, the above-mentioned exemption from advertisement and posting does not apply to the purchase of goods and equipment by the DBM-PS itself relative to its own procurement of CSEs from the market, unless the procurement modality adopted by the DBM-PS is an alternative method of procurement mentioned in Section 54.2 of the 2016 IRR of RA 9184, except those alternative modalities of procurement enumerated in the same Section that still needs to be posted. Accordingly, the DBM-PS shall still follow the prescribed rules on advertisement and posting relative to its procurement of goods and equipment, categorized as CSE, through public bidding.

Effect of Failure to Advertise or Post -

As to the effect of failure to comply with the advertisement and/or posting requirements, it is our considered view that such non-compliance with a mandatory provision of the Procurement Law and its associated 2016 IRR is a material defect that will affect the validity of the procurement process. The use of the word “shall” for the posting and advertisement of the IB or REI makes the requirement mandatory. The word shall means

¹ 21.2.1. Except as otherwise provided in Section 54.2 of this IRR and for the procurement of common-use goods and supplies, the Invitation to Bid/Request for Expression of Interest shall be:

- a) Posted at any conspicuous place reserved for this purpose in the premises of the Procuring Entity concerned for seven (7) calendar days as certified by the head of the BAC Secretariat of the Procuring Entity concerned.
- b) Posted continuously in the PhilGEPS website, the website of the Procuring Entity concerned, if available, and the website prescribed by the foreign government/foreign or international financing institution, if applicable, for seven (7) calendar days starting on date of advertisement; and
- c) Advertised at least once in one (1) newspaper of general nationwide circulation which has been regularly published for at least two (2) years before the date of issue of the advertisement: Provided, That advertisement shall not be required for contracts to be bid with an ABC of Ten Million Pesos (₱10,000,000.00) and below for the procurement of goods, Fifteen Million Pesos (₱15,000,000.00) and below for the procurement of Infrastructure Projects, and Five Million Pesos (₱5,000,000.00) and below for the procurement of Consulting Services. ...

² For alternative methods of procurement, the Procuring Entity may dispense with the advertisement in the newspaper and posting requirement as prescribed in Section 21.2.1 of this IRR. For the following modalities, however, the BAC, through its Secretariat, shall post the invitation or request for submission of price quotations/proposals in the PhilGEPS website, the website of the Procuring Entity concerned, if available, and at any conspicuous place reserved for this purpose in the premises of the Procuring Entity for a period of at least three (3) calendar days:

1. Section 49 Limited Source Bidding;
2. Section 52.1(b) Shopping for ordinary office supplies and equipment not available in DBM-PS (for ABC above Fifty Thousand Pesos (₱50,000.00));
3. Section 53.1 Two Failed Biddings;
4. Section 53.9 Small Value Procurement (For ABC above Fifty Thousand Pesos (₱50,000.00)); and
5. Section 53.11 NGO Participation.

ought to, must, or an obligation used to express a command or exhortation used in laws, regulations or directives to express what is mandatory.³ In common or ordinary phraseology, the term “shall” is a word of command one which has a compulsory meaning and is generally imperative of mandatory, unless the contrary intent appears.⁴ Article 5 of the Civil Code of the Philippines, on the other hand, provides that “[a]cts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity.”

Summary -

In sum, the PS-DBM must comply with the advertisement and posting requirements as provided for in Sec. 21.2.1 of the 2016 IRR of RA 9184 in the procurement of goods and equipment, categorized as common-use supplies and equipment, except as otherwise provided in Section 54.2 of the 2016 IRR of RA 9184. Failure to advertise and/or post the IB or REI constitutes a material defect that would affect the validity of the procurement process.

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.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director V

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³ *Baranda v. Gustilo*, 165 SCRA 757 (1988).

⁴ *Gonzales v. Chavex*, 205 SCRA 816 (1992).