

NPM No. 006-2018

6 February 2018

HON. BINGLE B. GUTTIEREZ

Executive Director

**DEPARTMENT OF BUDGET AND MANAGEMENT-
PROCUREMENT SERVICE (DBM-PS)**

RR Road, Cristobal Street, Paco, manila, Philippines 1007

**Re: Declaration of All Ongoing Contracts in
the Statement of All Ongoing Contracts -**

Dear Executive Director Gutierrez:

This refers to your request for guidance on the application of our two (2) Non-policy Matter Opinions issued in 2014 and 2016.

As represented, the Honorable Executive Director raised your concerns on the applicability of NPM No. 034-2014, which states that failure to include an ongoing contract, without qualification, including awarded but not yet started, whether similar or not in nature and complexity to the contract to be bid, or the failure to disclose information in the statement of contracts shall result in the disqualification of the bidder for non-compliance with the eligibility requirement. On the other hand, in NPM No. 003-2016, it was mentioned that the earlier pronouncement appears to have been qualified, wherein the Honorable Executive Director alleged that a bidder would only be considered ineligible and disqualified from obtaining an award if a misrepresentation has been uncovered or if the omission would affect the capability of the bidder to undertake the project.

In view of these opinions, the Honorable Executive Director would like to be enlightened on the consequence of the failure of a bidder to declare an ongoing DBM-PS project, which resulted in its post-disqualification. Finding merit in its request for reconsideration on the ground that the failure to declare the ongoing project by reason of mere inadvertence, the Bids and Awards Committee (BAC) handling the project reversed its earlier decision as the inadvertence did not affect the Net Financial Contract Capacity (NFCC) of the bidder. As such, the BAC declared the said bidder as the proponent with the lowest calculated and responsive bid. The Head of the Procuring Entity (HoPE), however, disapproved the recommendation of the BAC upon legal advice. The request for reconsideration subsequently submitted by the bidder has argued its case on NPM No. 003-2016 for which the HoPE sees as applicable in this instance. Hence, this query.

At the outset, it is noteworthy to emphasize that the Government Procurement Policy Board (GPPB) and its Technical Support Office (GPPB-TSO) only render policy and non-policy opinions, respectively, on issues pertaining to the interpretation and application of our procurement laws, rules and regulations. It has no jurisdiction to rule over actual controversies with regard to the conduct of the bidding since it has no quasi-judicial functions or investigatory powers under the law. Moreover, we adhere to the position that apart from the courts having

actual jurisdiction over the subject matter of a case, we cannot, nor any other government agency, authority, or official, encroach upon or interfere with the exercise of the functions of the Bids and Awards Committee (BAC), since these duties and responsibilities fall solely within the ambit of its authority and discretion as sanctioned by law.

It bears stressing that in NPM No. 034-2014, the dispositive portion was anchored on GPPB Resolution No. 29-2012, wherein the Board resolved that failure to include an immaterial ongoing contract or failure to disclose complete information in the statement of contracts shall result in disqualification of the bidder for non-compliance with the eligibility requirement under Section 23.1 or 24.1 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184. It states that the Statement of all ongoing contracts should include all ongoing contracts, without qualification including awarded but not yet started, whether similar or not in nature and complexity to the contract to be bid.

On the other hand, In NPM No. 003-2016, the dispositive portion states that failure to include all ongoing contracts in the Statement of all ongoing contracts submitted by the Joint Venture partners may be a ground for disqualification on the basis of misrepresentation or change in the bidder's capability. This was brought about by a different set of facts where Section 23.7¹ of the 2016 IRR was used as one of the legal bases in the formulation of the opinion.

Thus, the two (2) Non-Policy Matter Opinions are based on two (2) separate set of facts, which explains different set of dispositive portions and resulted in a qualified pronouncement. Nonetheless, the rule on Statement of all ongoing contracts is still the same as discussed below.

Statement of All Ongoing Contracts -

Section 23.4(a)(iv) of the 2016 revised IRR provides that one of the documents required for purposes of determining the eligibility of bidders is the Statement of all ongoing contracts, which states: “[S]tatement of the prospective bidder of all its ongoing 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.”

This was reinforced by the Government Procurement Policy Board (GPPB) in its Board Resolution No. 29-2012, dated 23 November 2012, which provides that:

- ...
2. To interpret that failure to include an immaterial ongoing contract or failure to disclose complete information in the statement of contracts shall result in the following:
 - a. Disqualification of the bidder for non-compliance with the eligibility requirement under Sections 23.1 or 24.1 of the revised IRR.

...

^{23.6} Notwithstanding the eligibility of a bidder, the Procuring Entity concerned reserves the right to review the qualifications of the bidder at any stage of the procurement process if the Procuring Entity has reasonable grounds to believe that a misrepresentation has been made by the said bidder, or that there has been a change in the bidder's capability to undertake the project from the time it submitted its eligibility requirements. Should such review uncover any misrepresentation made in the eligibility requirements, statements or documents, or any changes in the situation of the bidder which will affect the capability of the bidder to undertake the project so that it fails the eligibility criteria, the Procuring Entity shall consider the said bidder as ineligible and shall disqualify it from obtaining an award or contract, in accordance with Rules XXI, XXII, and XXIII of this IRR. (23.7a)

Accordingly, if the bidder fails to declare an ongoing government and private contracts in its “Statement of all on-going 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, including immaterial contract, is a ground for disqualification.

Dual Purpose of Statement of All Ongoing Contracts -

Please note that the requirement on Statement of all ongoing contracts has a dual purpose.

NFCC Computation

It is relevant in relation to the computation of the NFCC because in the NFCC formula, the value of all outstanding or uncompleted portions of ongoing contracts will be deducted from the product of the “*current assets minus current liabilities multiplied by 15.*” Hence, for the Procuring Entity to determine the correct computation of the NFCC, the bidder shall declare all of its ongoing 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.

Post-Qualification Exercise

Additionally, the Statement of all its ongoing government and private contracts has its significance in relation to the verification, validation and ascertainment of the Lowest Calculated Bidder’s performance in its ongoing contracts during the post-qualification process before it may be finally determined to be the bidder with the *Lowest Calculated and Responsive Bid*.

Section 34.3 of the 2016 IRR of RA 9184 provides a clear picture of the vetting mechanism and is well in point, to wit:

34.3. The post-qualification shall verify, validate, and ascertain all statements made and documents submitted by the bidder with the Lowest Calculated Bid/Highest Rated Bid, using non-discretionary criteria, as stated in the Bidding Documents. These criteria shall consider, but shall not be limited to, the following:

a) . . .

b) **Technical Requirements**. To determine compliance of the goods, infrastructure projects, or consulting services offered with the requirements specified in the Bidding Documents, including, where applicable:

i. . . .

ii. Verification of availability and commitment, and/or inspection and testing for the required capacities and operating conditions, of equipment units to be owned/leased/under purchase by the bidder for use in the contract under bidding, **as well as checking the performance of the bidder in its ongoing government and private contracts, if any of these ongoing contracts shows:**



- a. Negative slippage of at least fifteen percent (15%) in any one project or a negative slippage of at least ten percent (10%) in each of two (2) or more contracts;
- b. Failure of the contractor to commence repair works on ongoing contracts within seven (7) calendar days and to complete them within thirty (30) calendar days after receipt of the Procuring Entity's notice of defects and deficiencies;
- c. Failure of the contractor to commence repair works on contracts with pending certificates of acceptance within thirty (30) calendar days and complete them within ninety (90) days after receipt of the Procuring Entity's notice of defects and failures; or
- d. Substandard quality of work as per contract plans and specifications, or unsatisfactory performance of the contractor's obligations as per contract terms and conditions, at the time of inspection.

If the BAC verifies any of these deficiencies to be due to the contractor's fault or negligence, the agency shall disqualify the contractor from the award, for the procurement of Infrastructure Projects.

- iii. Verification and/or inspection and testing of the goods/product, after-sales and/or maintenance capabilities, in applicable cases, **as well as checking the following:**

- a. **Delay in the partial delivery of goods amounting to ten percent (10%) of the contract price in its ongoing government and private contracts;**
- b. If any of these contracts shows the bidder's failure to deliver or perform any or all of the goods or services within the period(s) specified in the contract or within any extension thereof granted by the Procuring Entity pursuant to a request made by the supplier prior to the delay, and such failure amounts to at least ten percent (10%) of the contract price; or
- c. Unsatisfactory performance of the supplier's obligations as per contract terms and conditions at the time of inspection.

If the BAC verifies any of these deficiencies to be due to the bidder's fault or negligence, the BAC shall disqualify the bidder from the award, for the procurement of Goods.
(Emphasis supplied)

Pointedly, it is important for the bidder to submit the Statement of all ongoing contracts, even if the ongoing contract does not affect the NFCC, because one of the important responsibilities of the BAC during the post-qualification stage is to verify, validate and ascertain the performance of the Lowest Calculated Bidder in all of its ongoing contracts identified in the "Statement of all ongoing contracts", and a finding of a negative slippage or delay in such percentage or amount as mentioned in Section 34.3 of the 2016 IRR of RA 9184 would necessitate the disqualification of the bidder.

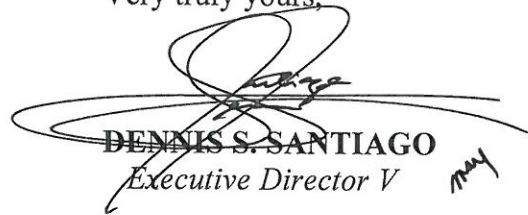


Summary -

In sum, we wish to stress that failure to declare an ongoing government and private contract, including contracts awarded but not yet started, if any, whether similar or not similar in nature and complexity to the contract to be bid is a ground for disqualification. These contracts, as reflected in the "Statement of all on-going contracts", are vital to the computation of the Net Financial Contracting Capacity of the bidder, and they are necessary information during the post-qualification stage to verify, validate and ascertain the technical qualification of the Lowest Calculated Bidder for the ultimate determination whether it is the Lowest Calculated and Responsive Bidder.

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.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director V