

NPM No. 010-2019

27 May 2019

ATTY. ENGELBERT C. CARONAN, JR., MNSA
President and Chief Executive Officer
Development Academy of the Philippines (DAP)
DAP Building, San Miguel Avenue
Ortigas Center, Pasig City

RECEIVED BY:
JOYKAT BAYG
5/28/19
10:30 AM

Re: Supporting Documents after the Notice of Award

Dear President Caronan, Jr:

This refers to your letter¹ requesting advice on a procurement project² undertaken through Negotiated Procurement (Two Failed Biddings).

As represented, the Bids and Awards Committee (BAC) recommended the award of contract to EMBrocal Builders Incorporated (EBI) whose bid was determined as the Lowest Calculated Responsive Bid (LCRB). The DAP Board of Trustees, as Head of the Procuring Entity, (HoPE) approved³ the BAC recommendation⁴ and issued the Notice of Award (NOA)⁵ to EBI, *albeit* with an instruction to submit its performance security; two (2) sets of printed draft contract; and seven (7) sets of supporting documents per Clause 31.4(f)⁶ of the Bid Data Sheet (BDS) of the Fifth (5th) Edition of the Philippine Bidding Documents (PBDs) for the Procurement of Infrastructure Projects.

EBI accordingly submitted⁷ its performance security and mayor's permit issued by the City of Manila and the official receipt for the renewal of its mayor's permit from City of Makati. EBI later submitted⁸ a mayor's permit issued by Makati City.

In this regard, you request clarification on the following:

- (1) The Philippine Government Electronic Procurement System (PhilGEPS) Certificate of Registration, as required under Annex "H"⁹ of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184;¹⁰
- (2) Substantial compliance with RA No. 9184 in respect of EBI's submission of its updated and recent business permits after the issuance of the NOA; and

¹ Dated 2 April 2019, received on 4 April 2019.

² Entitled "One Lot Construction of a Four-Storey Multi-Use Podium, Ten-Storey Accommodation Tower with Roof Deck and Basement Parking and Utilities in the Development Academy (DAP) Convention Center in Tagaytay City."

³ Through DAP Board Resolution (Res.) No. 2018-030, dated 21 December 2018.

⁴ DAP BAC Resolution No. 290, Series of 2018, dated 5 December 2018.

⁵ Dated 27 December 2018.

⁶ This includes Photocopy of Mayor's/Business permit issued by the city or municipality where the principal place of business of the prospective bidder is located, or the equivalent document for Exclusive Economic Zones or Areas.

⁷ Submitted on 4 January 2019.

⁸ Submitted in March 2019.

⁹ Entitled "Consolidated Guidelines for the Alternative Methods of Procurement."

¹⁰ Entitled the "Government Procurement Reform Act."

- (3) Grounds for non-award of contract or cancelation of the NOA after its issuance.

Validation of the PhilGEPS Certificate of Registration

At the outset, please be advised that the implementation of the mandatory submission of the PhilGEPS Certificate of Platinum Membership under the 2016 IRR of RA No. 9184 has been deferred pursuant to Government Procurement Policy Board (GPPB) Circular No 7-2017.¹¹ Thus, for all procurement projects advertised and/or posted after 31 July 2017, bidders have the option to either submit its PhilGEPS Certificate of Platinum Membership or all of the Class "A" Eligibility Documents under Section 23.1(a) of the 2016 revised IRR of RA No. 9184, or a combination thereof.¹²

In case of Negotiated Procurement, Annex H of the 2016 revised IRR requires the bidder to submit its Certificate of PhilGEPS Registration in accordance with Section 8.5.2 of the IRR of RA No. 9184.¹³ Section 8.5.2 on the other hand, tasks the bidder to upload and maintain the current and updated files of its Class "A" eligibility documents on the PhilGEPS under Section 23.1(a) of the 2016 IRR of RA No. 9184.¹⁴ Accordingly, the documentary requirements submitted in satisfaction of bidding requirements, such as the mayor's or business permits, must be valid at the time of their submission.¹⁵

Allow us to emphasize as well that the submission of the PhilGEPS Certificate of Platinum Membership is not conclusive compliance with the above-stated requirements. The rules expressly impose a responsibility on the bidder to maintain its current and updated Class "A" eligibility documents and ensure that the same are uploaded on the PhilGEPS. On the other hand, the BAC has an equal responsibility to validate eligibility documents submitted by the bidder with the Lowest Calculated Bid during the post-qualification process. Simply put, while the PhilGEPS Certificate of Platinum Membership is sufficient for purposes of eligibility under Section 23.1 of the 2016 IRR of RA No. 9184, the same must still be verified, validated and ascertained by the BAC as correct and compliant with the rules during the post-qualification proceedings as provided under Section 34.3.

It is likewise noteworthy that in a previous opinion,¹⁶ we had the occasion to clarify that for Negotiated Procurement, the BAC is further given the discretion to determine the legal, technical and financial requirements that must be submitted under this modality pursuant to Section V(D)(b)(i) of Annex H of the 2016 IRR of RA No. 9184.¹⁷ This means that under a Negotiated Procurement, the BAC may dispense with all together the submission of a mayor's permit and other documents if it finds the same no longer necessary after a mandatory review of the terms, conditions, specifications or terms of

¹¹ Dated 31 July 2017.

¹² Section 4.1.1 of the GPPB Circular No. 7-2017.

¹³ V.D.1.b(iv) of Annex H of the 2016 IRR of RA No. 9184 states:

For purposes of Negotiated Procurement under Section 53.1 (Two Failed Biddings), the BAC shall require the submission of a Certificate of PhilGEPS Registration in accordance with Section 8.5.2 of the IRR of RA No. 9184.

¹⁴ Section 8.5.2 of the 2016 IRR of RA No. 9184.

¹⁵ Non-Policy Matter (NPM) Opinion No. 40-2015, dated 8 October 2015.

¹⁶ NPM No. 79-2016, dated 15 November 2016.

¹⁷ After conduct of the mandatory review of the terms, conditions, specifications, and cost estimates, as prescribed in Section 35 of the IRR, the BAC, based on its findings, (...) may revise and agree on the technical, legal and financial eligibility requirements and technical specifications or terms of reference, and if necessary, adjust the ABC, subject to the required approvals. However, the ABC cannot be increased by more than twenty percent (20%) of the ABC for the last failed bidding.

reference used in the earlier two failed biddings. This affords the BAC, needed flexibility to avoid another failure of bidding. Needless to say that the adjusted legal, technical and financial requirements must of course be known to all the prospective bidders to guide them in their submission of bids. Thus, the Procuring Entity (PE) has the discretion, after the mandatory review explained above, to require or dispense with any of the legal, technical and financial documents, making sure only that in doing so, it is satisfied that it is entering into a contract with a technically, legally and financially capable contractor.

Based on the representations made in your letter, "the BAC in a joint meeting, together with the BAC-TWG, unanimously affirmed and decided to recommend to the HoPE that the LCRB is Embrocal Builders, Inc. at ₱770,355,331.00," which was the basis for the issuance of NOA in favor of EBI.

Supporting Documents after NOA

As stated in your letter, apart from the performance security, the DAP Board of Trustees,¹⁸ required the submission of supporting documents under Clause 31.4 of the BDS of the PBDs for Infrastructure Projects (5th Ed.). We note, however, that Section 37.2.3 of the 2016 IRR of RA No. 9184 and Clause 31.4 of the BDS of the PBDs for Infrastructure Projects authorize the PE to identify in the Bidding Documents additional supporting documents relevant to the Project as may be required by existing laws and/or the PE, to be submitted by the winning bidder during the contract preparation stage. An example of this would be the Project Evaluation Review Technique/Critical Path Method (PERT/CPM) or other acceptable tools of project scheduling.¹⁹ Thus, the PE should have first included the additional documents to be submitted after the issuance of a NOA in the Bidding Documents to properly apprise the prospective bidders.

Nonetheless, in the case of the mayor's/business permit, the same may be submitted after the NOA for the purpose of updating its earlier submission as a condition for award of contract, as when the permit expired after post-qualification, which should therefore be renewed before the award of contract.²⁰ It is not for the purpose of eligibility check nor post-qualification, as these should have been complied with prior to the issuance of a NOA.

Accordingly, compliance by EBI with respect to the submitted mayor's permit after the NOA is dependent on whether the same is included as an additional documentary requirement in the Bidding Documents pursuant to Clause 31.4 of the BDS of the PBDs for Infrastructure Projects or only for the purpose of updating the earlier validated submission. Based thereon, the PE shall evaluate the submission of EBI if the same is compliant with the purpose for which it was required. The decision to recommend and eventually award the contract is within the exclusive jurisdiction of the BAC and HoPE, respectively. It cannot, therefore, be supplanted through an opinion issued by the GPPB or its Technical Support Office, as doing so would encroach upon or interfere with the exercise of their respective authorities.

Grounds for non-Award of Contract or Cancellation of NOA

The HoPE may invoke his or her right to reject any and all bids, declare a failure of bidding, or not award the contract, under the Reservation Clause, in the following cases:

¹⁸ By virtue of DAP Board Resolution No. 2018-030, dated 27 December 2018.

¹⁹ Other examples include construction schedule and S-curve, manpower schedule, construction methods, equipment utilization schedule, construction safety and health program approved by the Department of Labor and Employment.

²⁰ GPPB Resolution No. 2-2015 and Circular No. 1-2015, dated 30 January 2015 states:

[T]he current and valid Mayor's Permit, as renewed, will be submitted or presented by the bidder with the Lowest Calculated and Responsive Bid or Highest Rated and Responsive Bid as a condition to the award of contract.

a) If there is prima facie evidence of collusion between appropriate public officers or employees of the Procuring Entity, or between the BAC and any of the bidders, or if the collusion is between or among the bidders themselves, or between a bidder and a third party, including any act which restricts, suppresses or nullifies or tends to restrict, suppress or nullify competition;

b) If the BAC is found to have failed in following the prescribed bidding procedures; or
c) For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the GoP, as follows: (i) if the physical and economic conditions have significantly changed so as to render the project no longer economically, financially, or technically feasible, as determined by the HoPE; (ii) if the project is no longer necessary as determined by the HoPE; or (iii) if the source of funds for the project has been withheld or reduced through no fault of the Procuring Entity.

Likewise, notwithstanding the eligibility of a bidder, the PE reserves the right to review the qualifications of the bidder at any stage of the procurement process if it 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.²¹ Similarly, despite the issuance of a NOA, failure of the bidder with the LCRB to satisfy the conditions set forth in Section 37.1.4 shall also be a ground for non-award of the contract.²²

As a final point, the above opinion was made on the basis of the particular facts presented and circumstances availing, and may not, therefore, be applicable given a different set of facts and circumstances.

We hope to have sufficiently clarified the matter at hand.

Sincerely yours,



ROWENA CANDICE M. RUIZ
Executive Director V

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²¹ Section 23.6 of the 2016 IRR of RA No. 9184.

²² 37.1.4. Notwithstanding the issuance of the Notice of Award, award of contract shall be subject to the following conditions:

- a) Submission of the following documents within ten (10) calendar days from Notice of Award:
 - i) Valid JVA, if applicable;
 - ii) In the case of procurement by a Philippine Foreign Office or Post, the PhilGEPS Registration Number of the winning foreign bidder;
 - iii) A valid PCAB license and registration for the type and cost of the contract to be bid for foreign bidders in Infrastructure Projects, when the Treaty or International or Executive Agreement expressly allows submission of such license and registration as a pre-condition to the Notice of Award; or iv) In the case of Consulting Services, the SEC Certificate of Registration of the foreign consulting firm, and/or the authorization or license issued by the appropriate GoP professional regulatory body of the foreign professionals engaging in the practice of regulated professions and allied professions, where applicable.
- b) Posting of performance security in accordance with Section 39 of this IRR;
- c) Signing of the contract as provided in Section 37.2 of this IRR; and
- d) Approval by higher authority, if required, as provided in Section 37.3 of this IRR