

NPM No. 062-2017

21 December 2017

MS. EMMA ESPER CALLADA

BAC Secretariat

PRIVATIZATION AND MANAGEMENT OFFICE

104 Gamboa Street, Legaspi Village, Makati City

Re: Failure of Bidding -

Dear Ms. Callada:

This refers to your electronic mail seeking clarification on whether the bidding, which was declared failed four (4) times due to lack of bidders, should be procured through Competitive Bidding or Negotiated Procurement.

We note that it is the Procuring Entity (PE) that has the sole authority and is in the best position to determine the appropriate method of procurement for a specific project based on the identified needs and requirements of the PE, the attendant circumstances and the time when these needs must be satisfied.

Section 10 of Republic Act (RA) No. 9184, the Government Procurement Reform Act, and its 2016 revised Implementing Rules and Regulations (IRR) mandate that all procurement shall be done through Competitive Bidding, except when resort to alternative methods of procurement is warranted by attending circumstances. More importantly, these alternative methods of procurement shall be resorted to only in highly exceptional cases provided in Sections 49 to 53 of RA 9184 and its 2016 Revised IRR.

Section 53.1 of the 2016 Revised IRR of RA 9184 provides that Negotiated Procurement (Two-Failed Biddings) may be resorted to only where there has been failure of competitive bidding or Limited Source Bidding for the second time as provided for in Section 35¹ of RA 9184 and its 2016 IRR. The instances mentioned in Section 35 of RA 9184 and its 2016 IRR refer to grounds for the declaration of failure of Competitive Bidding by the BAC. Thus, Negotiated Procurement through Two-Failed Biddings modality can be resorted to only if the original or the first mode of procurement, including the second failure, were conducted

¹ Section 35. Failure of Bidding

35.1. The BAC shall declare the bidding a failure when:

- a) No bids are received;
- b) All prospective bidders are declared ineligible;
- c) All bids fail to comply with all the bid requirements or fail post-qualification, or, in the case of consulting services, there is no successful negotiation; or
- d) The bidder with the Lowest Calculated Responsive Bid/Highest Rated Responsive Bid refuses, without justifiable cause, to accept the award of contract, and no award is made in accordance with Section 40 of the Act and this IRR.

through Competitive Bidding, and two-failed biddings were declared in accordance with Section 35 of the 2016 IRR of RA 9184.²

In view of the foregoing, the procurement that has been declared failed four (4) times may still be undertaken through Competitive Bidding, or through Negotiated Procurement under the Two Failed Biddings modality, depending on the needs of the procuring entity, the attending circumstances, and the time element for which these needs must be satisfied. Ultimately, the procuring entity, through the BAC, should weigh all the attending circumstances relative to the procurement; whether to proceed with Competitive Bidding or through Negotiated Procurement under the Two-Failed Biddings modality is a matter of exercising wisdom taking into consideration the principles of efficiency and economy in government procurement. Note that at this juncture, both modalities are available to the procuring entity.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this opinion is being issued on the basis of facts and particular 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 

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² NPM Opinion No. 52-2016 dated 3 October 2016.