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SECURITIES AND EXCHANGE COMMISSION (SEC)

7/F SEC Building, EDSA

Greenhills, Mandaluyong City

Re: Negotiated Procurement - Two Failed Biddings Modality

Dear Asst. Director Amberong:

This refers to your electronic mail (e-mail) requesting our opinion on whether it is possible to request a bidder to conduct a system demonstration that is not part of the Terms of Reference or Bidding Documents.

As represented, Two Failed Biddings modality of Negotiated Procurement was resorted to for the procurement of Subscription to an Alternative On-line Document Retrieval System. Upon review of the submitted documents by the lone bidder, you wanted to know if the third party software, Documents Management System (DMS) can really support the functionalities you are looking for, although you noted that part of the project requirements is the customization of the DMS being offered. Using as reference, Clause 26 (on Clarification of Bids) of the Instruction to Bidders (ITB), you are inquiring on whether it is possible to request the bidder to conduct a system demonstration that is not part of the Terms of Reference or Bidding Documents, and whether a negative finding can be used as a ground to disqualify the bidder.

To provide you with a more definitive clarification, we assume that the ITB Clause 26 referred in your letter-request pertains to that of the Philippine Bidding Documents for the Procurement of Goods (PBD for Goods).

We note that the specific rules in resorting to the Two Failed Biddings modality of Negotiated Procurement are detailed in Section 53.1 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184. Section 53.1.5 provides that “[t]he procuring entity shall select the successful offer on the basis of such best and final offers which should meet the procuring entity’s minimum technical requirements and should not exceed the ABC.” This means that the contract may be awarded to the lowest or single bidder provided that its offer meets the minimum technical requirements and does not exceed the ABC.

Under Section 54.2 of the IRR of RA 9184, the Bids and Awards Committee (BAC), through its Secretariat, shall post the invitation or request for submission of price quotations for Negotiated Procurement under Section 53.1 (Two Failed Biddings) of the same IRR 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 seven (7) calendar days. On the other hand, Section 53.1.3 of the IRR of RA 9184 mandates that any requirements, guidelines, documents, clarifications, or other information relative to the negotiations that are communicated by the procuring entity to a supplier, contractor, or consultant shall be communicated on an equal basis to all other suppliers, contractors, or consultants engaging in negotiations with the procuring entity relative to the procurement.

The foregoing provisions are anchored on the principles of competition and transparency, such that, to level the playing field among eligible and qualified bidders, all the requirements for a particular project are posted in specific websites and areas, and equally communicated to all bidders, as well. To be fair with the bidders, only these requirements, as posted and communicated in accordance with the provisions of RA 9184 and its IRR, shall be required by the BAC from the participating bidders. Necessarily, award of contract shall also be based on compliance with those requirements. This is the concept of “non-discretionary pass/fail criterion” being applied in the award of contracts with the intention of eliminating any discretion on the part of the procuring entity, which, if exercised capriciously and whimsically, may lead to corruption and therefore defeat the principle of good governance being promoted by RA 9184 and its IRR.

On the other hand, we wish to clarify that ITB Clause 26 of the PBD for Goods pertains to written clarification of bids submitted by the bidders, if requested by the procuring entity. Considering its nature as a mere clarification, the provision of said ITB Clause 26 cannot be used to impose, in the guise of a request for clarification, an additional requirement that is not specifically mentioned in the Terms of Reference or Bidding Documents without violating the principles of competition and transparency.

In this regard, it is our considered opinion that a procuring entity cannot request a bidder to conduct a system demonstration if it is not required or allowed in the Terms of Reference or Bidding Documents. Imposing additional requirement that is not posted or communicated through the Bidding Documents and disqualifying a bidder for non-compliance therewith are both inconsistent with the principles of competition and transparency being espoused by RA 9184 and its IRR. Thus, for Two Failed Biddings modality of Negotiated Procurement, the contract may be awarded to the lowest or single bidder provided that its offer meets the minimum technical requirements and does not exceed the ABC.

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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