

NPM No. 104-2017

29 December 2017

MR. ADELFO B. VALLE
General Manager
DAGUPAN CITY WATER DISTRICT
New Administrative Building,
Tambac district, Dagupan City

Re: Declaration of Failure of Bidding; Grounds to Disqualify a Bidder -

Dear Mr. Valle:

This refers to your letter requesting clarification on the following matters:

1. Whether or not substantial compliance in the bidding process may be disregarded due to technical issues; and
2. The instances wherein a Procuring Entity can technically disqualify a bidder.

Please be advised that the Government Procurement Policy Board (GPPB) and its Technical Support Office (TSO) only render policy and non-policy opinions respectively, on issues purely relating 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 under the law. Likewise, the GPPB and the GPPB-TSO do not have the authority to decide for and in behalf of a procuring entity, nor dictate upon the procuring entity on how to decide relative to its procurement activities. Hence, this office has consistently refrained from passing upon decisions of the BAC or even by the Head of the Procuring Entity (HOPE) relative to the application of and compliance with Republic Act (RA) 9184 and its 2016 revised Implementing Rules and Regulations (IRR). It is in this wise that we shall limit our discussion on the relevant provisions of the procurement law, rules and regulations pertinent to the issue presented.

Declaration of Failure of Bidding -

Declaration of failure of bidding is well within the authority and accountability of the Bids and Awards Committee (BAC) and the Head of the Procuring Entity (HoPE) to exercise, under Sections 35 and 41, respectively, of Republic Act (RA) No. 9184, the Government Procurement Reform Act, and its 2016 revised Implementing Rules and Regulations (IRR).

The authority of the BAC to declare a failure of bidding is limited to instances enumerated in Section 35.1 of the IRR of RA 9184, specifically, 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 LCB or HRB refuses to accept the award.

On the other hand, the declaration by the HOPE of a failure of bidding is governed by Section 41 of RA 9184 and its 2016 IRR. Under this provision, the HOPE reserves the right to reject any and all bids, declare a failure of bidding, or not to award the contract based on the grounds enumerated in said Section, thus:

Section 41. The HoPE reserves the right to reject any and all bids, declare a failure of bidding, or not award the contract in the following situations:

- 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

To support this provision, the Invitation to Bid for all procurement projects includes a Reservation Clause to properly apprise the public and the prospective bidders of this reserved right of the HOPE.

In sum, the decision to declare a failure of bidding, reject any and all bids, or not award the contract under any of the situations enumerated in Section 41 lies within the sole authority and jurisdiction of the HOPE. The BAC, nonetheless is authorized to declare a failure of bidding only under instances enumerated in Section 35 of the 2016 IRR.

Disqualification of a Bidder -

A bidder may be disqualified during Eligibility Screening, Bid Evaluation and Post-Qualification under Sections 23, 30, 32 and 34, respectively.

During Eligibility Screening, we explained¹ that the submission of the eligibility documents enumerated in Section 23.1 of the 2016 IRR is a mandatory requirement that must be complied with by prospective bidders, such that failure to submit any of the documents or the submission of an otherwise incomplete or patently insufficient document, will disqualify the bidder based on the non-discretionary “pass/fail” criterion under Section 30.1 of the IRR.

On the other hand, disqualification during the preliminary examination of bids provided under Section 30.1 of the 2016 IRR of RA 9184 may lie when the BAC checks the submitted documents of each bidder against a checklist of required documents to ascertain if they are all present, using a non-discretionary “pass/fail” criterion. If a bidder submits the required document, it shall be rated “passed” for that requirement, and rated “failed” if no document is submitted or if the document submitted is incomplete or patently insufficient. Section 30.2 of the 2016 IRR, vests upon the BAC the authority to determine each bidder's compliance with the required documents for purposes of eligibility. Thus, after determining compliance with the requirements in the first envelope, the second envelope of the eligible bidders whose first bid envelope was rated “passed” shall be opened. Only bids that are determined to contain all the bid requirements for both components shall be rated “passed” and shall immediately be considered for evaluation and comparison.

Section 32.2.4 of the 2016 revised IRR, likewise provide that the total bid prices, as evaluated and corrected for computational errors shall be ranked in ascending order, and those that exceeded the ABC shall be disqualified.

Disqualification during the Post-Qualification stage is covered by Section 34 of RA 9184 and its 2016 IRR. The objective of post-qualification is to determine whether the bidder complies with and is responsive to all the requirements and conditions specified in the bidding documents.² During post qualification, the BAC verifies, validates and ascertains all statements made and the documents submitted by the bidder with the lowest calculated bid (LCB) or highest rated bid (HRB), as the case may be, using non-discretionary pass/fail criteria.³

These criteria shall consider the legal, technical and financial requirements, such as, but not limited to, the bidder's stated competence and experience, the availability and commitment, and/or inspection and testing of the equipment units to be owned/leased/under purchase by the bidder for use in the contract under bidding. Hence, the verification under the post-qualification stage is not limited to the examination of documents submitted by the bidder, but also includes inspection of the subject equipment *vis-à-vis* the technical specifications specified in the bidding documents.⁴

In the event that the verification, validation, and ascertainment conducted by the PE yield a negative result; or on the scheduled date of inspection, the bidder fails to present the sample good or equipment for examination or evaluation, the BAC has the prerogative to declare the bidder post-disqualified for failure to comply with the requirements.⁵ Additionally, in case the BAC determines that the bidder with the LCB or HRB fails the criteria for post-qualification, **it shall immediately notify** the said bidder in writing of its

¹ Non Policy Matter No. 103-2013 dated 20 December 2013.

² NPM 069-2007 dated 3 December 2007.

³ NPM 064-2012 dated 25 May 2012.

⁴ *Id.*

⁵ *Id.*

post-disqualification and the grounds therefor pursuant to Sections 34.3 and 34.5 of the revised IRR of RA 9184.⁶

Moreover, Section 23.6 of the 2016 IRR states that if the procuring entity uncovers any misrepresentation made in the eligibility requirements, statements or documents, it shall consider the prospective bidder as ineligible and shall disqualify it from obtaining an award of contract. In connection with this, Section 4.1.1 of the *Uniform Guidelines for Blacklisting of Manufacturers, Suppliers, Distributors, Contractors, and Consultants*⁷ provides that the submission of eligibility documents containing false information or false documents during the competitive bidding stage shall render the suspension/blacklisting of such bidder from participating in government procurement activities.

Summary -


In sum, we wish to clarify the following:

(1) The decision to declare a failure of bidding, reject any and all bids, or not award the contract under any of the circumstances enumerated in Section 41 is within the sole authority and jurisdiction of the HoPE; while the authority of the BAC to declare a failure of bidding is limited to instances enumerated in Section 35.1 of the IRR of RA 9184; and

(2) As regards the disqualification of a bidder, the same may be done during Eligibility Screening, Preliminary Examination of Bids, Bid Evaluation and Post-Qualification stages. Notwithstanding the eligibility of the bidder, the Procuring Entity reserves the right to review the qualifications and disqualification in case of misrepresentation in accordance with Section 23.6 of the 2016 revised IRR.

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. *mm*

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⁶*Id.*

⁷ Issued through GPPB Resolution No. 09-2004, as amended by GPPB Resolution No. 03-2011, dated 28 January 2011, published in the Manila Times on 6 April 2011.