

NPM No. 136-2017

29 December 2017

MR. RODRIGO R. FERNANDEZ, JR.
Jfmd0766@yahoo.com

Re: Various Procurement Concerns -

Dear Mr. Fernandez:

This refers to your electronic mail requesting for guidance and comments on the following:

1. Whether it will invalidate the procurement process when the Bids and Awards Committee (BAC) Chairperson is not at least a 3rd ranking officer;
2. Whether including additional specifications, like Clinical Experience in the procurement of medicines, prohibited;
3. Whether the procuring entity can waive the submission by the bidder of its post-qualification requirements;
4. What is the punishment and who will impose the punishment in case the prohibition of transacting business with the bidders during post-qualification by the BAC have been violated?; and
5. Whether improper sealing is a ground for disqualification.

We shall respond to your queries sequentially, *thus*:

**BAC Chairperson as
3rd Ranking Permanent Official -**

Section 11.2.2 of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 provides:

11.2.2. The BAC for NGAs, departments, bureaus, offices, or instrumentalities of the GoP, including the judicial and legislative branches, constitutional commissions, SUCs, GOCCs, and GFIs **shall** be composed of the following:

Regular Members:

- a) Chairperson, who is at least a third (3rd) ranking permanent official of the Procuring Entity;

...

We note that said provision of the 2016 revised IRR uses the word “shall”, which is a word of command, and one which has always or which must be given a compulsory meaning,

and it is generally imperative or mandatory.¹ Thus, failure to comply with this mandatory provision of the law will affect the procurement process and render the same questionable.

Technical Specifications -

The 2016 revised IRR prohibits the imposition of additional eligibility requirements to allow greater participation, enhance competition among prospective bidders, and reduce transaction costs.² With regard to requiring additional technical specifications, however, the law recognizes the discretion of the procuring entity on all the specific requirements, limitations and parameters of the procurement at hand, which must be contained in the bidding documents. Thus, Section 17.2 of the 2016 revised IRR provides that “[T]he specifications and other terms in the Bidding Documents shall reflect the necessary specifications required to meet the needs of the Procuring Entity in clear and unambiguous terms.”

As such, additional specifications may be required by the procuring entity as long as it is necessary to meet its needs and must not restrict competition. Moreover, the technical specifications must be based on relevant characteristics, functionality and/or performance requirements, as stated in Section 18 of the 2016 revised IRR.

Post-qualification Documents -

Section 34.2 of the 2016 revised IRR provides that the bidder shall submit the post-qualification documentary requirements within five (5) calendar days from receipt of the notice from the BAC that the bidder has the Lowest Calculated Bid or Highest Rated Bid. The wordings of the provision is clear that said requirements shall be submitted by the bidder within the prescribed period and cannot be waived by the procuring entity such that failure to submit any of the post-qualification requirements on time, or a finding against the veracity thereof, shall disqualify the bidder for award.

“No Contact Rule”; Post-Qualification -

The “No Contact Rule” under Section 32, applies to all procurement officials, even the BAC Secretariat, and to those whose bids are being evaluated by the BAC after passing the preliminary examination of bids. As such, until a decision to award a contract is made by the BAC through the issuance of a Notice of Award, no communication should be made by bidders whose bids are being evaluated to veer away from perceptions of bias or favor.

Violation of this rule may hold the public officer liable under Republic Act No. 3019, or the Anti-graft and Corrupt Practices Act, which punishes graft and corrupt practices, particularly those causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence, among others. This is without prejudice to other penalties, which may be imposed against the erring public officers.

Improper Sealing; Not Ground for Disqualification -

Section 25.9 of the 2016 revised IRR of RA 9184 provides that:

¹ Lacson vs. Lacson, No. L-23482, August 30, 1968, 24 SCRA 848

² Non Policy Matter Opinion No 123-2014 dated 12 November 2014.

Unsealed or unmarked bid envelopes shall be rejected. However, **bid envelopes that are not properly sealed and marked, as required in the Bidding Documents, shall be accepted, provided that the bidder or its duly authorized representative shall acknowledge such condition of the bid as submitted.** The BAC shall assume no responsibility for the misplacement of the contents of the improperly sealed or marked bid, or for its premature opening. (Emphasis ours.)

It is thus clear that improper sealing of bids alone is not a ground for disqualification.

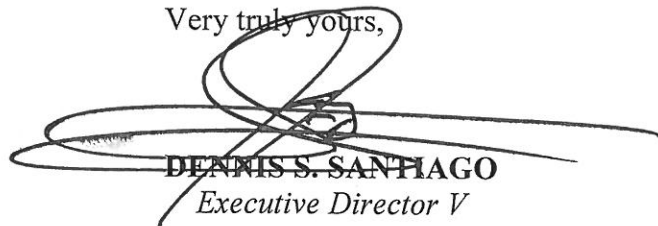
Summary –

In sum, we wish to reiterate the following:

1. The BAC Chairperson should be at least 3rd ranking permanent official and failure to comply with this mandatory provision of the law will affect the procurement process and render the same questionable;
2. It is prohibited to require additional eligibility requirements, but additional specifications may be required by the procuring entity as long as it is necessary to meet its needs and it shall not restrict competition;
3. Post-qualification documents shall be submitted by the bidder within the prescribed period and such cannot be waived by the procuring entity such that failure to submit any of the post-qualification requirements on time, or a finding against the veracity thereof, shall disqualify the bidder for award;
4. The “No Contact Rule” applies to all procurement officials and to those whose bids are being evaluated from bid evaluation until the issuance of the Notice of Award such that violation of this rule may hold the public officer liable under Republic Act 3019, without prejudice to other penalties, which may be imposed against the erring public officers; and
5. Unsealed or unmarked bid envelopes shall be rejected, but improperly sealed and marked bids shall be accepted, provided that the bidder shall acknowledge such condition of the bid as submitted.

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