



TECHNICAL SUPPORT OFFICE

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NPM No. 03-2005

March 15, 2006

ATTY. EFREN J. SABONG
Director
Directorate for Legal Affairs
National Food Authority
Matimyas Building
101 E.Rodriguez Sr. Avenue, Quezon City

Re: "Pre-qualification" in procurement of infrastructure projects

Dear Director Sabong:

This refers to your letter, dated 12 January 2006, requesting opinion and/or clarification on certain issues pertaining to the procurement of infrastructure projects in the light of Sec 23.1, Rule VIII of the Implementing Rules and Regulations Part A (IRR-A) of Republic Act No. 9184 (RA 9184) which prescribes, in part, that: "xxx. The eligibility envelopes of prospective bidders for the procurement of infrastructure projects shall be submitted on or before the deadline specified in the Invitation to Apply for Eligibility and to Bid, and shall be opened before the dates of the pre-bid conference and bid opening to determine the eligibility of prospective bidders, who shall then be allowed to acquire or purchase the relevant bidding documents from the procuring entity."

Reproduced hereafter, *in toto*, are the queries raised:

- 1) Is there still a pre-qualification stage in procurement of infrastructure projects in the light of the aforementioned provision, notwithstanding the policy of the new procurement law which is to do away with the pre-qualification stage?
- 2) If the purpose of the submission of the eligibility envelopes is to determine eligibility of prospective bidders before they are allowed to acquire or purchase the bid documents, can the procuring entity still require the submission of other eligibility requirements from those who were allowed to acquire or purchase bid documents on the specified date of bid opening?

- 3) If a prospective bidder in such procurement is declared ineligible even before the date of the pre-bid conference, can he still request for clarification or interpretation on the bidding documents within the period provided for in Section 22.5.1, Rule VII of the IRR-A of RA 9184?
- 4) In case there is no eligible bidder determined as such during the "pre-qualification stage," would that be counted as a failed bidding in order to resort to the alternative mode of negotiated procurement?

RA 9184 caters a shift from pre-qualification to eligibility screening and post-qualification

Verily, the policy of the new procurement law is to veer away from the use of ~~pre-qualification~~ procedures in procurement. Under conventional pre-qualification procedures, prospective bidders undergo detailed and subjective evaluation. At this early stage, contents of each document are validated and checked for their veracity. This procedure may take a minimum of three (3) months to a maximum of seven (7) months to complete and is variedly exposed to opportunities for corruption.

Under the system introduced by the new procurement law, the then pre-qualification process is transformed into an "eligibility screening" using transparent, non-discretionary criteria. The eligibility screening involves a simple check of the presence or absence of required documents with the end in view of hastening the process and expanding the aspect of competition. This is also seen to reduce governmental costs in procurement as a result.

The more detailed validation/verification of the documents takes place during the post-qualification. At this stage, all the documents of eligible bidders are subjected to a process of ascertaining their genuineness and their responsiveness to the requirements. The process is done sequentially, starting with the bidder with the lowest calculated bid (for goods and infrastructure projects) or highest rated bid (for consulting services) until a responsive bidder shall have been determined. He shall, hence, be declared as the bidder with the Lowest Calculated and Responsive Bid (LCRB) or Highest Rated and Responsive Bid, as the case maybe.

Having discussed the foregoing shift of the present procurement law from the concept of pre-qualification, we underscore that what was abandoned from the old process was the conduct of a detailed and discretionary determination of the qualification of prospective bidders at the onset of procurement procedures. The intent was to simplify the procedures while expanding the pool of bidders, discarding only those who are patently ineligible under the rules. This system leaves at the almost-tail-end stage of the bidding the procedure for the detailed verification/validation of documents.

Thus, it may be fitting to emphasize that the eligibility screening does not assume the same character as pre-qualification which it has particularly replaced for policy considerations. During the eligibility screening, a simple non-discretionary "pass-fail" check of compliance with eligibility requirements is done. In other words,

what the conventional system has achieved by way of pre-qualification is now the objective of the post-qualification stage under the new law. The pre-qualification in public procurement is now non-existent; and is definitely not recalled to life, so to speak, by RA 9184.

Submission of eligibility requirements after eligibility screening is without basis both in law

Anent the second issue on whether or not a procuring entity can still require from the bidders the submission of other eligibility requirements after eligibility screening had already been done, it is our opinion that the same is not allowable under the present rules not only because it lacks basis under the rules, but because it will only render nugatory the eligibility screening that was. Thus, to require additional eligibility documents would defeat the very intention of the eligibility checking process under the law.

Request for clarification or interpretation of bidding documents rests on the sound discretion of the BAC

Clarification is also sought on the issue of whether or not an ineligible bidder can still request for clarification or interpretation of the bidding documents within the period provided for in Section 22.5 Rule VII of the IRR-A of R.A. 9184.¹

We are of the view that although an ineligible bidder may be able to acquire copies of the bidding documents from other eligible bidders and thereafter ask for clarification/s upon the same, it should be taken into account that any grant or denial of such request rests upon the discretion of the Bids and Awards Committee (BAC). It should be taken into consideration however that a clarification sought by an ineligible contractor would no longer affect the said contractor's rights, considering that such contractor, is already barred from participating in the bidding.

BAC has to declare a failure of bidding after all prospective bidder are declared ineligible

Lastly, on the issue of whether or not a declaration of a failed bidding by a procuring entity is proper in cases where there are no eligible bidders determined during the eligibility checking stage, Section 35.1 of the IRR-A of R.A. 9184 proves helpful at this juncture, to wit:

¹ Section 22.5.1 of the IRR-A provides:

Requests for clarification(s) on any part of the bidding documents or for an interpretation must be in writing and submitted to the BAC of the procuring entity concerned at least ten (10) calendar days before the deadline set for the submission and receipt of bids. The BAC shall respond to the said request by issuing a Supplemental/Bid Bulletin, duly signed by the BAC Chairman, to be made available to all those who have properly secured the bidding documents from the procuring entity, at least seven (7) calendar days before the deadline for the submission and receipt of bids. It shall be the responsibility of all those who have properly secured the bidding documents to inquire and secure Supplemental/Bid Bulletins that may be issued by the BAC.

The BAC shall declare the bidding a failure and conduct a re-bidding with re-advertisement and/or posting, as provided for in Section 21 of the Act and this IRR-A, after a re-evaluation of the terms, conditions and specifications of the first bidding when:

- a) No prospective bidder submits an LOI or 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. (emphasis supplied)

x x x

Evidently, in cases where all participating bidders have been declared ineligible, there is no recourse but a declaration of a failure of bidding and the opening of the project for re-bidding with re-advertisement. Please take note however, that resort to the alternative method of negotiated procurement is justified only in cases where there has been failure of public bidding for the second time, among others.²

We trust that this clarifies matters.

Very truly yours,


ESTANISLAO C. GRANADOS JR.
Executive Director IV

² Section 53 of the IRR-A of R.A. 9184