

NPM No. 47-2013

17 June 2013


MR. RODULFO J. ARIESGA
Regional Director
COMMISSION ON AUDIT (COA)
REGIONAL OFFICE (RO) VIII
Leyte Government Center,
Candahug, Palo, Leyte

Re : Accreditation of Bidders and Conduct of Pre-Bid Conference

Dear Director Ariesga:

This refers to your letter dated 30 January 2013 requesting for opinion on matters relating to the accreditation of bidders and the conduct of pre-bid conference relative to the procurement of Spot Concreting of Poblacion-Tulay Farm-to-Market Road Project (Project) of the Municipality of Sta. Rita, Province of Samar. Said matters were relayed to COA-RO VIII in separate letters, both dated 23 May 2012, from Dover Construction, Inc. (DCI) and the Municipality of Sta. Rita.

Based on your communication and its attachments, the Project with an Approved Budget for the Contract (ABC) amounting to PhP22,041,998.00 is funded through Asian Development Bank (ADB) Loan No. 2465-PHI and OPEC Fund for International Development Loan No. 1225P under the Agrarian Reform Communities Project 2. As indicated in the Bid Notice Abstract, the procurement of the Project is governed by the ADB Procurement Guidelines. DCI expressed interest in participating in the Project, but the Bids and Awards Committee (BAC) refused to accept its letter of intent on the ground that DCI is not an accredited bidder per Municipal Ordinance No 12-2011¹. DCI also alleges that the Municipality of Sta. Rita did not conduct a pre-bid conference on 14 May 2012 as scheduled.

At the outset, we wish to note that Section 4 of Republic Act No. (RA) 9184 and its revised Implementing Rules and Regulations (IRR) provide that the procurement rules shall not apply in cases when a Treaty or International or Executive Agreement expressly provides use of foreign government/foreign or international financing institution procurement procedures and guidelines. Considering that the Project is governed by ADB Procurement Guidelines, the provisions of RA 9184 and its IRR will not apply. Nonetheless, we deem it proper to clarify the issues raised in your letter when RA 9184 and its IRR find application. 

¹ An Ordinance Prescribing the Guidelines in the Accreditation of Contractors, Suppliers, Service Providers, and Any Entities Who Wish to Participate as Bidders for Any Program, Project, or Activity/ies of the Municipality of Sta. Rita, Samar approved on 12 December 2011.

Accreditation of Bidders

We wish to stress that government procurement is strongly governed by the principles of competition by extending equal opportunity to private contracting parties to enable them to become eligible and qualified to participate in public bidding opportunities. RA 9184 and its IRR established a list of eligibility documents and criteria against which bidders will be evaluated for compliance. All bidders that are able to comply with these requirements shall be declared eligible and will be allowed to participate in the procurement activity.

As discussed in an opinion issued by this office, the establishment of an accreditation system within the agency would limit the participation of bidders only to those accredited suppliers, to the exclusion and prejudice of other bidders in the market². Consequently, the creation of an accreditation system is not in accordance with the mandate of the present procurement law because it in fact contravenes the very basic principles of competitive bidding³.

In this regard, and considering that municipal ordinances must not contravene any statute, we are of the view that Municipal Ordinance No 12-2011 runs counter to RA 9184 and its IRR in requiring an accreditation process as a condition precedent for participation in procurement activities of the local government unit.

Conduct of Pre-Bid Conference

Section 22.1 of the IRR of RA 9184 requires that at least one (1) pre-bid conference should be conducted by the procuring entity for projects costing at least PhP1 Million, in order to afford prospective bidders the opportunity to inquire on or clarify any of the requirements, terms, conditions, and specifications stipulated in the Bidding Documents.

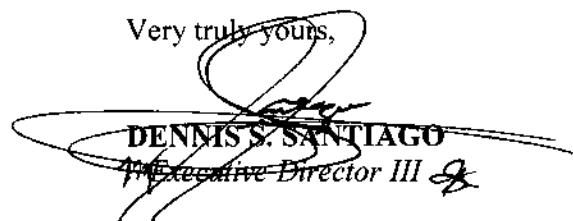
As such, failure to conduct a pre-bid conference for the Project amounts to a violation of a mandatory provision of law, which will render the procurement activity void under Article 5 of the Civil Code of the Philippines.

Summary

Based on all the foregoing, we wish to clarify that in cases of procurement activities covered by RA 9184 and its IRR, accreditation of bidders is not allowed for being violative of the requirements set forth in the law and rules, and the conduct of pre-bid conference for procurement activities with ABC of at least PhP1 Million is mandatory, such that failure to conduct such conference will render the procurement activity void.

We hope our advice 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 you have other concerns, please do not hesitate to contact us.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director III

² Non Policy Matter No. 28-2005 dated 31 May 2005.

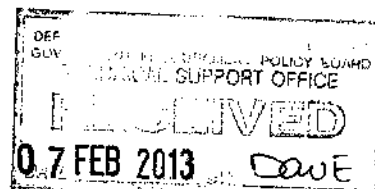
³ Non Policy Matter No. 33-2011 dated 28 December 2011.



Republic of the Philippines
COMMISSION ON AUDIT
Regional Office No. VIII
Leyte Government Center
Candahug, Palo, Leyte

January 30, 2013

The Chairperson
Government Procurement Policy Board (GPPB)
Unit 2506, Raffles Corporate Center
F. Ortigas Jr. Road
Ortigas Center, Pasig City 1605




Sir:

We respectfully refer to your Office the herein series of communications relative to the two (2) letters copy furnished to us, both dated May 23, 2012 of Engr. Domingo C. Fuentesbella, President of Dover Construction, Incorporated, Tacloban City and Honorable Lisandro Kim G. Adolfo, Municipal Mayor of the Municipality of Sta. Rita, Province of Samar, respectively, for a more authoritative opinion to resolve issues on matters pertaining to the proper implementation of Republic Act No. 9184 (An Act Providing for the Modernization Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes), otherwise known as the Procurement Reform Act.

A reply direct to Engr. Fuentesbella and Hon. Lisandro Kim G. Adolfo, copy furnished this Office will be highly appreciated.

Very truly yours,


RODOLFO J. ARIESSA
Director IV
Regional Director

Cc: Engr. Domingo C. Fuentesbella
President
Dover Construction, Incorporated
Diversion Road, Fatima Village, Tacloban City

Hon. Lisandro Kim G. Adolfo
Municipal Mayor
Municipality of Sta. Rita
Province of Samar

Encl: a/s



Republic of the Philippines
COMMISSION ON AUDIT
 Regional Office No. VIII
 Leyte Government Center
 Candahug, Palo, Leyte



COMMISSION ON AUDIT
REGIONAL OFFICE NO. VIII
 RECEIVED
 DATE: 22 JAN 2013 TIME: 5:00
LEGAL & ADJUDICATION OFFICE

MEMORANDUM

FOR:

RODOLFO MARIESA
 Regional Director

SUBJECT:

Letter-reply dated May 23, 2012 of Lisandro Kim G. Adolfo, Municipal Mayor, Sta. Rita, Western Samar, to Engr. Domingo C. Fuentebella, President, Dover Construction Incorporated, Tacloban City, and letter dated May 23, 2012 of Engr. Fuentebella to Ruel Duellos, MPDC/BAC Chairman.

DATE: January 16, 2013

This is in connection with the above-captioned communications, which basically involve the Spot Concreting of Poblacion-Tulay Farm-to-Market Road Project of the Municipality of Sta. Rita, Western Samar, and Sangguniang Bayan (SB) Ordinance No. 12-2011.

The letter dated May 23, 2012 of Mayor Adolfo is in reply to the May 17, 2012 letter from Engr. Fuentebella in his capacity as President of Dover Construction Incorporated, Tacloban City, (Dover) wherein the latter reiterated his interest to participate in the public bidding as per published Invitation to Bid dated April 26, 2012 for the Spot Concreting of Poblacion-Tulay Farm-to-Market Road Project, and questioned the validity of the municipal ordinance which limits the participation in bidding thereat only to contractors who are accredited thereby and excludes them for not being accredited therein.

The letter-reply of Mayor Adolfo is referred to our level for comments, as to whether or not the explanation of Mayor Adolfo, that the Bids and Awards Committee (BAC) of the Municipality of Sta. Rita has reason not to entertain contractors which are not accredited by the LGU as mandated by Municipal Ordinance No. 12-2011 which prescribes for its accreditation, is correct.

Perusal of Municipal Ordinance No. 12-2011 (Re: *An Ordinance Prescribing Guidelines in the Accreditation of Contractors, Suppliers, Service Providers and Any Entities Who Wish to Participate as Bidders for Any Program, Project or Activity of the Municipality of Sta. Rita*) disclosed the following:

1. Only accredited ones can participate in any bidding conducted by the Bids and Awards Committee;

2. Accreditation shall be annual by the Sangguniang Bayan;
3. Accreditation shall be at least 10 to 15 days within January of each year;
4. The applicant for accreditation shall be required to pay the Mayor's Business Permit Fee, an accreditation fee of P20,000.00, and payment for forms and processing fee in the amount of 3,000.00; and
5. The BAC shall take action on the application for accreditation within 15 days from receipt thereof in written form, copy furnished the applicants for information and guidance, and transmit the same to the Sangguniang Bayan for accreditation and final action.

Our present procurement law, Republic Act No. 9184 (*An Act Providing for the Modernization, Standardization, and Regulation of the Procurement Activities of the Government and for Other Purposes*), otherwise known as the "Government Procurement Reform Act", and its Revised Implementing Rules and Regulations, provide, among others:

Article I – General Provisions

Sec. 2. It is the declared policy of the State to promote the ideals of good governance in all its branches, departments, agencies, subdivisions, and instrumentalities, including government-owned and/or controlled corporations, and local government units.

Sec. 3. Governing Principles on Government Procurement.

a) xxx

b) Competitiveness by extending equal opportunity to enable private contracting parties who are eligible and qualified to participate in public bidding.

In the instant case, only those contractors who have been duly accredited by the Municipality of Sta. Rita, Samar, pursuant to Municipal Ordinance No. 12-2011, can participate in any bidding conducted by the BAC thereat. As such, the accreditation system limits the participation of bidders only to those who are accredited by the LGU, which is contrary to the principle of competitiveness enunciated in R.A. No. 9184.

A similar case is the subject of *Non-Policy Matter (NPM) 033-2011* of the Government Procurement Policy Board (GPPB), a copy of which is attached hereto. In said NPM, GPPB opined, among others, that the creation of an accreditation system of City of Digos, Davao del Sur is not in accordance with the mandate of the present procurement law because it contravenes the very basic principles of competitive bidding.

Moreover, in the case of *Magtajas vs. Pryce Properties Corporation, Inc., G.R. No. 111097 July 20, 1994*, the Supreme Court declared that for municipal ordinances to be valid, they:

- a. must not contravene the constitution or any statute
- b. must not be unfair or oppressive
- c. must not be partial or discriminatory



- d. must not prohibit, but may regulate trade
- e. must not be unreasonable
- f. must be general in application and consistent with public policy

In view thereof, it can be opined that the validity of the governing Municipal Ordinance No. 12-2011 is questionable, hence, the explanation of Mayor Adolfo that the BAC of the Municipality of Sta. Rita has reason not to entertain contractors which are not accredited by the LGU as mandated by the subject ordinance which prescribes for its accreditation, may be considered as disputable as well.

With respect to the letter dated May 23, 2012 addressed to Ruel Duellos, MPDC/BAC Chairman, regarding the Motion for Bidding Postponement of Engr. Fuentebella in his capacity as President of Dover, the same has been referred to our level for appropriate action. Perusal of the letter and the documents attached thereto disclosed that the basis of the Motion for the Postponement of the Bid Opening scheduled on May 25, 2012 was the purported absence of actual Pre-Bid Conference for the aforementioned project with an Approved Budget for the Contract (ABC) of P22,041,998.60 during the scheduled date therefor on May 14, 2012, and the earlier denial of the Letter of Intent of the entity by the BAC thereat by imposing the above-mentioned Municipal Ordinance governing the accreditation of contractors.

Relative thereto, the IRR of R.A. No. 9184 provides:

Section 22. Pre-bid Conference

22.1. For contracts to be bid with an approved budget of one million pesos (P1,000,000.00) or more, the BAC shall convene at least one (1) pre-bid conference to clarify and/or explain any of the requirements, terms, conditions and specifications stipulated in the Bidding Documents. For contracts to be bid costing less than one million pesos (P1,000,000.00), pre-bid conferences may be conducted at the discretion of the BAC. Subject to the approval of the BAC, a pre-bid conference may also be conducted upon written request of any prospective bidder.

22.2. The pre-bid conference shall be held at least twelve (12) calendar days before the deadline for the submission and receipt of bids. If the procuring entity determines that, by reason of the method, nature, or complexity of the contract to be bid, or when international participation will be more advantageous to the GOP, a longer period for the preparation of bids is necessary, the pre-bid conference shall be held at least 30 calendar days before the deadline for the submission and receipt of bids.

22.3. The pre-bid conference shall discuss, among other things, the technical and financial components of the contract to be bid. Attendance of the bidder shall not be mandatory. However, at the option of the Procuring Entity, only those who have purchased the Bidding Documents shall be allowed to participate in the pre-bid conference and raise or submit written queries or clarifications.

22.5. Supplemental/Bid Bulletins

22.5.1. 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.

22.5.2. Supplemental/Bid Bulletins may be issued upon the procuring entity's initiative for purposes of clarifying or modifying any provision of the bidding documents not later than seven (7) calendar days before the deadline for the submission and receipt of bids. Any modification to the bidding documents shall be identified as an amendment.

In the instant case, it is alleged that there was no actual Pre-Bid Conference despite the scheduled date therefor on May 14, 2012. If this was really the case, it violates Sec. 22.1 of the IRR of R.A. No. 9184 which provides that a Pre-Bid Conference is mandatory for contracts to be bid with an approved budget of one million pesos (P1,000,000.00) or more to clarify and/or explain any of the requirements, terms, conditions and specifications stipulated in the Bidding Documents. However, it is our view that it is within the discretion of the BAC thereat whether or not to grant the Motion for Postponement of the Bid Opening pursuant to Sec. 22.5.2 of the same IRR.

For your consideration, please.



BLAS MATHIAS A. SYPACO
Technical Service Chief

Technical and Information Technology Services