



Department of Budget and Management
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE

NPM No. 56-2014

15 October 2014

MR. HENRY S. BINAHON
BINAHON AGROFORESTRY FARM
Bol-ogan, Songco
Lantapan, Bukidnon

Re: Sealing of Bids

Dear Mr. Binahon:

This refers to your electronic mail (email) dated 10 October 2014 seeking our opinion in relation to the public bidding conducted by the Philippine Coconut Authority (PCA) Region IX Bids and Awards Committee (BAC) on 07 October 2014 for the procurement of cacao seedlings.

As represented, the Binahon Agroforestry Farm (BAF) participated in the PCA procurement activity. Due to BAF's failure to sign the bid envelope, it was declared as "ineligible" in reference to Instruction to Bidders Clause 20.3¹, which provides that the original and the number of copies of the Bid as indicated in the Bid Data Sheet (BDS) shall be typed or written in indelible ink and shall be signed by the bidder or its duly authorized representative/s. In this light, you are seeking clarification on the following concerns:

1. Can BAC outrightly declare a bidder ineligible without opening the eligibility documents?
2. What is the standard in signing all bid envelopes based on ITB Clause 20.3?
3. What are the legal implications to those previous bids that were declared as passed but without signature in the envelope?
4. Who has jurisdiction to entertain complaint of bidders?

At the outset, we would like to emphasize that it is the BAC that is vested with the responsibility to examine and evaluate bids utilizing a non-discretionary "pass/fail" criterion in considering, among others, the completeness of the bids submitted. Accordingly, the Government Procurement Policy Board (GPPB) and its Technical Support Office (GPPB-TSO) cannot determine or rule for the BAC, neither dictate upon nor interfere with the BAC's functions², since these fall within its authority, function, and discretion under the

¹ Philippine Bidding Documents for the Procurement of Goods.

² Section 12.1 of the IRR of RA 9184.

procurement law and its associated rules.³ In this regard, we shall limit our discussion on the interpretation of relevant procurement laws, rules and regulations pertinent to the issue presented.

Declaration of Eligibility and Ineligibility

Under Section 23 of Republic Act (No.) RA 9184, the BAC shall determine the eligibility of prospective bidders for the procurement of goods and infrastructure projects based on the bidder's compliance with the eligibility requirements. In connection with this, Section 30.1 of the IRR of RA 9184 provides that in determining each bidder's compliance with the documents required to be submitted for eligibility and for the technical requirements, the BAC shall check 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. Essentially, this means that the absence, incompleteness or insufficiency of a document shall make a prospective bidder ineligible to bid for the particular procurement. Otherwise, the bidder shall be considered eligible and its technical bid proposal considered; and eventually second envelope shall be opened in the same manner the first envelope was opened.

Based on the foregoing, the eligibility or ineligibility of the bidder is contingent upon the presence, completeness and sufficiency of the documentary requirements submitted. A bidder may be declared ineligible if its bid failed to include any requirement or is incomplete or patently insufficient.

Sealing of Bids

In a previous opinion⁴, we noted that Clause 20.3 of the PBDs for the Procurement of Goods provides that the original and copies of the envelopes containing the technical and financial components of the bid shall be signed by the bidder, but is silent whether the same should be done with the single envelope where all the envelopes containing the original and copies of the technical and financial components of the bid are enclosed. As such, it is our considered view that a Procuring Entity (PE) may require that all envelopes shall be duly signed in the sealed overlaps or flaps by the bidder or duly authorized representative in order to maintain the integrity of the documents, provided that this requirement is explicitly and clearly indicated in the PE's Bidding Documents.

We likewise opined that failure to observe the proper sealing and marking of bids may be a ground to disqualify a bidder.⁵ This is anchored on the fact that the rules on sealing and marking of bids used the word "shall". In our jurisprudence, the word "shall" has always been deemed mandatory⁶ and its mandatory acceptance is distinguished from the discretion that is allowed by the use of the word "may"⁷. Hence, the sealing and marking of bids shall be considered mandatory. It must be emphasized that under Article 5 of the New Civil Code of the Philippines, acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity.

³ NPM No. 08-2014 dated 28 March 2014.

⁴ NPM No. 102-2013 dated 20 December 2013.

⁵ NPM No. 36-2013 dated 10 April 2013.

⁶ Joseph Peter Sison, et al. vs. Rogelio Tablang, G.R. No 177011, 5 June 2009.

⁷ Buzabal v. Salvador, 84 SCRA 176 citing Dizon v. Encarnacion 9 SCRA 714.

Protest Mechanism

We wish to clarify that for any question regarding the decision of the BAC at any stage of the procurement process, the protest mechanisms provided in Rule XVII of the revised Implementing Rules and Regulations (IRR) of RA 9184 may be utilized to protect the rights of a bidder recognized under the procurement law and its associated IRR. Section 55.1 of the IRR of RA 9184 provides that decision of the BAC at any stage of the procurement process may be questioned by filing a request for reconsideration within three (3) calendar days upon receipt of written notice or upon verbal notification, and the BAC shall decide on the request for reconsideration within seven (7) calendar days from receipt thereof.

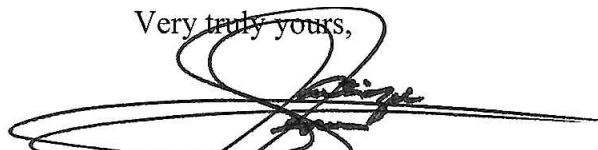
Summary

All told, we would like to clarify the following matters relative to your concerns:

1. Eligibility or ineligibility of the bidder is contingent upon the presence, completeness and sufficiency of the documentary requirements submitted; a bidder may be declared ineligible if its bid fail to include any eligibility requirement or are incomplete or patently insufficient;
2. A PE may require that all envelopes shall be duly signed in the sealed overlaps or flaps by the bidder or duly authorized representative in order to maintain the integrity of the documents, provided that this requirement is explicitly and clearly indicated in the PE's Bidding Documents; and
3. Any question regarding the decision of the BAC at any stage of the procurement process, the protest mechanisms provided in Rule XVII of the revised Implementing Rules and Regulations (IRR) of RA 9184 may be utilized to protect the rights of a bidder recognized under the procurement law and its associated IRR.

We hope 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 you have further questions, please do not hesitate to contact us.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director V

Secretariat

61/23/15

From: Henry S. Binahon <hbinahon@yahoo.com>
Sent: Friday, October 10, 2014 2:59 AM
To: gppb@gppb.gov.ph; legal@gppb.gov.ph; secretariat@gppb.gov.ph; monitoring@gppb.gov.ph; imd@gppb.gov.ph
Subject: Public Bidding at PCA- R IX

Sir/ Madam,

The Philippine Coconut Authority (PCA) -RIX- Bid and Award Committee have conducted public bidding for Cacao seedlings last October 7, 2014.

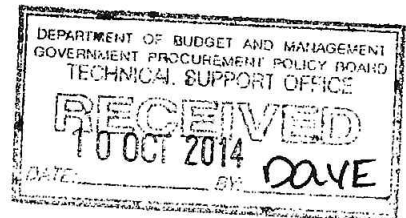
The Binahon Agroforestry Farm have participated such bidding, but declared " INELIGIBLE" . This is accordingly due to our failure to sign the bid envelope. Moreso, this is violation of BDS General Provision of Section 20.3 " THE ORIGINAL AND NUMBER OF COPIES OF BID AS INDICATED IN THE BDS SHALL BE TYPE WRITTEN OR WRITTEN IN INDELIBLE INK AND SHALL BE SIGNED BY THE BIDDER OR ITS DULY AUTHORIZED REPRESENTATIVE/S."

Our question are:

1. Can the BAC outright declare us Ineligible, without opening our eligibility documents?
2. What is the standard? All bid envelope must be signed based on the above provision? or Fail to sign the envelope will be declared as ineligible.
3. This in the first instance that our bid was declared ineligible. If this is the standard, Are all are previous winning bids, without signature in the envelop has legal implications.
4. Who has jurisdiction to entertain our compliant, if possible?

We would like ti hear from you.

HENRY S. BINAHON- BINAHON AGROFORESTRY FARM.



Jan (Jerry), *10/20/2014*
For, please.
Henry S. Binahon
OPINION *ms*