



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

NPM No. 72-2013

5 August 2013

MS. LORNA N. FICK-CUBERO
Chairperson, Bids and Awards Committee (BAC)
SECURITIES AND EXCHANGE COMMISSION (SEC)
CEBU EXTENSION OFFICE (CEO)
SEC Building, V. Rama Ave., Englis,
Guadalupe, Cebu City 6000

**Re : Negotiated Procurement under Section 53.1 (Two-
Failed Bidding) of Republic Act No. (RA) 9184 and
its revised Implementing Rules and Regulations
(IRR)**

Dear Ms. Fick-Cubero:

We respond to your letter dated 10 June 2013, which we received on 8 July 2013, requesting for clarification on whether the SEC-CEO BAC should conduct a re-bidding or resort to negotiated procurement for the procurement of Consultancy Services for the Proposed Renovation of the SEC-CEO Building (Project).

As represented, in line with the first public bidding conducted by the SEC-CEO BAC for the Project, it passed a resolution recommending award of contract to the single calculated and responsive bid. The Head of the Procuring Entity (HOPE), however, disapproved the recommendation for the reason that she wants to be assured that SEC will obtain the most advantageous offer and terms for the Project, and directed the wider dissemination of the Project information to attract more bidders. In compliance with the instructions of the HOPE, the SEC-CEO BAC conducted a re-bidding for the Project. Nonetheless, only one (1) firm submitted its eligibility and shortlisting documents, which was later on found ineligible for failure to comply with the requirements for the Project. As such, the SEC-CEO BAC declared a failure of bidding, which was approved by the HOPE. It is in this context that the SEC-CEO BAC is inquiring whether the Project may already be procured through Negotiated Procurement under Section 53.1 (Two-Failed Biddings) of the IRR of RA 9184 or has to be offered for public bidding.

Please note that Section 53.1 of the IRR of RA 9184 provides that Negotiated Procurement may be resorted to where there has been failure of public bidding for the second time as provided in Section 35 of RA 9184 and the IRR.

Under Section 35 of RA 9184 and its IRR, the BAC may declare failure of bidding in the following instances: (a) No bids are received; (b) All prospective bidders are declared

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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; and (d) The bidder with the Lowest Calculated Responsive Bid/Highest Rated Responsive Bid refuses, without justifiable cause, to accept the award of contract, and no award is made in accordance with Section 40 of RA 9184 and its IRR. Section 40 of the IRR of RA 9184, on the other hand, declares that the failure of the bidder to comply with the submission of the requirements identified in Section 37.1 of the IRR amounts to a failure of bidding for being unable to enter into contract.

Section 41 of the IRR, on the other hand, vests upon the HOPE the right to reject any and all bids, declare a failure of bidding, or not award the contract when there are situations of collusion; failure of BAC to follow bidding procedures; or justifiable and reasonable ground where award of contract will not redound to the benefit of the government.

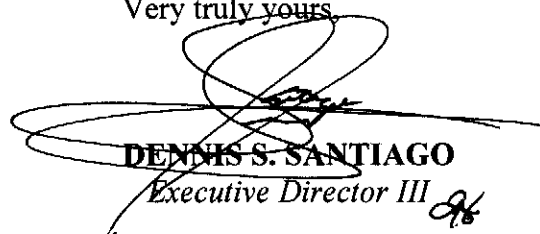
Clearly, the separate authorities of the BAC and the HOPE to declare failure of bidding are based on different situations and circumstances. The former's authority is based on factual circumstances when the bidding activity can no longer be pursued because no bidder participated or no bidder qualified. The latter's authority, on the other hand, is based on findings of violation of the rules and occurrence of events that render the activity unnecessary or unfavorable. Moreover, the BAC's authority to declare failure of bidding, unlike that of the HOPE's, does not rest on its discretion, but solely on the aforementioned circumstances.

In this regard, distinction should be made that as required in Section 53.1 of the IRR of RA 9184, resort to Negotiated Procurement may be done only when the failed biddings were due to any of the circumstances mentioned in Section 35 of RA 9184 and the IRR, and not when one or both instances of failure of bidding were due to the exercise by the HOPE of its authority to declare failure under Section 41 of the IRR of RA 9184.

Based on the foregoing, we wish to clarify that the SEC-CEO can only resort to Negotiated Procurement under Section 53.1 (Two Failed Biddings) of the IRR of RA 9184 for the procurement of the Project if the two failed biddings were due to circumstances enumerated under Section 35 of the same IRR. Since the other cause for the failure of bidding was the declaration by the HOPE pursuant to Section 41 of the IRR, we are of the view that Negotiated Procurement (Two Failed Biddings) cannot be resorted to under the circumstances.

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