



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

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MR. CIPRIANO V. FRUTO JR.
General Manager/Owner
**JVF COMMERCIAL AND PROJECT
DEVELOPMENT SUPPORT SERVICE (JVF)**
JVF-KANEDAI Building Mindanao Ave.,
Brgy. Bahay Toro, Proj. 8, Quezon City

Re: Competitive Public Bidding and Refund of the Cost of Bidding Documents

Dear Mr. Fruto:

We refer to your letter relative to the bidding conducted by the City Government of Surigao through the Bids and Awards Committee (BAC) on 27 October 2011 where JVF participated as bidder.

As represented, JVF bought bidding documents from the City Government of Surigao on the basis of the First Invitation to Bid (IB) issued by the BAC on 22 February 2011. However, the bid opening scheduled on 22 March 2011 for the procurement of twelve (12) units of Heavy Equipment was cancelled due to technical reasons per BAC Resolution No. 07, series of 2011. Bidders who previously bought bidding documents or bid forms were no longer required to pay the bid forms for a rebidding on the procurement of the said equipment.

The second Invitation to Bid, ITB No. 17-2011¹, issued by the BAC specified, among others, that one complete package should be in one (1) brand for heavy equipment and one (1) brand for dump trucks, or both equipment and dump trucks are in one (1) brand only.

JVF withdrew its participation from the bidding and asserted that the requirement of one brand only for all the equipment favored only one supplier and is a circumvention of Section 18 of the Implementing Rules and Regulations (IRR) of Republic Act No. 9184 (RA 9184). As a result, JVF requested for a refund of the P120,000.00 it paid for the bidding documents.

JVF now seeks clarification on the following matters:

1. Whether the requirement of one brand only for all the equipment in the ITB provided obstacles for a competitive open public bidding and unduly favored one prospective supplier; and

¹Posted on PhilGEPS website on September 23, 2011 and published in the Philippine Daily Inquirer on 25 September 2011.

2. Whether JVF can request for a refund of the amount paid for the bidding documents after the terms and conditions of the first bidding documents originally purchased were materially changed.

Technical Specifications; Unfair Competition

Anent the first issue, we refer you to Section 18 of RA 9184 and the IRR, which mandates that: "Specifications for the Procurement of Goods shall be based on relevant characteristics and/or performance requirements. Reference to brand names shall not be allowed."

Under the law, procuring entities may prepare and craft detailed technical specifications in their bidding documents; and it is incumbent upon them to show that the specifications or conditions set forth are based on relevant characteristics and/or performance requirements. An indication that different goods or equipment must be supplied in one (1) brand may be acceptable so long as the procuring entities can show that this is necessary, imperative and relevant based on its needs and pursuant to considerations relative to inter-connectivity, inter-operability, or replacement for integral components of an existing fleet or stock.

However, it bears stressing that inclusion in the IB and bidding documents of such conditions, detailed design or technical descriptions that are not couched on the procuring entity's needs, which leaves the procuring entity with no option but to procure from a particular brand or supplier, defeats the essence, nature and purpose of public bidding.

The Supreme Court in the case of Information Technology Foundation of the Philippines (ITFP) vs. COMELEC² held that:

Settled jurisprudence requires the strict application of pertinent rules, regulations and guidelines for public bidding for the purpose of *placing each bidder, actual or potential, on the same footing*. The essence of public bidding is, after all, an opportunity for fair competition, and a fair basis for the precise comparison of bids. In common parlance, public bidding aims to "level the playing field." That means each bidder must bid under the same conditions; and be subject to the same guidelines, requirements and limitations, so that the best offer or lowest bid may be determined, *all other things being equal*.

Absent any showing that the procurement of twelve (12) units of Heavy Equipment in one (1) brand is necessary, imperative, indispensable, and relevant based on its needs, the procuring entity should consider revising such conditions or specifications which may favor only one supplier, thus placing each bidder, actual or potential, on different or unequal footing. In ITFP, the High Tribunal stressed that "[p]ublic bidding is violated by the practice of requiring very high standards or unrealistic specifications that cannot be met -- like the 99.9995 percent accuracy rating in this case -- only to water them down after the bid has been awarded. Such scheme, which discourages the entry of prospective bona fide bidders, is in fact a sure indication of fraud in the bidding, designed to eliminate fair competition."³

² G.R. No. 159139, January 13, 2004.

³ Id.

Cost of Bidding Documents; Refunds

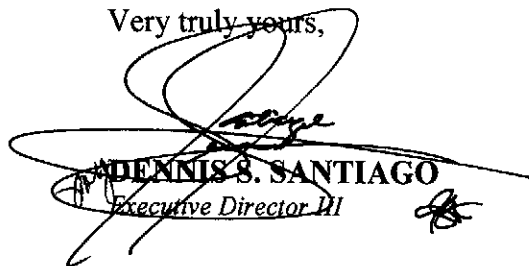
Anent the second issue, we refer you to Section 17.4 of the Revised IRR of RA 9184, which states that: "Bidders may be asked to pay for the Bidding Documents to recover the cost of its preparation and development." Moreover, the Philippine Bidding Documents for Goods specify under the IB and the Instruction to Bidders (ITB) that Bidders are to pay the non-refundable fee for bidding documents to be able to participate in the bidding.

Nonetheless, we wish to note that fees charged for the bidding documents must always be reasonable and conscionable, and not unjust, excessive, oppressive, or confiscatory, based on the fundamental principle governing the exercise of the taxing and other revenue-raising powers of local government units provided in Section 130(b)(2) of Republic Act No. 7160, otherwise known as the Local Government Code; and, the Civil Code provision on unjust enrichment.⁴ The principle of unjust enrichment under Article 22 requires two conditions: (1) that a person is benefited without a valid basis or justification, and (2) that such benefit is derived at another's expense or damage.⁵

From the foregoing, if JVF finds reason in claiming a refund based on legal remedies available under the Local Government Code on the collection of unjust, excessive, oppressive, or confiscatory fees; and the principle of unjust enrichment,⁶ it may raise the matter in an appropriate proceeding in a proper court, quasi-judicial or administrative agencies of competent jurisdiction.

We hope that our advice sufficiently addresses your concerns. Note that this opinion is being rendered on the basis of the facts and particular circumstances as presented. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director III

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⁴ Article 22, Civil Code of the Philippines.

⁵ Car Cool Philippines, Inc. v. Ushio Realty and Development Corporation, G.R. No. 174286, June 5, 2009, 588 SCRA 690; *See also* DBP v. Medrano, G.R. NO. 167004, 7 February 2011 which held that [i]t was not proper for a government financial institution to hold on to a person's shares of stock after it became obvious that he will not be able to comply with the conditions for the contract of sale. From that point onwards, the prudent and fair thing to do was to return the shares because it had no just or legal ground to retain them.

⁶ Unjust enrichment exists "when a person unjustly retains a benefit to the loss of another, or when a person retains money or property of another against the fundamental principles of justice, equity and good conscience." Philippine Realty and Holdings Corporation v. Ley Construction and Development Corporation, G.R. No. 165548 and Ley Construction and Development Corporation v. Philippine Realty and Holdings Corporation, G.R. No. 167879, June 13, 2011.