



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

NPM No. 121-2013

26 December 2013

ATTY. JOSE A. TAPNIO

Corporate Secretary

MANILA INTERNATIONAL AIRPORT AUTHORITY (MIAA)

MIAA Administration Building, MIA Road

Pasay City

Re : Submission of Request for Reconsideration During Bid Evaluation; Effect of Non-Posting of the Bid Bulletin in the Philippine Government Electronic Procurement System (PhilGEPS)

Dear Atty. Tapnio:

This is in response to your letter, which we received on 27 September 2013, requesting for an opinion on whether the MIAA Board should grant a request for reconsideration on its decision approving the recommendation of the MIAA Bids and Awards Committee (BAC) to declare a failure of bidding on account of the MIAA BAC's failure to follow the requirement to post the Supplemental/Bid Bulletin in the respective website of the procuring entity and the PhilGEPS.

The request is being made based on the succeeding facts and circumstances presented in the said letter. MIAA conducted public bidding for the Supply, Installation, and Commissioning of Fourteen (14) Units Brand New Full Body Scanning Equipment at NAIA Terminals. A prospective bidder (Bidder 1) requested for an amendment of the Terms of Reference. The MIAA BAC granted the request by issuing Bid Bulletin No. 3 and transmitting the same to the prospective bidders via facsimile. On the day of bid opening, only two (2) bidders participated, one of which was Bidder 1 who was declared as the bidder with the Lowest Calculated Bid (LCB). The other participating bidder (Bidder 2) subsequently questioned the non-publication of Bid Bulletin No. 3 in the MIAA and PhilGEPS websites, contrary to Section 22.5.3 of the revised Implementing Rules and Regulations (IRR) of Republic Act No. (RA) 9184. The MIAA BAC resolved to recommend to the MIAA Board the declaration of failure of bidding based on Section 41 (b) of the IRR of RA 9184 in view of the MIAA BAC's failure to follow the prescribed procedure under Section 23.5.3 of the same IRR. The MIAA Board agreed to the recommendation and declared the public bidding a failure. Expectedly, Bidder 1 filed a motion for reconsideration on the MIAA Board's decision, arguing that Bidder 2's letter should not have been considered as it was sent during the "no contact period" under Section 32.1 of the IRR of RA 9184 and that the publication of Bid Bulletin is not mandatory since Section 22.5.3 of the IRR merely requires publication in PhilGEPS "if available".

At the outset, we wish to remind you that neither the GPPB nor its Technical Support Office (GPPB-TSO) has the power to decide for and on behalf of a government agency in relation to its procurement activity. As previously opined¹, “the GPPB may only render contemporaneous construction of the provisions of the law pursuant to its quasi-legislative fiat, and issue rules and regulations pursuant to its rule-making power.” Thus, we wish to clarify that the GPPB and the GPPB-TSO cannot dictate to the procuring entity how to decide or resolve issues relative to its procurement activities.

No Contact Rule and Request for Reconsideration

For your guidance, Section 32.1 of the IRR of RA 9184 prohibits the BAC and its support staff from making or accepting any communication with any bidder regarding the evaluation of their bids until the issuance of the Notice of Award (NOA), also referred to as the “no contact” rule. However, Section 55 of the same IRR allows decisions of the BAC to be questioned at any stage of the procurement process by filing a request for reconsideration within three (3) calendar days upon receipt of written notice or upon verbal notification. As such, there appears to be conflicting rules on acceptance of communications during the period of bid evaluation until the issuance of NOA as it may happen that a request for reconsideration may be filed timely, but within the period covered by the “no contact” rule. These two apparently conflicting provisions should be reconciled in line with the rule in statutory construction that a statute must be construed and given effect as a whole.²

The perceived conflict may be reconciled by looking at the respective objective of the provisions. Section 32.1 of the IRR of RA 9184 proscribes communications made by bidders whose bids are being evaluated to veer away from perceptions of bias or favor.³ On the other hand, Section 55 of the same IRR provides administrative remedies in order to allow for a less expensive and speedier avenue for solving disputes, and give the procuring entity the opportunity to pass upon an issue and decide on the same correctly. Hence, the two provisions are not entirely contradictory since the former refers to communications that may sow bias or favor on the evaluation of bids, while the latter refers to those that seek redress of grievance.

Based on this, we are of the view that requests for reconsideration filed in accordance with Section 55 of the IRR of RA 9184 may be considered excluded from the coverage of the prohibition under Section 32.1 of the IRR in order to give effect to the administrative recourse available to a bidder who feels aggrieved by a decision. To opine otherwise may prevent a bidder from exercising its right to question decisions of the BAC at any stage of the process, particularly, when a request for reconsideration may only be filed timely if submitted within the period covered by the “no contact” rule. The availability of this avenue is material in ensuring that the whole process is beyond question and that the actions and decisions of the procuring entity were done in accordance with the provisions of RA 9184 and its IRR.

Requirement for Posting of Supplemental/Bid Bulletin

Section 22.5.3 of the IRR of RA 9184 states that “[a]ny Supplemental/Bid Bulletin issued by the BAC shall also be posted on the PhilGEPS and the website of the procuring

¹ Non-Policy Matter No. 25-2011 dated 27 December 2011.

² Ruben E. Agpalo, Statutory Construction, 5th Edition (2003), p. 252.

³ Non-Policy Matter No. 007-2013 dated 28 January 2013.

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entity concerned, if available.” We wish to clarify that the phrase “if available” refers to the phrase “the website of the procuring entity”, and not “the PhilGEPS”.

A cursory reading of said Section of the IRR would show that the phrase “if available” only applies to the phrase “the website of the procuring entity” because not all government agencies are able to maintain a website. Even assuming, for the sake of discussion, that the phrase “if available” also pertains to the PhilGEPS, the fact that such website exists and is available would require the procuring entity to comply with the posting obligation under Section 22.5.3 of the IRR.


In this regard, we are of the view that the procuring entity is mandated to post the Supplemental/Bid Bulletin in the PhilGEPS website. As a mandatory requirement, the same may not be set aside. Thus, the failure of the BAC to comply with this procedural requirement amounts to a failure to follow the prescribed bidding procedures that may warrant declaration of failure of bidding by the Head of the Procuring Entity pursuant to Section 41 (b) of the IRR of RA 9184.

Summary

In sum, we wish to clarify that requests for reconsideration filed in accordance with Section 55 of the IRR of RA 9184 may be considered excluded from the coverage of the prohibition under Section 32.1 of the IRR, and that it is mandatory for the procuring entity to post its Supplemental/Bid Bulletin in the PhilGEPS website such that failure to do so amounts to a failure to follow the prescribed bidding procedures.

We hope that this opinion issued by the GPPB-TSO 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 further questions, please do not hesitate to contact us.

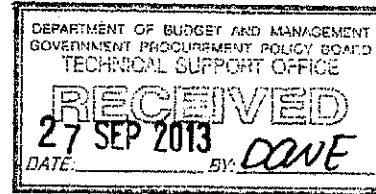
Very truly yours,


DENNIS LORNE S. NACARIO
Officer-in-Charge



Republic of the Philippines
MANILA INTERNATIONAL AIRPORT AUTHORITY
MIAA Administration Building, MIA Road Pasay City, Metro Manila

THE CHAIRPERSON
GOVERNMENT PROCUREMENT
POLICY BOARD
Unit 2506 Raffles Corporate Center
F. Ortigas Jr. Road, Ortigas Center
Pasig City



Attention: **ATTY. DENNIS S. SANTIAGO**
Executive Director, Technical Support Office

Subject: **Failure of Bidding due to Non-Publication of Bid Bulletin**
with PhilGEPS

Dear Sir:

In behalf of the MIAA Board of Directors (as HOPE), we respectfully request your Honorable Office for an Opinion on the above subject.

BACKGROUND

The Manila International Airport Authority (MIAA) bid out the project "Supply, Installation, & Commissioning of Fourteen (14) Units Brand New Full Body Scanning Equipment at NAIA Terminals" with an ABC of Php196,000,000.00.

The Terms of Reference (TOR) – Technical Specifications for the project stated that the Equipment to be supplied "must be TSA qualified or its European equivalent."

One interested bidder (Bidder "D") wrote the BAC requesting for amendment of the TOR - Technical Specification regarding the submission of the TSA qualification (or its European equivalent) for the offered equipment. It proposed instead to submit either proof:

- That the equipment is TSA qualified or its European equivalent or
- Of an on-going participation in any qualification – test program with TSA or its European equivalent.

In view thereof, the MIAA Bids & Awards Committee (BAC) issued Bid Bulletin No. 3 dated 26 March 2013 which stated that the "TSA Qualification or European equivalent for the offered equipment shall be submitted by winning bidder prior to the issuance of the contract. Failure to submit the TSA qualification or European equivalent, shall be a ground for cancellation of the Award." Bid Bulletin No. 3 was transmitted to and received by the bidders via fax.

During the bid opening on 03 April 2013, Bidder "D" was declared as the lowest bidder (as read). Only two (2) bidders participated.

The other bidder (Bidder "A") subsequently wrote the BAC pointing out, among others:

- The non-publication of Bid Bulletin No. 3 in the MIAA and/or PhilGEPS website/s, contrary to Sec. 22.5.3 of the Revised IRR of RA 9184.

In view of Bidder "A"'s letter, the BAC issued a Resolution¹ recommending to the Head of the Procuring Entity (HOPE) to declare a failure of bidding for the BAC's failure to follow the prescribed procedures under Sec. 22.5.3 and in accordance with Sec. 41 (b), both of the Revised IRR of RA 9184.

The MIAA Board of Directors (as the HOPE in this case) subsequently passed its own Resolution² approving the BAC recommendation to declare the failure of bidding for the project on account of the BAC's non-observance of the prescribed posting procedure under Sec. 22.5.3 in conjunction with Sec. 41 (b) of the Revised IRR of RA 9184.

Expectedly, Bidder "D" filed a Motion for Reconsideration of the Board decision alleging, among others, that:

- Bidder "A"'s letter should not have been considered or entertained as it was sent during the "no contact period" under Sec. 32.1 of the Revised IRR of RA 9184;
- A strict literal interpretation of Sec. 41 (b) of the Revised IRR or RA 9184 would mean that every omission – no matter how trivial – committed by the BAC will already merit a declaration of a failure of bidding and a dissolution of the bidding process;
- The non-publication of Bid Bulletin No. 3 in the PhilGEPS website is inconsequential to the bidding process, since Bidder "A" never sought a declaration of failure of bidding but merely questioned the non-publication of Bid Bulletin No. 3 in the MIAA and/or PhilGEPS website/s;
- Online publication in PhilGEPS is not mandatory since Sec. 22.5.3 merely requires publication in PhilGEPS "if available".
- In a previous project³ (the "EDS" project), the MIAA approved and awarded a contract and upheld the bidding notwithstanding lack of publication of Supplemental/Bid Bulletins and the Notice of Award (NOA) in the PhilGEPS website. Despite such failure to post in the PhilGEPS website, the MIAA did not declare a failure of bidding for the project and proceeded to award the contract to the winning bidder.

In view thereof, Bidder "D" requested the MIAA Board to accord the same treatment to it by reversing the decision declaring a failure of bidding in the subject project due to the BAC's failure to publish Bid Bulletin No. 3 in the PhilGEPS website.

On the other hand, the position of the MIAA BAC is as follows:

¹ BAC Resolution No. 2013-025

² MIAA Board Resolution No. 2013-040

³ Supply, Installation, & Commissioning of Four (4) Units of Explosive Detection Security Screening System at NIAA Complex

1. Publication of Bid Bulletins such as Bid Bulletin No. 3 in the Philgeps website is mandatory based on the wordings of Sec. 22.5.3 of the Revised IRR of RA 9184 which uses the word "shall".
2. Non-publication in the Philgeps website is a procedural error and a ground for the declaration of failure of bidding.
3. A.O. No. 17 dated 28 July 2011 even mandates all government procuring entities to use the Philgeps in its procurement activities and to post all opportunities, notices (which include Bid Bulletins), awards, and contracts in it.
4. Regarding the previous (EDS) project being cited by Bidder "D" in support of its Motion for Reconsideration, the BAC members were not aware of the failure to publish the Supplemental/Bid Bulletins and the NOA in the PhilGEPs website and thus did not recommend a failure of bidding for the EDS project. The BAC, and for that matter the Board, cannot therefore be faulted for it and Bidder "D" cannot cite the EDS project as precedent in requesting that it be accorded the same treatment as the winning bidder therein.

QUERY: Should the MIAA Board grant Bidder "D"s request for reconsideration by reversing its decision approving the BAC recommendation to declare the failure of bidding for the project on account of the BAC's non-observance of the prescribed posting procedure under Sec. 22.5.3 in conjunction with Sec. 41 (b) of the Revised IRR of RA 9184?

Your valuable opinion on the matter will greatly serve to guide the MIAA Board (as HOPE) in resolving the issue.

Very truly yours,


ATTY. JOSE A. TARNIO
Corporate Secretary