



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

NPM No. 124-2014

12 November 2014

MS. DIGNA B. PUCAN

Bids and Awards Committee (BAC) Secretariat

FERTILIZER AND PESTICIDE AUTHORITY (FPA)

FPA Bldg., BAI Compound, Visayas Ave., Diliman, Quezon City

Re: Negotiated Procurement under Section 53.1 (Two-Failed Biddings)


Dear Ms. Pucan:

This refers to your request for opinion on the conduct of Negotiated Procurement under Section 53.1 (Two-Failed Biddings) of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, thus:

- a. Do we need to invite an Observer for this type of procurement?
- b. What are the minimum requirements needed for a contractor to become eligible and participate in the negotiation process. Are the requirements the same as that of the eligibility requirements in the conduct of public bidding?

Invitation of Observers

Generally, invitation of Observers are not required when resorting to alternative methods of procurement except in those where competitive bidding or semblance a semblance thereof is still present, such as in Limited Source Bidding and Negotiated Procurement (Two Failed Biddings) under Section 49 and Section 53.1, respectively, of the revised IRR. For Negotiated Procurement (Two Failed Biddings), we refer, for proper guidance, to Section 53.1.6 of the IRR of RA 9184, which states that “[i]n all stages of the negotiations, Observers *shall* be invited.” The use of the word “shall” makes the invitation of Observers mandatory. The word “shall” means ought to, must, obligation used to express a command or exhortation used in laws, regulations or directives to express what is mandatory¹.

Following the requirements under Section 13.3 of the revised IRR of RA 9184, Observers shall be invited at least three (3) calendar days before the date of the negotiation and the absence of Observers will not nullify the BAC proceedings, provided that they have been duly invited in writing. If any of the invited Observers fail to attend the negotiation stage on the indicated schedule, the procurement process should continue since the absence of any of the Observers is not a ground to delay the proceedings. 

¹ NPM No. 37-2012 dated 19 April 2012, *citing* Baranda vs. Gustilo, 165 SCRA 757 (1988).

Accordingly, under Section 53.1.6 of the IRR of RA 9184, Observers shall be invited during the negotiation for negotiated procurement under the two-failed biddings modality.

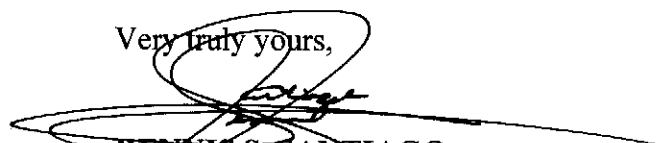
Minimum Eligibility Requirements

In an earlier opinion², we have discussed that the revised IRR of RA 9184 is silent as to whether or not the same eligibility documents required in public bidding must likewise be submitted when resorting to any of the Alternative Methods of Procurement, except those where competitive bidding or semblance thereof is present, *i.e.* Limited Source Bidding and Negotiated Procurement (Two Failed Biddings). This being the case, the procuring entity has the discretion as to what legal, technical and financial eligibility documents to require, with a *caveat* that it shall “[d]irectly negotiate a contract with a technically, legally and financially capable supplier, contractor or consultant.”³ On the other hand, it must be emphasized that the use of alternative methods of procurement is couched upon the principles of efficiency and economy, such that requiring too many eligibility documents may, in the process, defeat the very purpose for which the relevant alternative procurement modalities were introduced and institutionalized.

From the foregoing, if so requested, it is our considered view that only a few, but most relevant, technical, legal and financial eligibility documents may be required for submission during negotiated procurement under the two-failed bidding modality, where the procuring entity should assure itself that it shall enter into a contract with a technically, legally and financially capable supplier, contractor or consultant.

We hope that 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 there be other concerns, please do not hesitate to contact us.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director

//skp 

² NPM No. 142-2012 dated 5 November 2012.

³ Section 53, IRR of RA 9184.