

NPM No. 129-2015

27 November 2015

MR. RAMON F. GOROSPE
General Manager / Head of Procuring Entity
APARRI WATER DISTRICT (AWD)
J.A. Santos Street, San Antonio
Aparri, Cagayan

Re : Bid Securing Declaration

Dear Mr. Gorospe:

This refers to your letter requesting for guidance on matters concerning the submission of Bid Securing Declaration (BSD) *vis* other forms of Bid Security, specifically on the following issues:

- 1.) Whether a Supplemental/Bid Bulletin is necessary to clarify that a BSD is not necessary to be submitted by the bidder if another recognized form of Bid Securities has been submitted;
- 2.) Whether the failure to post a Supplemental/Bid Bulletin may be used as basis for the denial of the issuance of a *Certificate of No Objection* by the creditors; and
- 3.) Whether there is a legal impediment in awarding a contract if the Head of the Procuring Entity (HOPE) failed to act on the recommendation of the Bids and Awards Committee (BAC) within the prescribed period.

It is represented that AWD, pursuant to the loan obtained from the Local Water and Utilities Administration (LWUA) and KfW Development Bank (KfW), conducted public bidding for the construction of a Glass Reinforced Polyester (GRP) Tank in accordance with Republic Act (RA) No. 9184 and its revised Implementing Rules and Regulations (IRR). It received bids from two bidders, Uni-Field Enterprises and Flometrics. Incidentally, during the opening of bids, AWD found that Uni-Field submitted an Irrevocable Letter of Credit and a BSD, while Flometrics submitted a Surety Bond. It is in this instance that representatives of LWUA and KfW, who were observing the opening of bids, opined that all bidders should submit a BSD in compliance with Instruction to Bidders (ITB) Clause No. 18.1. Upon informing LWUA and KfW about GPPB Circular No. 01-2014, dated 01-2014, AWD proceeded with the procurement activity and found Uni-Field Enterprises as the bidder with the Lowest Calculated Bid (LCB), but it eventually declared Flometrics as having the Lowest Calculated and Responsive Bid (LCRB). Accordingly, in order for AWD to proceed with the award of the contract, it needs to secure first the appropriate "Certificate of No Objection" from LWUA and KfW. However, KfW requested that it be furnished a copy of the Supplemental/Bid Bulletin stating that the submission of a single form of bid security has been allowed. It is in this regard that our opinion is sought.

At the outset, we wish to inform you that the GPPB and the GPPB-TSO do not have the jurisdiction to rule over actual controversies with regard to the conduct of bidding, since the office has no quasi-judicial functions or investigatory powers under the law. We adhere to the position that apart from courts having actual jurisdiction over the subject matter of a case, we cannot, nor any other government agency, authority, or official, encroach upon or interfere with the exercise of the functions of the BAC, since these duties and responsibilities fall solely within the ambit of its authority and discretion sanctioned by the law.¹ Hence, we shall limit our discussion on the interpretation of relevant procurement laws, rules and regulations pertinent to the issue presented.

Only one form of Bid Security is necessary to be submitted by the bidder

In order to properly address your concerns, we would like to reiterate² the proper interpretation of the submission of recognized Bid Securities pursuant to the provisions of the IRR of RA 9184 and other issuances.

Clause 18.1 of the ITB is in accordance with Section 27.2³ of the IRR of RA 9184, which has been subject to clarification by GPPB Circular No. 01-2014. In this regard, PEs are given the option to limit the choice of acceptable bid security to two (2) forms in the Bidding Documents, where one of which shall be the BSD as a mandatory form to be included, while the other form may be chosen from at least one (1) of the following, thus:

Form of Bid Security	Amount of Bid Security (Equal to Percentage of the ABC)
a) Cash or cashier's/manager's check, issued by a Universal or Commercial Bank.	Two percent (2%)
b) Bank draft/guarantee or irrevocable letter of credit issued by a Universal or Commercial Bank: Provided, however, that it shall be confirmed or authenticated by a Universal or Commercial Bank, if issued by a foreign bank.	
c) Surety bond callable upon demand issued by a surety or insurance company duly certified by the Insurance Commission as authorized to issue such security.	Five percent (5%)
d) Any combination of the foregoing.	Proportionate to share of form with respect to total amount of security

¹ NPM No. 46-2013, dated 11 June 2013.

² NPM No. 21-2014, dated 17 June 2014.

³ As amended by GPPB Resolution No. 25-2013, dated 30 August 2013.

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On the other hand, the prospective bidder is given the choice to post just one form of bid security, that is, either a BSD **OR** any other form of bid security indicated by the PE in the Bidding Documents.

An illustration of this amendment was provided for under Section 3.2 of GPPB Circular No. 01-2014, thus:

To illustrate, the PE shall include BSD, as one of the choices; the other form of bid security may be Cashier's Check (or Cash, Manager's Check, Bank Draft/Guarantee, Irrevocable Letter of Credit, Surety Bond, or combination of the identified forms). The prospective bidder shall post **ONLY ONE (1) FORM** of bid security, a BSD **OR** Cashier's Check as its bid security. Accordingly, the prospective bidder is required to post only one (1) form of bid security, in this example, it could either be a BSD **OR** Cashier's Check.

In view of the foregoing, we emphasize that bidders are not required to post two (2) forms of bid security. The PE is mandated to include the BSD in its Bidding Documents as an acceptable form of bid security and at least one (1) of the forms provided for under the rules. Ultimately, the bidder has the discretion to choose what form of bid security it shall post from those provided by the PE in the Bidding Documents.

Supplemental/Bid Bulletin

Section 22.5 of the IRR of RA 9184 requires the BAC to issue a Supplemental/Bid Bulletin at least seven (7) calendar days before the deadline for the submission and receipt of bids upon receipt of written requests for clarifications or interpretations on any part of the Bidding Documents at least ten (10) days before the deadline for the submission of bids. A Supplemental/Bid Bulletin may likewise be issued pursuant to the PEs own initiative for purposes of clarifying or modifying any provision of the Bidding Documents.

In this regard, a Supplemental/Bid Bulletin is not necessary if the BAC has not received any written request for clarification or interpretation before the deadline for the submission of bids, or that there was no clarification or modification made to the Bid Documents as deemed necessary by the BAC. Accordingly the BAC need not issue clarifications or interpretations of the requirements if such matter has been duly addressed by the GPPB, in this case through GPPB Circular No. 01-2014.

Certificate of No Objection

In accordance with Section 37.1.4 of the IRR of RA 9184, a Certificate of No Objection is not among the documentary requirements needed in order for the contract to be awarded. We understand that this document is required alongside the loan agreement entered into by AWD with LWUA and KfW, which renders it outside the ambit of RA 9184. As such, we cannot opine on whether AWD has complied with its obligations to warrant the issuance of a Certificate of No Objection.

Failure to Award Contract within the Mandatory Period

As provided for by Section 37 of RA 9184, the HOPE shall approve or disapprove the recommendation of the BAC for award of the contract within a period of fifteen (15) calendar days upon determination and declaration by the BAC of the bidder with the LCRB⁴. In this regard, it is emphasized that the periods provided under Section 37 are mandatory as articulated by the nomenclature used therein. Accordingly, the Supreme Court in the case of *Jacomille v. Abaya*, ruled that failure to comply with the mandatory periods set forth in Section 37 is an irregularity which renders the procurement process null and void.⁵

Summary

In view of the foregoing, we wish to reiterate that:

1. In selecting the acceptable forms of bid securities for a given procurement activity, the PE is mandated to provide that a BSD may be submitted in lieu of the other acceptable form it has specified in the Bid Documents. Since this requirement has been clarified in GPPB Circular No. 01-2014, a Supplemental/Bid Bulletin need not be issued to clarify this requirement specially when the BAC has not received any written request for clarification or interpretation on this matter before the deadline for the submission of bids, or that there has been no modification made to the Bid Documents concerning the said requirement;
2. A Certificate of No Objection is subject to the terms of the loan agreement for which it is being required. It is not among the documentary requirements necessary for contract award recognized by RA 9184 or its IRR; and
3. Failure to award the contract within the mandatory period renders the procurement process null and void.

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 V

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⁴ Highest Calculated and Responsive Bid (HCRB) in the procurement of Consulting Services.

⁵ G.R. No. 212381, dated 22 April 2015.