



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

**NPM No. 145-2012**

13 November 2012

**MR. PETER GOCHENG**

*Sales Manager*

Jodaar Cottage Industries

1576-1582 E. Remigio St., Sta. Cruz, Manila

**Re: Protest Fee; Sealing and Marking of Bids**

Dear Mr. Gocheng:

This pertains to your request for assistance, intervention and/or legal opinion regarding the alleged abuses committed by National Food Authority (NFA) Region I Bids and Awards Committee (BAC) in the procurement of Region-I 2011 Rice and *Palay* Empty Sacks (MTS) requirements.

In your letter, you represented that the BAC of NFA Region I did not open Jodaar Cottage Industries' (Jodaar) bid envelope because of alleged violation of the two (2) envelope system. Aggrieved by the decision of the BAC, Jodaar filed a Motion for Reconsideration questioning the said decision. However, the BAC resolved to deny the Motion of Jodaar. It is in this wise that you were advised to file a written protest and pay a non-refundable fee equivalent to 1% of the ABC.

Consequently, you ask for clarification on the following:

1. The propriety of disqualifying a bidder on the basis of non-observance of the procedure on sealing and marking of bids; and
2. The requirement of payment of a non-refundable fee equivalent to 1% of the ABC as protest fee.

**Sealing and Marking of Bids**

Anent your first concern, we refer to the procedure stated in the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, particularly Section 25 thereof,<sup>1</sup> and Clauses 20.1 and 20.2 of the Instructions to Bidders (ITB) contained in the Philippine Bidding Documents (PBDs) for Goods, as guide documents for the procedure to

<sup>1</sup> Section 25.1. Bidders shall submit their bids through their duly authorized representative using the forms specified in the Bidding Documents in two (2) separate sealed bid envelopes, and which shall be submitted simultaneously. The first shall contain the technical component of the bid, including the eligibility requirements under Section 23.1 of this IRR, and the second shall contain the financial component of the bid.

be adopted in the submission, sealing and marking of bids. This is the same procedure to be adopted by the BAC and is to be used unchanged by procuring entities in the preparation of the Bidding Documents.

Under Clause 20.1, Section II. ITB of the PBD for Goods, original eligibility and technical documents shall be enclosed in a sealed envelope marked "ORIGINAL - TECHNICAL COMPONENT", and the original financial component in another sealed envelope marked "ORIGINAL - FINANCIAL COMPONENT", sealing them all in an outer envelope marked "ORIGINAL BID". Moreover, under Clause 20.2, Section II. ITB, each copy of the first and second envelopes shall be similarly sealed duly marking the inner envelopes as "COPY NO. \_\_\_ - TECHNICAL COMPONENT" and "COPY NO. \_\_\_ - FINANCIAL COMPONENT" and the outer envelope as "COPY NO. \_\_\_", respectively, and these envelopes containing the original and the copies shall then be enclosed in one single envelope.

It should be noted that while rules of procedure on the marking of the bids are detailed and more specific, the rules of procedure on sealing are simple and general. However, although the rules simply provide that the envelopes containing the technical and financial components should be sealed, the main purpose of maintaining the integrity of the submitted documents through the proper sealing of the envelopes is imperative upon the BAC and the bidders.

Notice that the cited provisions use the word "shall", which connotes command and compulsion. It is a basic legal construction that where words of command such as "shall," "must," or "ought" are employed, they are generally and ordinarily regarded as mandatory. Thus, where, as in Rule 64, Section 3 of the Rules of Court, the word "shall" is used, a mandatory duty is imposed, which the courts ought to enforce.<sup>4</sup>

Accordingly, we opine that these mandatory provisions give the BAC enough bases to disqualify the bidder in the event the procedures that is, marking and sealing of bids, contained therein are not observed. Acts which are executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity.<sup>2</sup>

On the other hand, it is our view that Clause 20.5,<sup>3</sup> ITB, PBD for Goods only intends to discharge the public officer concerned from any liability under Section 65 of the IRR that may result from the improper sealing and marking of the bids, without fault or negligence on the part of the public officer. This provision, however, does not undermine the mandatory provisions to be followed in the submission, sealing and marking of bids.

### **Protest Mechanism and Non-Refundable Protest Fee**

Secondly, you inquired whether it is mandatory for an aggrieved bidder to pay the non-refundable fee equivalent to 1% of the Approved Budget for the Contract as a condition *sine qua non* for filing a written protest before the Head of the Procuring Entity (HOPE).<sup>2</sup>

<sup>4</sup> Mirasol v. CA, G.R. No. 128448 dated 1 February 2001.

<sup>2</sup> Article 5, Republic Act No. 386, otherwise known as "An Act to Ordain and Institute the Civil Code of the Philippines".

<sup>3</sup> If bids are not sealed and marked as required, the Procuring Entity will assume no responsibility for the misplacement or premature opening of the bid.

We answer in the affirmative.

It must be emphasized that Section 55.3 of the IRR of RA 9184 specifically prescribes the requirements for the filing of a protest before the HOPE, to wit:

The protest must be filed within seven (7) calendar days from receipt by the party concerned of the resolution of the BAC denying its request for reconsideration. A protest may be made by filing a verified position paper with the Head of the Procuring Entity concerned, accompanied by the payment of a non-refundable protest fee; the non-refundable protest fee shall be in an amount equivalent to no less than one percent (1%) of the ABC.

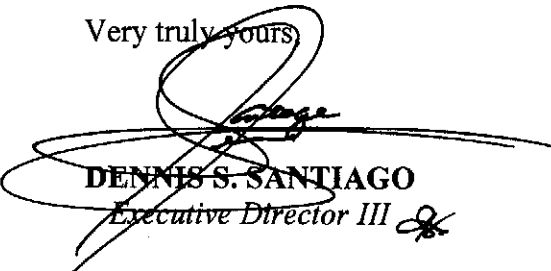
In *DBM-PS v. Kolonwel Trading*,<sup>4</sup> the Honorable Supreme Court had the occasion to declare that the payment of a non-refundable fee is one of the requirements for filing a protest before the head of the procuring entity, thus:

[A]s may be noted, the aforequoted Section 55 of R.A. No. 9184 sets three (3) requirements that must be met by the party desiring to protest the decision of the Bids and Awards Committee (BAC). These are: 1) the protest must be in writing, in the form of a verified position paper; 2) the protest must be submitted to the head of the procuring entity; and 3) the payment of a non-refundable protest fee.

Consequently, being one of the indispensable requirements for filing a protest, the non-payment of the protest fee does not toll the prescriptive period for filing a protest and it becomes a justifiable basis for the HOPE not to entertain a protest. Simply stated, a bidder whose request for reconsideration was denied must pay the required protest fee to avail of the protest mechanism under the procurement law and its associated rules.

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 further questions, please do not hesitate to contact us.

Very truly yours,

  
**DENNIS S. SANTIAGO**  
*Executive Director III*

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<sup>4</sup> G.R. No. 181735 dated 20 July 2010.