



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

NPM No. 152-2012

14 December 2012

MR. EMMANUEL L. CAPARAS

Acting Chief Regulator

MR. RANDOLPH Q. MARCIAL

Acting Chairman, Bids and Awards Committee (BAC)

METROPOLITAN WATERWORKS AND SEWERAGE SYSTEM (MWSS)

4th Floor, Administration Building, MWSS Complex,
489 Katipunan Avenue, Balara, Quezon City

**Re: Section 34.2 of the Revised Implementing Rules and
Regulations (IRR) of Republic Act (RA) No. 9184**

Dear Messrs. Caparas and Marcial:

We respond to your letters dated 28 September and 3 December 2012 seeking our opinion on the correct interpretation of Section 34.2 of the IRR of RA 9184 in relation to the following issues:

1. Whether the submission of required documents for post-qualification should be complied after the opening of the financial proposal/negotiation or prior to post-qualification;
2. Whether the three (3) calendar day period within which to submit the required documents under Section 34.2 of the IRR of RA 9184 is inclusive of the seven (7) calendar day period for post-qualification stated in Section 34.8 of the IRR;
3. Whether the verification slip issued by the Bureau of Internal Revenue may be considered in lieu of the Tax Clearance; and,
4. Whether the subsequent submission of the Tax Clearance Certificate within the extended period granted by the Head of the Procuring entity (HOPE) fully complies with all relevant legal requirement.

As represented, the MWSS Regulatory Office (RO) BAC is currently conducting negotiated procurement for the hiring of a Rate Rebasing Consultant (RRC) using the MWSS Board of Trustees (BOT) approved Technical Evaluation Criteria and following the Quality-Based Evaluation Procedure under Section 33.2.1(a) of the IRR of RA 9184. The RRC will assist the MWSS RO in reviewing the historical performance and analyzing the business plans of the agency's two concessionaires for purposes of determining whether adjustments

in the water tariff of Twelve (12) Million consumers in Metro Manila are warranted, and up to what extent. The Rate Rebasing exercise takes place once every five (5) years and adjustments to tariff take effect on 1 January of the year immediately following the same.

It is further represented that the bidder with the Highest Rated Bid (HRB) was identified and duly informed of the requirements for post-qualification pursuant to Section 34.2 of the IRR of RA 9184. On the deadline set, the HRB has merely submitted a tax verification slip issued by the Bureau of Internal Revenue (BIR) instead of the Tax Clearance Certificate for one of the Joint Venture (JV) partners, and requested for ten (10) days extension for submission of the same. Subsequently, the Tax Clearance Certificate of the JV partner has been submitted two (2) days after the deadline. Initially, the RO BAC has disqualified the bidder and forfeited the bid security based on (1) Clause 24.1, Section III of the Bid Data Sheet of the Philippine Bidding Documents (PBDs) for Consulting Services; (2) Clause 27.2, Section II of the Instruction to Bidders of the PBDs; and, (3) Section 34.2 of the IRR of RA 9184. Nonetheless, the MWSS BOT, as the HOPE, has decided to extend the three (3) day period and accept the JV partner's Tax Clearance Certificate pursuant to Section 34.8¹ of the IRR of RA 9184. Considering that there are no other bidders left to negotiate with given that the second and third HRBs have already been engaged by other entities, MWSS cannot afford to delay the procurement process.

Document Submission During Post-Qualification

For your guidance, Section 34 of the IRR of RA 9184 lays down the procedure to be followed by the Procuring Entity (PE) in conducting post-qualification. Section 34.2 thereof provides that the bidder shall submit the enumerated documentary requirements² within three (3) calendar days from receipt of the notice from the BAC that it offered the HRB. This provision is clear that it is only after the BAC has determined the bidder with the HRB and issued the corresponding notice that the bidder will be given three (3) calendar days to comply with the submissions under Section 34.2. Consequently, this implies that the documents are not yet required after the opening of the financial proposal/negotiation or prior to post-qualification. Nonetheless, as discussed in a previous opinion³ issued by this office, bidders are not precluded from submitting the post-qualification documents during the submission of bids. However, in case there is delay in the conduct of post-qualification, it is prudent for the PE to request for the latest and current legal documents during post-qualification to ascertain, validate and verify the authenticity and currency of the documents and establish the eligibility and responsiveness of the bidder.

Periods for Submission of Additional Documents and Post-qualification

We wish to note that Section 34.8 of the IRR of RA 9184 states that the post-qualification process shall be completed in not more than seven (7) calendar days from the determination of the HRB. Considering that the three (3) calendar day period under Section 34.2 of the IRR of RA 9184 is reckoned from the same point as the period for post-qualification, *i.e.*, from determination of the Lowest Calculated Bid (LCB) or HRB, it is our

¹ The post-qualification process shall be completed in not more than seven (7) calendar days from the determination of the Lowest Calculated Bid/Highest Rated Bid. In exceptional cases, the post-qualification period may be extended by the Head of the Procuring Entity, but in no case shall the aggregate period exceed thirty (30) calendar days.

² (i.) Tax clearance, (ii.) Latest income and business tax returns, (iii.) Certificate of PhilGEPS registration, and (iv.) Other appropriate licenses and permits required by law and stated in the Bidding Documents.

³ NPM No. 09-2012 dated 12 January 2012.

considered view that said three (3) calendar day period is necessarily included in the seven (7) calendar day period for post-qualification.

Requirement for Tax Clearance

We wish to inform you that what is required under Section 34.2 of the IRR of RA 9184 is the submission of Tax Clearance per Executive Order (EO) No. 398⁴ (or Tax Clearance Form 17.4B).⁵ Likewise, the Government Procurement Policy Board issued Circular No. 02-2005 on 28 April 2005 to enforce compliance with EO 398. Further, the use of the word “shall” in this provision makes the submission of the documentary requirements mandatory within the specified period. 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 mandatory. In common or ordinary parlance, the term “shall” is a word or command, one which has a compulsory meaning, and is generally imperative or mandatory, unless the contrary intention appears.⁶ Hence, a verification slip issued by the BIR will not suffice in lieu of the Tax Clearance requirement since substitution is not allowed under Section 34.2 of the IRR. The Tax Clearance must be the document submitted at the outset.

Extension of Period for Submission of Tax Clearance

As discussed above, the use of the term “shall” in requiring the submission of Tax Clearance within three (3) calendar days from determination of HRB or LCB creates a mandatory imposition upon the bidder, failure to comply with which results in disqualification. In addition, the categorical statement under the PBDs that the said period is non-extendible concretizes the policy that such requirement should be complied with within the fixed period of three (3) calendar days.

This notwithstanding, note that it is implicit in Section 65.1(b) of the IRR of RA 9184 that post evaluation process beyond the prescribed period of action may be recognized for justifiable causes, such that, although the period of action required under the rules are mandatory in character, penal sanctions or liability will not set in against the concerned public officers provided that, valid, reasonable, and justifiable causes exist to warrant a delay in the process.⁷ However, we wish to stress that it is the PE’s responsibility and accountability to determine the existence of justifiable causes that led to the delay.⁸

In this wise, we wish to clarify that extension of mandatory periods under the IRR of RA 9184, such as the three (3) calendar day period under Section 34.2 thereof, is prohibited. Should the PE decides to extend the same, it must show and provide compelling, sufficient, valid, reasonable, and justifiable cause for such extension. Elsewise put, the burden lies upon the PE to provide credible and legal bases to justify the extension. Such valid justification,

⁴ **Section 1** All persons, natural or juridical, local or foreign, desiring to enter into or participate in any contract with the government, its departments, bureaus, offices and agencies including state universities and colleges, government-owned and/or controlled corporations, government, financial institutions and local government units, shall, as a pre-condition, submit, along with their proposal and/or bid, a copy of their latest income tax and business tax returns duly stamped and received by the Bureau of Internal Revenue, and duly validated with the tax payment made thereon.

They shall also submit a tax clearance from the Bureau of Internal Revenue to prove full and timely payment of taxes. (Underline ours)

⁵ NPM 025-2012 dated 12 August 2012.

⁶ NPM No. 70-2012 dated 7 June 2012 citing Baranda v. Gustilo, 165 SCRA 757 (1988) and Gonzales v. Chavez, 205 SCRA 816 (1992).

⁷ NPM No. 10-2012 dated 16 January 2012.

⁸ NPM No. 14-2008 dated 8 August 2008.

however, will only free the concerned officials from penal sanction or liability, but not from applicable administrative and civil sanctions or liabilities under existing laws, rules and regulations.

Negotiated Procurement Under Two-Failed Biddings

As in this case, the BAC after two-failed biddings may conduct its procurement activity through the negotiated modality sanctioned under Section 53.1⁹ of the IRR of RA 9184. Accordingly, the procurement procedures to be undertaken are those contained in Section 53.1, which does not involve the rigors and strictures mandated under a competitive bidding regime. Hence, in order to obviate circumstances that may cause delay in the conduct of the procurement process under a negotiated modality (two-failed biddings), the MWSS RO BAC should have proceeded utilizing and observing the less rigorous and simplified procurement procedures under Section 53.1 of the IRR of RA 9184.

All told, the submission of a Tax Clearance under Section 34.2 of the IRR of RA 9184 is mandatory, and no substitute document, such as a Tax Verification Slip, shall be accepted as substitute. In addition, the non-submission of a Tax Clearance within the 3 day grace period shall be cause for disqualification. Moreover, extension of mandatory periods such as the three (3) calendar days under Section 34.2 is prohibited. However, should the PE opts to extend, it must show and provide compelling, sufficient, valid, reasonable, and justifiable cause for such extension; the burden lies upon the PE to provide credible and legal bases to justify the extension. Stress must be made, however, that the valid justification will only free the concerned officials from penal sanction or liability, if legally acceptable, but not from

⁹ 53.1. Two Failed Biddings. Where there has been failure of public bidding for the second time as provided in Section 35 of the Act and this IRR.

53.1.1. After conduct of the mandatory review of the terms, conditions, specifications, and cost estimates, as prescribed in Section 35 of this IRR, the BAC shall revise and agree on the minimum technical specifications, and if necessary, adjust the ABC, subject to the required approvals. However, the ABC cannot be increased by more than twenty percent (20%) of the ABC for the last failed bidding.

53.1.2. The BAC shall invite and engage in negotiations with a sufficient number of suppliers, contractors or consultants to ensure effective competition.

53.1.2.1. In the case of infrastructure projects, bona fide contractors licensed with the CIAP whose eligibility documents are on file with the procuring entity concerned or the Department of Public Works and Highways (DPWH) Contractors' Registry, as the case may be, and who have been classified under the type of contract/project where the subject contract falls are eligible to be invited for negotiation. Other contractors not previously deemed eligible may also apply for eligibility.

53.1.2.2. All Procuring Entities shall maintain a registry of suppliers, contractors, and consultants as basis for drawing up the short list and/or selecting the suppliers, contractors, and consultants for negotiations.

53.1.3. Any requirements, guidelines, documents, clarifications, or other information relative to the negotiations that are communicated by the procuring entity to a supplier, contractor, or consultant shall be communicated on an equal basis to Revised Implementing Rules and Regulations all other suppliers, contractors, or consultants engaging in negotiations with the procuring entity relative to the procurement.

53.1.4. Following completion of the negotiations, the procuring entity shall request all suppliers, contractors, or consultants remaining in the proceedings to submit, on a specified date, a best and final offer with respect to all aspects of their proposals.

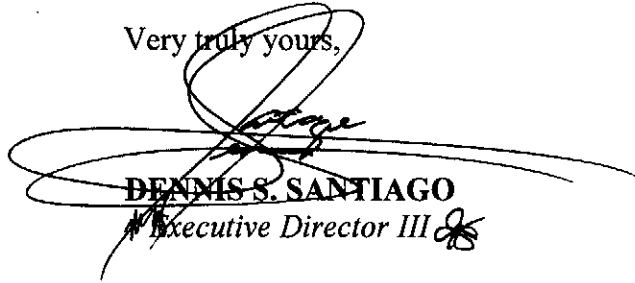
53.1.5. The procuring entity shall select the successful offer on the basis of such best and final offers which should meet the procuring entity's minimum technical requirements and should not exceed the ABC.

53.1.6. In all stages of the negotiations, observers shall be invited.

applicable administrative and civil sanctions or liabilities under existing laws, rules and regulations.

We hope that our advice provided sufficient guidance on the matter. Please note that this opinion is being rendered on the basis of the facts and particular situation presented, and may not be applicable given a different set of facts and circumstances. 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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