



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

NPM No. 156-2012

21 December 2012

MR. DAVID R. SANSANO

General Manager

MOUNT SINAI SCIENTIFIC AND PHARMACEUTICAL SUPPLY

Carillo-Sansano Building, 47 Annapolis Street,
Cubao, Quezon City

Re: Reference to Brand Names

Dear Mr. Sansano:

We respond to your letter dated 20 September 2012, requesting our opinion on the option available to a winning bidder when the manufacturer of one of the items it has to deliver has a distributorship agreement with another supplier.

As represented, Mount Sinai Scientific and Pharmaceutical Supply (Mount Sinai) won the bidding conducted by the Philippine Navy for several medical articles. Mount Sinai was able to acquire majority of the items except for the Rapid Plasma Reagent which is being produced by Sterling Diagnostic Corporation (SDC). However, SDC informed Mount Sinai that it could not sell Rapid Plasma Reagent as Metro Globe is its exclusive distributor for the Philippine Navy. Subsequently, Mount Sinai suggested another brand to the Philippine Navy, which is allegedly the better and more expensive Cormay, as a substitute to the Sterling brand, but the offer was refused. Moreover, the Philippine Navy informed Mount Sinai that it will be blacklisted if it fails to deliver the Sterling brand on or before 30 September 2012.

Reference to Brand Names

We wish to inform you that Section 18 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) 9184 provides an absolute prohibition as regards reference to brand names. As discussed in an opinion¹ issued by this office, in specifying the goods sought to be procured, reference to brand names is prohibited. The prohibition is absolute in its terms and bars any exception as reference to brand names is restrictive or preventive of any healthy competition as it creates an uneven playing field. Hence, it would be prudent for the Procuring Entity (PE) to judiciously prepare its "technical specifications" so that it is bound by the technical nature of the item to be procured rather than by its brand. Section 18 of the IRR allows the inclusion of specifications based on relevant characteristics and performance requirement.

¹ NPM No. 41-2005 dated 20 September 2005.

Failure of Bidding

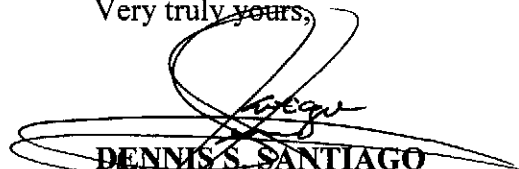

It should be noted that as long as the bidder complies with the technical specifications stated in the Bidding Documents or in the Purchase Order (PO) and offers the corresponding bid price that is below the approved budget for the contract, then it may be declared as the Lowest Calculated and Responsive Bid. Assuming that there is violation of Section 18 of the IRR of RA 9184, the PE may consider the declaration of a failure of bidding in accordance with Section 41(b) of the IRR of RA 9184 as the BAC failed to conform with the prescribed bidding procedures, particularly the specification of the Sterling brand for the Rapid Plasma Reagent.


In addition, it is represented that one of the provisions in the Special Conditions of the Contact of the Philippine Navy states that "any item/s found solely and exclusively being distributed by a participating bidder during the whole bidding process will automatically nullify the bidding for the project".² Thus, if the Rapid Plasma Reagent can only be procured from Metro Globe as the exclusive distributor of SDC, then the PE may likewise consider declaring the bidding null and void.

Anent all the foregoing, the PE cannot refuse to accept the delivery of an item, which is compliant with the technical specifications provided for in the Bidding Documents. Additionally, reference to a brand name in the Bidding Documents is proscribed under Section 18 of the IRR of RA 9184.

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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² Letter of Mount Sinai to the Philippine Navy dated 2 August 2012.