



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

NPM No. 158-2012

21 December 2012

MR. YOUNG TAE LEE

Chairman

HERI CONSULTING, INC. (HERI)

1411A-1-B Sumulong Hi-way,
Brgy. Mambungan, Antipolo City

Re: Reference to Brand Names

Dear Mr. Lee:

We respond to your letter dated 19 July 2012 on the proper interpretation of Section 18 on the Reference to Brand Names of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184.

As represented, HERI was the winning bidder in the procurement of one (1) unit brand new mini coaster for the Pamantasan ng Lungsod ng Marikina (PLMAR). In the Purchase Order (PO) issued by the City of Marikina as the Procuring Entity (PE), one of the specifications indicated was that the engine should be 4HGI four (4) cylinder in line with Turbo Intercooler Diesel. Since HERI discovered that there was no available Isuzu engine (4HGI) prior to placing an order to its foreign supplier, it gave the City of Marikina a list of three (3) engine options with the same specifications, similar to the performance and quality of an Isuzu engine (4HGI). It was likewise represented that Marikina City Mayor Del R. de Guzman approved the Cummins engine from among the three (3) options given by HERI and relayed this information to the procurement office and the members of the Bids and Awards Committee (BAC). However, when HERI tried to deliver the mini coaster with the Cummins engine, the City of Marikina refused to accept it on the ground that the vehicle did not conform to the specifications for an Isuzu engine as indicated in the PO. HERI posited the view that since the specification of 4HGI refers to a model of an Isuzu engine, it is in contravention with Section 18 of the IRR of RA 9184 on reference to brand names. It likewise asserted that the City of Marikina should accept the delivery of the mini coaster as it complies with the specification that the engine should be four (4) cylinder Turbo Intercooler Diesel.

Reference to Brand Names

For your guidance, Section 18 of the IRR of RA 9184 imposes an absolute prohibition on 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

¹ NPM No. 156-2012 dated December 21 2012 citing NPM No. 41-2005 dated 20 September 2005.

absolute in its terms and bars any exception as it is restrictive or preventive of any healthy competition and creates an uneven playing field. Following the rule on statutory construction, the use of the word "shall" in Section 18 of the IRR is mandatory in nature. 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 of command, one which has a compulsory meaning, and is generally imperative or mandatory, unless the contrary intent appears.² Thus, the PE should 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. Hence, what may be allowed under Section 18 of the IRR are specifications based on relevant characteristics and performance requirement.

Moreover, the technical specifications stated in the Bidding Documents or the PO provide the basis for determination of the responsiveness of an offer. Hence, the bidder who complies with all the technical specifications and offers the lowest price is declared the Lowest Calculated and Responsive Bidder, in whose favor, award of contract may be made. The same set of technical specifications is likewise used in determining whether the winning bidder has complied with its contractual obligations in delivering the required item.

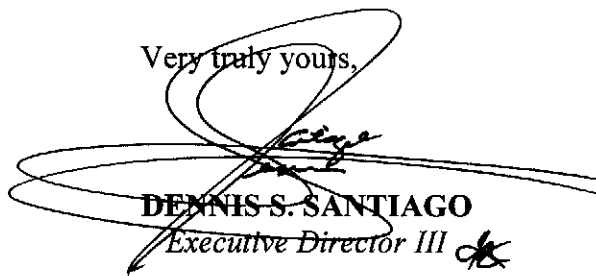
Failure of Bidding

Assuming, for the sake of discussion, that there was violation of Section 18 of the IRR of RA 9184 by referring to a specific brand name, the PE may even declare a failure of bidding under Section 41(b) on the ground that the BAC failed in complying with the prescribed bidding procedures.

Based on the foregoing, although the PE cannot refuse to accept the delivery of an item that is compliant with the technical specifications, reference to a brand name in the Bidding Documents violates Section 18 of the IRR of RA 9184. Under the circumstances presented, the PE may declare a failure of bidding based on Section 41(b) of the IRR.

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 NPM No. 70-2012 dated 7 June 2012 citing NPM No.37-2012 dated 19 April 2012.