

NPM No. 159-2015

22 December 2015

MS. BEBS OPENA

Proprietor

BM MARKETING

No. 36, Delgado Street San Antonio Village,
Ortigas, Pasig City

Re : Refusal to Sell Bidding Documents

Dear Miss Opena:

This refers to your letter seeking clarification whether the Bids and Awards Committee (BAC) may validly refuse to sell the Bidding Documents on the ground of non-attendance of the prospective bidder in the pre-bid conference as stated in the Invitation to Bid.

As represented, the pre-bid conference was conducted on 18 September 2015. Despite non-attendance, you expressed your intention to participate in the bid but was refused by the BAC Secretariat (BAC Sec) stating that only prospective bidders that purchased the Bidding Documents can participate in the bid and that the Bidding Documents were available only until the pre-bid conference as contained in the Invitation to Bid, which states that: "*the pre-bid conference shall be open only for those who have purchased the bid documents. No more sale of bid documents after pre-bidding conference in order for the bidders to submit a highly technical and educated bid.*" In view thereof, two letters were sent to the BAC on September 21 and 23, 2015, both expressing your intention to participate in the project by allowing the purchase of the subject Bidding Documents.

On 23 September 2015, the Procuring Entity (PE), thru BAC Chairman, issued a letter denying with finality your request to purchase the bid documents. The PE anchors its refusal on Section 22.3 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, which provides:

22.3. The pre-bid conference shall discuss, among other things, the eligibility requirements and the technical and financial components of the contract to be bid. Attendance of the bidders shall not be mandatory. However, **at the option of the Procuring Entity, only those who have purchased the Bidding Documents shall be allowed to participate in the pre-bid conference and raise or submit written queries or clarification.** (Emphasis supplied).

The BAC, in the said letter, stated that "*it is discretionary on our part that only those who have purchased the bid documents shall be allowed to participate in the pre-bid conference and it is but proper for us to refuse to sell bid documents after the conduct of pre-bid conference.*"

In essence, the issue for clarification is whether the BAC may set a deadline for the availability of bid documents at a date earlier than the deadline set in Section 17.3 of the revised IRR.

At the outset, it is noteworthy to emphasize that the Government Procurement Policy Board (GPPB) and its Technical Support Office (GPPB-TSO) only renders policy and non-policy opinions, respectively, on issues pertaining to the interpretation and application of our procurement laws, rules and regulations. It has no jurisdiction to rule over actual controversies with regard to the conduct of the bidding since it has no quasi-judicial functions or investigatory powers under the law. Moreover, we adhere to the position that apart from the 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 as sanctioned by law¹.

Period for the Availability of Bidding Documents

Section 17.3(a) of the IRR of RA 9184 clearly mandates the BAC to make available the bidding documents from the time the Invitation to Bid (IB) is first advertised or posted until the deadline for submission and receipt of bids². The use of the word “shall” in Section 17.3 underscores its mandatory character. Accordingly, the BAC cannot limit the availability of the bid documents at a date earlier than that mandated by Section 17.3 of the IRR, to do otherwise would be to violate a mandatory provision of the rules.

Application of Section 22.3 of the IRR

A careful reading of Section 22.3 of the IRR would show that the PE is given the option to allow a prospective bidder to participate in the pre-bid conference, that is, to raise questions, clarifications or recommendations, depending on whether s/he purchased or secured a copy of the bidding documents. We take this opportunity to clarify that Section 22.3 of the IRR relates to the conduct of the pre-bid conference, and does not refer to the manner, time, period or limitation for the distribution or sale of bidding documents. If at all, the consequence to a prospective bidder for not purchasing or securing a copy of the bidding documents is the risk of not being able to actively participate during the pre-bid conference. This, notwithstanding, s/he should still be able to purchase or secure a copy of the bidding documents from the time the IB was advertised until the deadline for the submission and receipt of bids.

In a previous opinion³, we had the occasion to explain that Section 22.3 clearly provides that the PE may limit the opportunity to raise and submit written queries or clarifications only to those who have purchased the Bidding Documents, by clearly indicating such rule in the IB. We stated further that the policy was adopted to address the experience of PEs of having to respond to queries and requests for clarification, during the pre-bid conference, from entities that do not have any genuine intention to participate in the procurement activity.

In fine, prospective bidders may purchase or secure a copy of the bidding documents even after the conduct of the pre-bid conference, until the deadline for the submission and

¹ NPM No. 111-2014, dated 07 November 2014.

² NPM No. 014-2010, dated 21 May 2010.

³ NPM No. 132-2014, dated 18 November 2014.

receipt of bids in view of Section 17.3 of the IRR of RA 9184. The non-attendance of the prospective bidder during the pre-bid conference should not in any way hinder her/him from purchasing or securing the bidding documents.

We hope 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 you have further questions, please do not hesitate to contact us.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director V

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