



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

NPM No. 23-2011

26 December 2011

MS. DOLORES A. SANTIAGO
Executive Vice President & BAC Chairman
DEVELOPMENT BANK OF THE PHILIPPINES
Sen. Gil J. Puyat Avenue cor. Makati Avenue,
Makati City

Re: Forfeiture of Bid Security under Section 34 of the IRR

Dear Ms. Santiago:

We respond to your letter dated 18 November 2011 seeking our opinion whether it is discretionary on the part of the Development Bank of the Philippines (DBP) to forfeit the bid security submitted by the bidder for failure to comply with the requirements within the timeframe stated in Section 34 of Republic Act (RA) 9184 and its Implementing Rules and Regulations (IRR). Stated differently, DBP wants to know if it can forego the forfeiture of the bid security of the disqualified bidder since it has suffered no damage or loss.

The questioned provision refers to the last paragraph of Section 34.2 of the IRR, to wit:

Failure to submit the above requirements on time or a finding against the veracity of such shall be ground for the forfeiture of the bid security and disqualify the bidder for award.

The documents enumerated under Section 34.2 of the IRR would have to be complied with to be post-qualified¹. Based on this provision, the inability of the bidder to submit the requirements on time or if there is a finding against the veracity of the submitted documents would necessarily result to forfeiture and disqualification. Applying the same principle, the mandate of the law is to forfeit the bid security and disqualify the bidder from receiving the award if there is non-compliance with Section 34.2.

In addition, we wish to inform you that the term "shall" spells out clearly the mandatory character² of Section 34.2. In statutory construction, the general rule is that the use of the word "shall" in a statute implies that it is mandatory. In common parlance and in its ordinary understanding, "shall" is a word of command, and one which has or which must be given compulsory meaning.³ Therefore, the rule in Section 34.2 is mandatory, and not discretionary, as this is quite clear from the wordings of the provision.

¹ NPM No. 006-2010 dated 4 February 2010

² NPM No. 021-2004 dated 26 February 2004 and NPM No. 003-2003 dated 10 March 2003

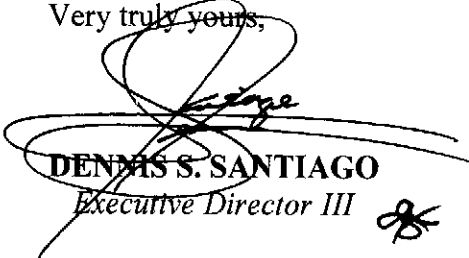
³ Statutory Construction, Agpalo, 5th Edition (2003)

Clearly, suffering damage or loss is not a pre-requisite for forfeiture of bid security. Nonetheless, it is our view that a bidder's non-compliance with Section 34.2 results in damage or loss on the part of the government in the form of days lost; delay in the delivery of essential public service; resources expended; and, cost incurred in evaluating the lowest offer.

Based on the foregoing, it is our opinion that forfeiture of bid security grounded on non-compliance with the requirements under Section 34.2 of the IRR is mandatory and is not subject to the discretion of the procuring entity.

We hope we have provided sufficient guidance on the matter. Should you have further questions, please do not hesitate to contact us.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director III