

NPM No. 107-2017

29 December 2017

ENGR. BAYANI C. SAN JUAN, MSc, MNSA, CESE

Bids and Awards Committee Chairperson

FOOD AND DRUGS ADMINISTRATION

<mgguevara@fda.gov.ph>

Re: Supplemental/Bid Bulletin; Reservation Clause-

Dear Engr. San Juan:

This refers to your electronic mail requesting clarification on the invocation of the Reservation Clause under Section 41(b) of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, the Government Procurement Reform Act, with respect to the posting of a Supplemental/Bid Bulletin reducing the minimum required experience of the proposed professional staff from fifteen (15) years to ten (10) years) on the day of the deadline for submission and opening of the Expression of Interest.

Supplemental Bid Bulletin-

Section 22.5.2¹ of the 2016 IRR of RA 9184 provides that Supplemental/Bid Bulletins may be issued at least seven (7) calendar days before the deadline for the submission and receipt of bids, thus:

For purposes of clarifying or modifying any provision of the Bidding Documents, Supplemental/Bid Bulletins may be issued upon the Procuring Entity's initiative **at least seven (7) calendar days before the deadline for the submission and receipt of bids**. Any modification to the Bidding Documents shall be identified as an amendment. (Emphasis ours)

It is clear from the above-cited provision that the Supplemental/Bid Bulletin should be issued at least seven (7) calendar days before the deadline for the submission and receipt of bids. In addition, the Supplemental/Bid Bulletin should be posted in the Philippine Government Electronic Procurement System (PhilGEPS) at least seven (7) calendar days before the deadline for the submission and receipt of Expression of Interest. The minimum period of at least 7 calendar days was prescribed for the purpose of giving the prospective bidders enough time to prepare a responsive bid.

¹ For purposes of clarifying or modifying any provision of the Bidding Documents, Supplemental/Bid Bulletins may be issued upon the Procuring Entity's initiative at least seven (7) calendar days before the deadline for the submission and receipt of bids. Any modification to the Bidding Documents shall be identified as an amendment.

Reservation Clause-

Under Section 41(b) of the 2016 IRR of RA 9184, the Head of the Procuring Entity (HoPE) may exercise his/her right to reject any and all bids, declare a failure of bidding or not award the contract if the Bids and Awards Committee (BAC) is found to have failed in following the prescribed bidding procedures.

Despite the recognition under Section 41 of RA 9184 and its 2016 IRR of the "Reservation Clause", we explained in an earlier opinion² that the right to reject any and all Bids, declare a failure of bidding or not award the contract should not be exercised whimsically, arbitrarily or capriciously. Section 37.1.3 of the 2016 IRR of RA 9184 mandates that the disapproval by the HoPE of the recommendation of the BAC to award the contract with the Bidder with the Lowest Calculated Responsive Bid (LCRB) shall be based only on valid, reasonable and justifiable grounds, *i.e.*, grounds enumerated under Section 41 of RA 9184 and its IRR. In the absence of any of these grounds, the HoPE has no basis to disapprove the recommendation of the BAC to award the contract to the LCRB.

Summary-

All told, the Supplemental/Bid Bulletin should be posted in the PhilGEPS at least seven (7) calendar days before the deadline for the submission and receipt of the Expression of Interest. Failure by the BAC to comply with the posting requirement would allow the HoPE to exercise his/her right under the "Reservation Clause".

(sgd.)

~~DENNIS S. SANTIAGO~~
Executive Director V *nm*

nm
//lrds

² NPM Opinion No. 16-2017 dated 27 October 2017.