

NPM No. 125-2017

29 December 2017

MS. EVELYN J. FERNANDEZ
Bids and Awards Committee Secretariat
LOCAL GOVERNMENT OF SURIGAO CITY
Borromeo St. Brgy. Washington,
Surigao City

Re: Cancellation and Rebidding -

Dear Ms. Fernandez:

This refers to your letter requesting for guidance on whether the Head of the Procuring Entity's (HoPE) is correct to recommend for the cancellation and rebidding of the LGU of Surigao's procurement because of the findings that the bids offered by the two (2) bidders have different technical specifications, in effect having unequal bids. This then created doubt on his part to approve the recommendation of the Bids and Awards Committee (BAC) for award. As such, he believes that it will not redound to the benefit of the City Government as it will deprive the government the ideal contract for the project. He also recommends the adoption of the two- (2-) stage bidding procedure in order to come up with the best technical specifications and designs for the benefit of the government.

It is further represented that the winning bidder filed for a request for reconsideration stating that the "variance in specifications does not necessarily affect the quality of the products and services that they can offer because this is only due to the fact that they are of different brands"; and that the ground relied upon by the HoPE in his recommendation for the cancellation and rebidding is not one of those which is considered valid, justifiable and reasonable pursuant to Section 41 of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, the Government Procurement Reform Act. For this reason, a Special Discussion was convened by the HoPE to discuss the matter, but no resolution was made. Hence, this request.

At the outset, we would like to clarify that the Government Procurement Policy Board (GPPB) and its Technical Support Office (TSO) render policy and non-policy opinions, respectively, on issues purely pertaining to the interpretation and application of procurement laws, rules and regulations. Moreover, we adhere to the position that we cannot, nor any other agency, authority, or official, except courts of competent jurisdiction, encroach upon or interfere with the exercise of the functions of the Head of the Procuring Entity (HOPE) and the Bids and Awards Committee (BAC), since these duties and responsibilities fall solely within the ambit of their authority and discretion. In this regard, we shall limit our discussion on the interpretation of relevant procurement rules and regulations pertinent to the issues presented.



For guidance, the HoPE reserves the right to reject any and all bids, declare a failure of bidding, or not award the contract in the situations provided in Section 41¹ of the 2016 IRR of RA 9184. Accordingly, if the HoPE determines that any of the grounds provided in Section 41 is present in the conduct of the procurement activity, such as “for any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the GoP, to wit:

- i. if the physical and economic conditions have significantly changed so as to render the project no longer economically, financially, or technically feasible, as determined by the HoPE;
- ii. if the project is no longer necessary as determined by the HoPE; or
- iii. if the source of funds for the project has been withheld or reduced through no fault of the Procuring Entity, the HoPE has the right to reject any and all bids, declare a failure of bidding or not award the contract, in accordance with Section 41 of the IRR of RA 9184.

As previously opined by this office in *Non-Policy Matter Opinion No. 141-2015*, dated 27 November 2015,

As the approving authority, the HOPE is given discretionary power to approve or disapprove the recommendations made by the BAC. The HOPE reserves the right to reject any and all bids, declare a failure of bidding, or not award the contract based on the grounds provided in Section 41 of RA 9184 and its IRR, which is also reflected in the Invitation to Bid of the Philippine Bidding Documents (PBDs). Nonetheless, when the HOPE exercises its power under the Reservation Clause, he must be able to clearly show the existence of the ground/s relied upon. Moreover, the same is not without any sanction if exercised capriciously. Thus, Section 65 of RA 9184 and its IRR provides penal sanctions to the HOPE if he abuses his power to reject any and all bids as mentioned under Section 41 of RA 9184 and its IRR, with manifest preference to any bidder who is closely related to him in accordance with Section 47² of the Act and the IRR.



¹ Section 41. Reservation Clause. The HoPE reserves the right to reject any and all bids, declare a failure of bidding, or not award the contract in the following situations: a) If there is prima facie evidence of collusion between appropriate public officers or employees of the Procuring Entity, or between the BAC and any of the bidders, or if the collusion is between or among the bidders themselves, or between a bidder and a third party, including any act which restricts, suppresses or nullifies or tends to restrict, suppress or nullify competition; b) If the BAC is found to have failed in following the prescribed bidding procedures; or c) For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the GoP, as follows: (i) if the physical and economic conditions have significantly changed so as to render the project no longer economically, financially, or technically feasible, as determined by the HoPE; (ii) if the project is no longer necessary as determined by the HoPE; or (iii) if the source of funds for the project has been withheld or reduced through no fault of the Procuring Entity.

² Section 47. Disclosure of Relations

All bids shall be accompanied by a sworn affidavit of the bidder that it is not related to the Head of the Procuring Entity, members of the BAC, the TWG, and the BAC Secretariat, the head of the PMO or the end-user unit, and the project consultants, by consanguinity or affinity up to the third civil degree. Failure to comply with the aforementioned provision shall be a ground for the automatic disqualification of the bid in consonance with Section 30 of this IRR. For this reason, relation to the aforementioned persons within the third civil degree of consanguinity or affinity shall automatically disqualify the bidder from participating in the procurement of contracts of the procuring entity. On the part of the bidder, this provision shall apply to the following persons:

- a) If the bidder is an individual or a sole proprietorship, to the bidder himself;
- b) If the bidder is a partnership, to all its officers and members;
- c) If the bidder is a corporation, to all its officers, directors, and controlling stockholders; and
- d) If the bidder is a joint venture, the provisions of items (a), (b), or (c) of this Section shall correspondingly apply to each of the members of the said joint venture, as may be appropriate.

Accordingly, if a bidder's offer is indeed responsive to all the legal, technical and financial requirements of the bid, and who actually met and passed the minimum and necessary specifications contained in the bidding documents, the HoPE must be able to clearly show the existence of the ground/s relied upon under Section 41.

As for the rebidding of the project and use of a 2-stage bidding procedure, "it is also within the procuring entity's authority, function, and discretion to decide, whether the procurement should be eventually pursued according to its needs and budget availability. Caveat must be made, however, that when a project has been cancelled by the HOPE for reason provided for under Section 41 of the procurement law and its IRR, the rebidding of the same project must be carefully studied."³

We hope that 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 there be other concerns, please do not hesitate to contact us.

Very truly yours.
(sgd.)

~~DEBEN S. SANTIAGO~~
Executive Director

Arda ca.

³ See NPM 141-2015.