



Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 012-2016

21 March 2016

[REDACTED]

Re: Delayed Award of Contract

Dear [REDACTED]:

This refers to your letter requesting for guidance relative to the procurement of infrastructure project conducted by the Eulogio “Amang” Rodriguez Institute of Science and Technology (EARIST) wherein Speedex Construction and Development Corporation (SCDC) was declared as the bidder with the Lowest Calculated and Responsive Bid (LCRB). However, the issuance of the Notice of Award (NOA) and the corresponding contract and Notice to Proceed (NTP) was deferred until such time that EARIST has its newly-elected President.

As represented, EARIST initiated a project for the “Rehabilitation of Damaged School Building caused by Typhoon Glenda at EARIST Cavite Campus (ECC). SCDC was declared the bidder with the LCRB but on 17 November 2014, there was a verbal instruction from the designated OIC-President of EARIST to defer the project until such time that a new President has been elected. This notwithstanding, the Bids and Awards Committee (BAC) issued Resolution No. 107-2014 on 23 December 2014, recommending the award of contract to SCDC. But in the copy of the said Resolution, as well as the Notice of Award, dated 29 December 2014, there was no approval/signature from the President of EARIST, who already assumed office by 26 November 2014. After several follow-up letters from SCDC, the project has not been awarded to SCDC. It is in this context that you request this office to the award the contract to you.

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, encroach upon or interfere with the exercise of the functions of the Head of the Procuring Entity (HOPE) and the BAC, *i.e.* mandating the PE to award the contract to a particular supplier, 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.

AB

HOPE Approval

It bears stressing that the recommendation of the BAC to award a contract is subject to the approval of the HOPE. This can be gleaned from the provisions of Section 12.1 of the Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 which limit the authority of the BAC to recommend award of contract to the HOPE, who on the other hand, is the proper authority to award procurement contracts. Thus, the bidder with the LCRB, who was recommended by the BAC, is not guaranteed to receive an award, until the HOPE approves such recommendation for award.


We would like to emphasize that the power of the HOPE to approve or disapprove the recommendations made by the BAC in the entire procurement process is a discretionary act as distinguished from a purely ministerial act¹. The decision to award a contract rests within the sole discretion of the HOPE. Within a period not exceeding seven (7) calendar days from the date of receipt of the recommendation of the BAC relative to the award of contract, the HOPE is given the discretion to approve or disapprove such recommendation.²

Under Section 37.1.3 of the IRR of RA 9184, in case of approval of the recommendation of the BAC, the HOPE shall immediately issue the NOA to the bidder with the LCRB. On the other hand, in the event that the HOPE disapproves such recommendation, the disapproval shall be based only on valid, reasonable, and justifiable grounds to be expressed in writing, copy furnished the BAC.

Thus, under Section 41 of RA 9184 and its IRR, 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 the following prescribed procedures; or
- c) For any justifiable or 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; and (iii) if the source of funds for the project has been withheld or reduced through no fault of the procuring entity.

Failure to Award Contract within the Mandatory Period

As to the delay of the award to SCDC, we understand that you have been informed of our previous opinion to EARIST³ (attached in your query) stating that Section 37 of RA 9184 and its revised IRR explicitly mandates that the procurement process from the opening of bids up to the award of contract shall not exceed three (3) months, or a shorter period to be determined by the Procuring Entity (PE) concerned. Failure to comply with this mandatory period will certainly affect the validity of the bidding process. 

¹ NPM No. 118-2004 dated 27 August 2004.

² Section 37.1.2 of the IRR of RA 9184.

³ NPM No. 148-2015 dated 27 November 2015.

This was reiterated in our latest opinion⁴ where we emphasized that the periods provided under Section 37 are mandatory as articulated by the nomenclature used therein. Accordingly, the Supreme Court in the case of *Jacomille v. Abaya*, ruled that failure to comply with the mandatory periods set forth in Section 37 is an irregularity which renders the procurement process null and void.⁵ Thus:

The Court does not agree with the OSG that the 3-month period is merely directory. The said provision contains the word "shall" which is mandatory in character. Such period was placed in a separate provision under Section 38, rather than compressed with Section 37, to emphasize its importance. There is nothing in the law which states that the 3-month period can be disregarded. Non-compliance with the period will certainly affect the validity of the bidding process. In fact, Section 38.1 of the IRR of R.A. No. 9184 reaffirms the obligatory 3-month period:

The procurement process from the opening of bids up to the award of contract **shall** not exceed three (3) months, or a shorter period to be determined by the procuring entity concerned. All members of the BAC shall be on a "jury duty" type of assignment until the Notice of Award is issued by the Head of the Procuring Entity in order to complete the entire procurement process at the earliest possible time. (Emphasis supplied)

Based on the foregoing, the power of the HOPE to approve or disapprove the recommendation for award is a discretionary act. However, he should be able to decide within 7 calendar days from the receipt of the BAC recommendation. Clearly, the periods of action under RA 9184 and its IRR are mandatory in character. Non-compliance with the period will affect the validity of the bidding process.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is being 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.

(sgd.)


DENNIS S. SANTIAGO
Executive Director V

//Ird4

⁴ NPM No. 129-2015, dated 27 November 2015.

⁵ G.R. No. 212381, dated 22 April 2015.