



Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 030-2016

27 April 2016

[REDACTED]

Re: Reservation Clause

Dear [REDACTED]:

This refers to your letter requesting our opinion on the legality of the cancellation of a procurement project.

As represented, the procurement project subject of this request for opinion pertains to the rehabilitation of network structure damaged due to Typhoon Yolanda, whereby the procuring entity is a local government unit (LGU) in Leyte. Upon seeing the procurement opportunity that was posted at the Philippine Government Electronic Procurement System (PhilGEPS) website, you submitted a Letter of Intent (LOI) to the procuring entity and were instructed to pay a certain amount of money for the purchase of the bidding documents. On the scheduled date of the bid opening, but hours before the deadline for the submission of bids, you submitted your sealed bid that was accepted by the procuring entity. In relation to this submission, you requested clarification on the following matters:

1. Whether it is legal to cancel a bidding project instead of continuing the scheduled bid opening without any reason; and
2. Whether it is proper that after the cancellation of the bidding project, the procuring entity will repost the opportunity at the PhilGEPS website and schedule another bidding.

LOI Submission

At the outset, we wish to clarify that bidders are no longer required to submit an LOI to participate in government procurement. Instead, bidders are only expected to submit their bids not later than the deadline for the submission and receipt of bids.¹ In addition, the provisions requiring submission of LOI for procurement activities where procuring entities use an electronic registry were rendered unnecessary, and were abandoned upon the effectivity of GPPB Resolution No. 27-2012 on 10 September 2013.² The removal of the requirements for a written LOI is anchored on the objective of reducing transaction cost, enhancing competition, preventing collusion and streamlining the procurement process.

¹ NPM No. 55-2013 dated 26 June 2013.

² NPM No. 101-2013 dated 20 December 2013.

MMY

Reservation Clause

Section 41 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 provides that the Head of the Agency reserves the right to reject any and all Bids, declare a failure of bidding, or not award the contract in the following situations:

1. If there is prima facie evidence of collusion between appropriate public officers or employees of the procuring entity, or between the Bids and Awards Committee (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;
2. If the BAC is found to have failed in following the prescribed bidding procedures; or
3. For any justifiable and reasonable ground where the award of the contract will not redound to the benefit of the government, 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 Head of the Procuring Entity; (ii) if the project is no longer necessary as determined by the Head of the Procuring Entity; and (iii) if the source of funds for the project has been withheld or reduced through no fault of the procuring entity.

The aforecited provision, referred to as the "reservation clause", authorizes the Head of the Procuring Entity (HOPE) to reject any and all bids, declare a failure of bidding, or not award the contract if any of the above-mentioned situations exist. These circumstances and conditionalities serve as safeguards of bidders from possible abuse in the exercise of the "reservation clause" sanctioned by Section 41 of RA 9184 and its IRR. Thus, in invoking the "reservation clause", it is incumbent upon the HOPE to prove that at least one (1) of these situations exist warranting the exercise of the reserved right.

It is well settled in our jurisprudence that there is grave abuse of discretion (1) when an act is done contrary to the Constitution, the law or jurisprudence; or (2) when it is executed whimsically, capriciously or arbitrarily out of malice, ill will or personal bias.³ Hence, rejecting any and all bids, declaring a failure of bidding, or not awarding the contract without any lawful, valid and justifiable ground as specified in Section 41 of RA 9184 and its IRR constitutes grave abuse of discretion; more so when the reservation clause was invoked whimsically, capriciously or arbitrarily out of malice, ill will or personal bias as may be determined by a court or authority of competent jurisdiction.

It is our considered view that the HOPE may opt to cancel the procurement project by rejecting any and all bids, declaring a failure of bidding, or not awarding the contract if it has determined that any of the grounds specified in Section 41 of RA 9184 and its IRR exist. It is worthy to stress, however, that the cancellation shall be based only on lawful, valid and justifiable grounds sanctioned by Section 41 of RA 9184 and its IRR.

³ *Information Technology Foundation of the Philippines, et.al., v. Commission on Elections, et.al.*, G.R. No. 159139, 13 January 2004 citing *Republic v. Cocofed*, 372 SCRA 462, 493, 14 December 2001 and *Tañada v. Angara*, 272 SCRA 18, 79, 2 May 1997.

Re-bidding of Previously Cancelled Bidding Project

For declaration of failure of bidding under Section 35 of RA 9184 and its IRR, the BAC shall conduct a mandatory review and evaluation of the terms, conditions, and specifications in the Bidding Documents, including its cost estimates, and based on its findings, may conduct a re-bidding of the project.⁴ However, for declaration of failure of bidding under Section 41 of RA 9184 and its IRR, no similar provision is provided. Nonetheless, in an earlier opinion we opined that after the declaration of failure of bidding under Section 41 of RA 9184 and its IRR, procuring entities may conduct a re-bidding in conformity with the prescribed rules.⁵

Accordingly, based on the actual needs of the procuring entity, a procurement project which was cancelled based on Section 41 of RA 9184 and its IRR may again be submitted for bids provided that the procuring entity complies with the advertisement, posting and other requirements of the procurement law and its associated rules.

Summary

In sum, we wish to clarify the following matters:

1. The procuring entity, through the HOPE may cancel the procurement project by rejecting any and all bids, declaring a failure of bidding, or not awarding the contract if lawful, valid and justifiable grounds exist as specified in Section 41 of RA 9184 and its IRR; and
2. A procurement project which was cancelled based on Section 41 of RA 9184 and its IRR may again be submitted for bids provided that the procuring entity complies with the advertisement, posting and other requirements of the procurement law and its associated rules.

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.)

MELISSA A. SANTIAGO-YAN
Officer-In-Charge



⁴ Section 35.2 and 35.3 of the IRR of RA 9184.

⁵ NPM 143-2004 dated 10 November 2004.