



Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 39-2016

6 June 2016

[REDACTED]

Re: Failure of Bidding due to Lack of Funds

Dear [REDACTED]

This is in response to your letter requesting for an opinion on whether a Procuring Entity may declare failure of bidding due to lack of funds.

As represented, a bidding activity was canceled by the Procuring Entity after post-qualification due to lack of funds despite the substantial costs already incurred by the bidders. It is likewise alleged that the cancellation was not in accordance with Section 35 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184. It is in this regard that our opinion is sought.

At the outset, we wish to inform you that the Government Procurement Policy Board (GPPB) and its Technical Support Office (TSO) do not have the authority to decide for and in behalf of the Procuring Entity. Thus, we wish to clarify that the GPPB and the GPPB-TSO cannot dictate upon the Procuring Entity to declare a failure of bidding or to proceed with a particular procurement activity.

Failure of Bidding under Section 35.1 and Section 41

Under Section 35.1 of the IRR, a failure of bidding shall be declared by the Bids and Awards Committee (BAC) when:

1. No bids are received;
2. All prospective bidders are declared ineligible;
3. All bids failed to comply with all the bid requirements or fail post qualification, or in the case of consulting services, there is no successful negotiation; or
4. The bidder with the Lowest Calculated Responsive Bid/Highest Rated Responsive Bid refuses, without justifiable cause, to accept the award of contract, and no award is made in accordance with Section 40 of RA 9184 and its IRR.

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However, a declaration of a failure of bidding is not exclusively exercised by the BAC, since it can also be resorted to by the Head of the Procuring Entity (HOPE) in accordance with Section 41 of the IRR under the following circumstances:

- 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 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 HOPE; (ii) if the project is no longer necessary 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.

Also referred to as the “reservation clause,” Section 41 of the IRR authorizes the 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 conditions 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.¹

Failure of Bidding due to Unavailability of Funds

A careful perusal of Section 41(c)(iii) of the IRR indicates that the HOPE is allowed to reject any and all bids, declare a failure of bidding, or not award the contract for any justifiable and reasonable ground where the award of contract will not redound to the benefit of the government such that the source of funds for the project has been withheld or reduced through no fault of the Procuring Entity. As earlier mentioned, it is incumbent upon the HOPE, and his sole responsibility, to determine and establish the existence of any ground to support a declaration of a failure of bidding under Section 41 of the procurement law and its associated IRR.

Summary

In view of the foregoing, a failure of bidding may be declared by the HOPE pursuant to the “reservation clause”, when it has proven that the source of funds for the project is no longer available through no fault of the Procuring Entity, and that the award of contract will not be beneficial for the government.

¹ NPM No. 030-2016 dated 27 April 2016.

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.)

DENNIS S. SANTIAGO

Executive Director V

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