

**NPM No. 052-2016**

3 October 2016

[REDACTED]

**Re: Negotiated Procurement (Two-Failed Biddings)**

Dear [REDACTED]:

This refers to your electronic-mail (e-mail) seeking our guidance on whether you can proceed to Negotiated Procurement after two failure of biddings conducted by your agency.

It is represented that in November 2015, you conducted competitive bidding for the procurement of a vehicle with the following technical specifications, *i.e.*, eighteen (18) seater van and Asian Utility Vehicle (AUV) classification. The bidding failed because the technical specifications were changed by the end-user, particularly, the seat requirement and the change of its classification from AUV to Sports Utility Vehicle (SUV). On the other hand, the second bidding failed since the supplier could not deliver the vehicle subject of its offer. Thus, you would like to be clarified on whether you may now resort to Negotiated Procurement under the Two-Failed-Biddings modality considering that the first bidding was for the procurement of AUV, while the second bidding was for SUV procurement.

**Negotiated Procurement (Two-Failed Biddings)**

We wish to stress that under Section 53.1 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, Negotiated Procurement through Two-Failed Biddings modality may be resorted to only where there has been failure of public bidding for the second time as provided for in Section 35<sup>1</sup> of RA 9184 and its IRR. Hence, to warrant the use of this negotiated method of procurement by the Procuring Entity (PE), there

<sup>1</sup> **Section 35. Failure of Bidding**

35.1. The BAC shall declare the bidding a failure when:

- a) No bids are received;
- b) All prospective bidders are declared ineligible;
- c) All bids fail to comply with all the bid requirements or fail post-qualification, or, in the case of consulting services, there is no successful negotiation; or
- d) 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 the Act and this IRR.

must be an occurrence of two failed biddings under Section 35 of RA 9184 and its revised IRR.

The requirement of two-failed biddings refers to two failures of Competitive Bidding as defined under Section 5(e)<sup>2</sup> of RA 9184. The instances mentioned in Section 35 of RA 9184 and its IRR refer to grounds to declare failure of Competitive Bidding. Thus, Negotiated Procurement through Two-Failed Biddings modality can be resorted to only if the original or the first mode of procurement, including the second failure, is Competitive Bidding and two-failed biddings were declared in accordance with Section 35 of the revised IRR of RA 9184.

It is noteworthy to stress that the grounds mentioned for the failure of the two (2) biddings conducted by your agency, that is: (1) change of specifications by the end-user; and, (2) failure of the supplier to deliver the vehicle subject of its offer, do not conform with the requirements of Two Failed Biddings warranting the PE to use Negotiated Procurement under Section 53.1 (Two-Failed Biddings) of the revised IRR of RA 9184.

### **Procedures in Resorting to Two-Failed Biddings Modality**

For guidance, Sections 35.2 and 35.3 of the revised IRR of RA No. 9184 provide that whenever a failure of bidding has occurred, the PE is required to conduct a mandatory review of the terms, conditions and **specifications** in the bidding documents, including its cost estimates. Based on the findings during the mandatory review, the procuring entity may revise and agree on a new set of technical specifications; and, if necessary, may adjust the amount of the ABC, subject to the required approvals under the IRR.

If, after two failed biddings under Section 35 of the IRR, the PE decides to resort to Negotiated Procurement (Two-Failed Biddings), Section 53.1.1 of the IRR also requires the BAC, and of course the end-user, to conduct a mandatory review of the terms, conditions, **specifications**, and cost estimates; and, when necessary, increase the ABC provided that it is not more than twenty percent (20%) of the ABC for the last failed bidding.

Accordingly, during the conduct of the mandatory review, the specifications provided for in the first failed bidding may be revised, and the PE may agree on a new set of technical specifications for the second competitive bidding, such as the change of the classification from AUV to SUV; Provided, however, that the grounds for failure of the two competitive biddings are anchored under Section 35 of RA 9184 and its revised IRR.

### **Summary**

Based on the foregoing, we wish to reiterate the following:

1. Negotiated Procurement through Two-Failed Biddings modality can be resorted to only if the original mode of procurement is Competitive Bidding and there has been a failure of bidding for the second time in accordance with Section 35 of the IRR of RA 9184; and



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<sup>2</sup> (e) *Competitive Bidding* – refers to a method of procurement which is open to participation by any interested party and which consists of the following processes: advertisement, pre-bid conference, eligibility screening of prospective bidders, receipt and opening of bids, evaluation of bids, post-qualification, and award of contract, the specific requirements and mechanics of which shall be defined in the IRR to be promulgated under this Act.

2. After failure of bidding, the PE is required to conduct a mandatory review of the specifications in the bidding documents, among others. Thus, if the PE deems it fit, and based on the findings in its mandatory review, it may revise and agree on a new set of technical specifications.

We hope 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 you have further questions, please do not hesitate to contact us.

(sgd.)

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


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