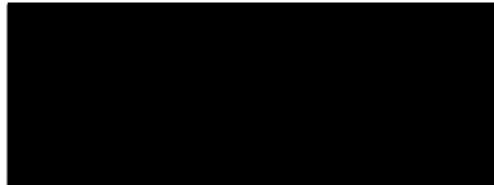


NPM No. 080-2016

15 November 2016



Re: Failure of the Bids and Awards Committee (BAC) to follow the prescribed bidding procedures; Award of Contract to the Highest Bidder

Dear [REDACTED]

This refers to your letter requesting for an opinion on whether your company was properly disqualified in a bidding activity, and if the resulting contract may be awarded to the remaining bidder which incidentally submitted the highest bid.

It is represented that your company, after receiving the Notice of Award and posting the necessary Performance Bond, received a Notice of Post-Disqualification signed by the Bids and Awards Committee (BAC) Chairman recommending revocation of the Notice of Award and citing Section 41(b) of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184. The Notice of Post-Disqualification was issued upon finding that your company failed to comply with one of the technical specifications required by the Procuring Entity. It is in this regard that our opinion is sought.

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 matter opinions, respectively, on issues purely pertaining to the interpretation and application of procurement laws, rules and regulations. We have no authority to dictate to the Procuring Entity how to decide or resolve issues relative to its procurement activities. 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, 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.

Reservation Clause

Section 41 of RA 9184, and its IRR, reserves to the HOPE the authority 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; and (iii) if the source of funds for the project has been withheld or reduced through no fault of the Procuring Entity.

This provision, also referred to as the “reservation clause”, gives the HOPE the discretion whether to: 1.) reject a bid, 2.) declare a failure of bidding, or 3.) not award the contract should any of the aforementioned conditions exist. This authority may be exercised by the HOPE with or without prior recommendation by the BAC. 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 conditions exist warranting the exercise of the reserved right¹.

Non-Compliance with Technical Specifications

Section 41(b) explicitly allows the HOPE to exercise the reservation clause and reject a bid in case the BAC failed to follow the prescribed bidding procedures. This pertains to the failure of the BAC to perform any of its functions or to observe any of the procedures mandated by RA 9184 and its IRR at any stage of the procurement process.

In this regard, if the BAC fails to conduct the evaluation of bids in accordance with Section 30 of the IRR due to non-compliance with the non-discretionary “pass/fail” criterion, or to rate a bid as “failed” and disqualify the same if it did not satisfy the technical specifications, the HOPE is justified to reject said bid.

In the case of *Mata v. San Diego*³, the Supreme Court declared that the HOPE, through the reservation clause, is vested the discretion to ascertain which among the bidders submitted the most advantageous bid for the government. Hence, in the exercise of such discretion, the HOPE is under no obligation to award a contract to a bidder who did not meet the technical specifications.

¹ NPM 030-2016, dated 27 April 2016.

³ G.R. No. L-30447, dated 21 March 1975.

Continuing Review of Qualifications

In the exercise of its functions to determine the eligibility of prospective bidders, to evaluate the bids and undertake post-qualification proceedings, the BAC is not estopped from correcting its findings and recommendations made to the HOPE particularly when the initial findings and recommendation are erroneous or are contrary to RA 9184, its IRR, or the Bidding Documents.

Section 23.7 of the IRR reserves to the Procuring Entity concerned the right to review the qualifications of the bidder at any stage of the procurement process if there is a reasonable ground to believe that a misrepresentation has been made by the said prospective bidder, or that there has been a change in the prospective bidder's capability to undertake the project from the time it submitted its eligibility requirements. Hence, if it is discovered in the course of the review that a bidder should have been declared ineligible or disqualified, the BAC shall render the proper decision or recommendation to correct its prior findings.

Award to the Bidder with the Highest Calculated Bid

In the procurement of Goods and Infrastructure Projects, it is not guaranteed that the bidder who submitted the lowest calculated bid will be awarded the contract. In this regard, Section 34.1 of the IRR subjects the bidder with the lowest calculated bid to undergo the post-qualification process, wherein the BAC shall verify, validate, and ascertain all statements made and documents submitted by the bidder using a non-discretionary criterion, as stated in the Bidding Documents. As such, if the bid fails the post-qualification process, Section 34.5 of the IRR provides that the bidder with the lowest calculated bid shall be declared post-disqualified and shall be duly notified in writing immediately.

Accordingly, Section 34.6 provides that upon notification of the post-disqualification of the first bidder, the bidder with the second lowest calculated bid shall undergo the same post-qualification process. If the BAC finds that the second bidder passes all of the criteria for post-qualification, it shall declare its bid as the Lowest Calculated Responsive Bid. However, if the second bidder is post-disqualified, Section 34.7 of the IRR provides that the bidder with the next lowest calculated bid shall undergo the same post-disqualification process and such process shall continue until a bidder is found to have with the Lowest Calculated Responsive Bid. Hence, it is not impossible for a bidder who submitted the highest calculated bid to be awarded the contract particularly when lower calculated bids failed the post-qualification process.

Summary

In sum, we wish to clarify the following matters:

1. Section 41(b) of the IRR allows the HOPE to reject any and all bids if the BAC failed to follow the prescribed procedures in any of the stages of competitive bidding;
2. In accordance with Section 23.7, the Procuring Entity may review the eligibility and qualifications of the bidder at any stage of the procurement activity. As such, the BAC may correct any of its decisions or recommendations if it finds any error upon review; and

3. The bidder who submitted the highest bid may be awarded the contract, provided that the bid is found to be the one with the Lowest Calculated Responsive Bid after undergoing the post-qualification process pursuant to Section 34 of the IRR. This situation occurs when lower bids did not pass the post-qualification criteria enumerated in the Bidding Documents.

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 

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