

NPM No. 121-2016

6 December 2016



Re: Cancellation of Procurement Activities

Dear [REDACTED]

This refers to your electronic mail (e-mail) requesting our opinion on whether the Bids and Awards Committee (BAC) is allowed to declare a cancellation of procurement activities and re-posting of advertisement.

As represented, upon advertisement of the Request for Expression of Interest (REI) for a consultancy services project, you received requests for consideration from prospective bidders. The end-user determined that it was more beneficial to improve the Terms of Reference and also discovered an error in the evaluation criteria for shortlisting a day before the submission and opening of eligibility documents. Thereafter, the BAC, the Technical Working Group (TWG) and the Secretariat agreed that it was more beneficial to cancel advertisement, review and revise the Terms of Reference and re-advertise the project. Hence, this request for opinion.

We wish to clarify that Republic Act (RA) No. 9184 and its 2016 Revised Implementing Rules and Regulations (IRR) do not specifically provide rules on cancellation of procurement activities. Instead, Sections 35 and 41 thereof provide rules on declaration of failure of bidding.

Section 35 of RA 9184 and its 2016 Revised IRR allow the BAC to declare a failure of bidding in the following instances:

- 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 RA 9184 and its IRR.

In order to determine the reason for the failed bidding, 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, it shall revise the terms, conditions, and specifications, and if necessary, adjust the ABC, subject to the required approvals, and conduct a re-bidding with re-advertisement and/or posting, as provided for in Section 21.2 of the 2016 Revised IRR.¹

On the other hand, under Section 41 of RA 9184 and its 2016 Revised IRR, the Head of the Procuring Entity (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 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 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.

In a recent opinion², we had the occasion to discuss cancellation of procurement activities in relation to the Reservation Clause under Section 41 of RA 9184 and its IRR. We explained that a 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. We also opined that procurement project which was cancelled based on the Reservation Clause 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 note that the declarations of failure of bidding under Sections 35 and 41 differ from each other. For one, the declarations are based on different grounds. On the other hand, the authority to declare a failure of bidding lies with a different body or official – the BAC for Section 35 and the HoPE for Section 41.

In this regard, we wish to clarify that the authority of the BAC to declare a failure of bidding and to subsequently conduct a re-bidding is confined with the provisions of Section

¹ 2016 Revised IRR of RA 9184, Sections 35.2 and 35.3.


² NPM No. 30-2016, dated 27 April 2016.

35 of RA 9184 and its 2016 Revised IRR. For cancellation of procurement activities, the HoPE may opt to use the Reservation Clause 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. Consequently, based on the actual needs of the procuring entity, a cancelled procurement project 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.)

 **AGO**
Executive Director V

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