

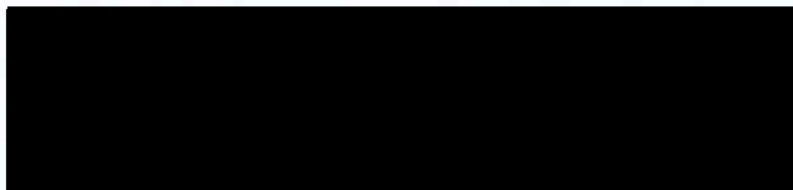


Republic of the Philippines  
**GOVERNMENT PROCUREMENT POLICY BOARD**  
**TECHNICAL SUPPORT OFFICE**



**NPM No. 20-2015**

7 October 2015



**Re: Advertisement and Posting Requirements; Failure of Bidding**

Dear :

We respond to your electronic mail (email) requesting clarification relative to Section 21.2 of the Implementing Rules and Regulations (IRR) of Republic Act (R.A.) 9184.

As represented, the DPWH conducted a competitive bidding for the Repair/Rehabilitation/Improvement of Mambuslao-Imbug Road on 18 September 2014 with an Approved Budget for the Contract (ABC) of PhP10,087,253.94, which was subsequently declared by its Bids and Awards Committee (BAC) as failed because it was discovered that the project was not successfully posted in the PhilGEPS website in accordance with Section 21.2.1(b) of the IRR of R.A. 9184 due to honest mistake or pure inadvertence. It is in this context that you would like to clarify the following issues, thus:

1. Whether it is legal to proceed with the awarding and execution of contract although the posting in the PhilGEPS website was not successful, but the advertisement and other posting requirements were complied with? If it is legal, will it create any future violation of COA rules since the IRR of RA 9184 requires posting in the PhilGEPS website?
2. Whether it is appropriate that the checking of postings in the PhilGEPS website and in conspicuous place, and advertisement in the newspaper of general circulation be done during post qualification stage or prior to post qualification process?

**PhilGEPS Posting**

It bears stressing that all procuring entities are mandated to fully use the PhilGEPS in the conduct of procurement procedures<sup>1</sup>. The mandatory character of PhilGEPS posting requirement is further emphasized in Section 21.2.1 of the IRR which directs that, except as otherwise provided in Sections 21.2.2 and 54.2 of this IRR, and for the procurement of common-use goods and supplies, the Invitation to Bid/Request for Expression of Interest **shall** be posted continuously in the PhilGEPS website, the website of the procuring entity concerned, if available, and the

<sup>1</sup> Section 2 of E.O. 662 signed by President Gloria Macapagal-Arroyo on 20 September 2007.

website prescribed by the foreign government/foreign or international financing institution, if applicable, for seven (7) calendar days starting from the date of advertisement.<sup>2</sup>

The use of the word "shall" makes the posting of the Invitation to Bid in the PhilGEPS website mandatory, unless falling under the exceptions expressly stated in the foregoing provisions. The word "shall" means ought to, must, or an obligation used to express a command or exhortation used in laws, regulations or directives to express what is mandatory.<sup>3</sup> In common or ordinary phraseology, the term "shall" is a word of command, one which has a compulsory meaning, and is generally imperative or mandatory, unless the contrary intent appears.<sup>4</sup>

Thus, if the posting in the PhilGEPS website is not observed, it renders the proceeding to which it relates illegal and void, or the violation of which makes the decision therein rendered invalid<sup>5</sup> because Article 5 of the Civil Code of the Philippines provides that acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity. RA 9184, having been enacted for the advancement of public welfare, undoubtedly contains mandatory provisions, such as the aforementioned provision.

#### **Review of Advertisement and/or Posting Requirements during Post Qualification**

It will be noted that the purpose of the post-qualification process is to verify, validate, and ascertain all statements made and documents **submitted by the bidder** with the Lowest Calculated Bid/Highest Rated Bid.<sup>6</sup> Although non-compliance by the BAC with the rules may be discovered during the post-qualification stage, this process does not cover the verification, validation, and ascertainment of such non-compliance of the BAC with the requirements under the law and the rules, such as, but not limited, to advertisement and posting; the same is true even prior to post-qualification stage.

Nonetheless, the Head of the Procuring Entity (HOPE) may exercise the Reservation Clause, as stated in the Invitation to Bid based on the presence of legal, valid and justifiable grounds embodied in Section 41 of the IRR of RA 9184, as follows:

- 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.

<sup>2</sup> Section 21.2.1(b)

<sup>3</sup> NPM 37-2012 dated 19 April 2012, *citing* Baranda vs. Gustilo, 165 SCRA 757 (1988).

<sup>4</sup> *Gonzales vs. Chavez*, 205 SCRA 816 (1992).

<sup>5</sup> NPM No. 170-2012 dated 28 December 2012 and NPM No. 026-2005 dated 25 April 2005.

<sup>6</sup> Section 34.3 of the IRR of RA 9184.

On the other hand, the BAC may declare a failure of bidding based on Section 35.1 of the IRR of RA 9184, specifically 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 LCB or HRB refuses to accept the award.

It must be emphasized that the BAC cannot declare a failure of bidding for reasons other than those provided in Section 35 of the IRR of RA 9184, and the BAC cannot exercise the reservation clause provided for under Section 41 of the IRR in declaring a failure of bidding, since such authority exclusively belongs to the HOPE.<sup>7</sup>

Accordingly, a failure of bidding may be declared by the HOPE based on the Reservation Clause "[If] the BAC is found to have failed in following the prescribed bidding procedures."<sup>8</sup>

### Summary

In sum, we wish to reiterate the following:

1. All procuring entities are mandated to fully use the PhilGEPS in the conduct of their procurement procedures, non-observance of which renders the proceeding to which it relates void, or the violation of which makes the decision therein rendered invalid.
2. The BAC cannot declare a failure of bidding for reasons other than those provided in Section 35 of the IRR of RA 9184, and the BAC cannot exercise the reservation clause provided for under Section 41 of the IRR in declaring a failure of bidding for failure to comply with the posting requirement since such authority exclusively belongs to the HOPE.

We hope that our advice provided sufficient guidance on the matter. Please note that this opinion is being rendered on the basis of the facts and particular situation presented, and may not be applicable given a different set of facts and circumstances. Should you have additional questions, please do not hesitate to contact us.

(sgd.)

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

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<sup>7</sup> NPM-122-2013 dated 26 December 2013.

<sup>8</sup> Section 41(b), IRR of RA 9184