

NPM No. 107-2015

2 November 2015

Re: Grounds for Disqualification

Dear [REDACTED]

This refers to your electronic mail (e-mail) seeking our opinion relative to the disqualification of one of your bidders.

As represented, only one (1) bidder submitted a bid for the procurement of carriage of mails by sea, which happened to be the direct competitor of the PHILPost in the courier/delivery of mails. As the end-user has already manifested its opposition to award the contract to the bidder, while you are undergoing post qualification of the lone bidder, you are requesting for guidance about the grounds to be used in disqualifying the said bidder or declaring it ineligible. Hence, this request.

At the outset, we wish to inform you that the Government Procurement Policy Board (GPPB) and its Technical Support Office (TSO) render policy and non-policy matter opinions, respectively, on issues purely relating to the interpretation and application of our procurement laws, rules and regulations. It has no jurisdiction to rule over actual controversies with regard to the conduct of the bidding since it has no quasi-judicial functions under the law. Hence, the determination of a bidder's qualification, eligibility and compliance with the requirements for a procurement opportunity lies within the responsibility and discretion of the BAC of the Procuring Entity (PE) concerned.¹ In this wise, we shall limit our discussion on the interpretation of relevant procurement laws, rules and regulations pertinent to the issue presented.

Basis for Disqualification

We wish to clarify that under Section 23 of Republic Act (RA) No. 9184, eligibility of prospective bidders for the procurement of goods shall be determined based on the bidder's compliance with the eligibility requirements. Accordingly, Section 23.1 of the revised Implementing Rules and Regulations (IRR) of RA 9184 prescribes the eligibility

¹ NPM No. 044-2009 dated 18 August 2009.

requirements consisting of legal, financial and technical documents to be used for purposes of determining the eligibility of bidders.

Relatedly, Sections 30.1 and 30.2 of the IRR of RA 9184 requires that the Bids and Awards Committee (BAC) shall check the submitted documents of each bidder against a checklist of required documents to ascertain if they are all present, using a *non-discretionary "pass/fail" criterion*. The rules further mandate that only bids that are determined to contain all the bid requirements for both components (technical and financial) shall be rated "passed" and shall immediately be considered for evaluation and comparison.

During Bid Evaluation, the BAC conducts a detailed evaluation of all bids *using non-discretionary pass/fail criterion* to determine the bidder with the Lowest Calculated Bid (LCB)². Also, during Post-Qualification, the BAC shall also use *non-discretionary pass/fail criterion* in verifying, validating and ascertaining all the statements made and documents submitted by the bidder with the LCB, in order to determine whether the bidder concerned complies with and is responsive to all the requirements and conditions as specified in the Bidding Documents.³

The foregoing provisions explain that the BAC shall use non-discretionary pass/fail criterion in determining the bidder's eligibility and qualifications to participate and be awarded a contract. It means that such determination shall be based solely on the requirements and conditions indicated in the IRR of RA 9184 and the corresponding Bidding Documents. The purpose is to remove any form of discretion on the part of the BAC and thereby promote fairness and equality among all bidders. Essentially, the BAC, in determining the eligibility of the bidders, cannot act whimsically, capriciously or arbitrarily out of malice, ill will or personal bias as this would be tantamount to grave abuse of discretion⁴.

It must be noted, however, that notwithstanding the eligibility of bidder, the Procuring Entity (PE) may still declare a bidder ineligible and disqualify it from obtaining an award or contract, if it shall uncover any misrepresentation made in the eligibility requirements, statements or documents, or any changes in the situation of the bidder which will affect the capability to undertake the project so that it fails the eligibility criteria.⁵

Disclosure of Relationship; Disqualification

At this juncture, we would like to emphasize that Section 47 of the IRR of RA 9184 mandates that a bidder who is a relative, by consanguinity or affinity up to the third civil degree, of the Head of the Procuring Entity, members of the BAC, the TWG, and the BAC Secretariat, the head of the Project Management Office or the end-user unit, and the project consultants *shall be automatically disqualified* from participating in the procurement of contracts of the PE. In addition, under Clause 4.1 of the Instruction to Bidders (ITB) of the Philippine Bidding Documents (PBD) for the Procurement of Goods, all bidders found to

² Section 32.1 of the IRR of RA 9184.

³ Section 34.1 and 34.3 of the IRR of RA 9184.

⁴ *Information Technology Foundation of the Philippines, et al. v. Commission on Elections, et al.*, G.R. No. 159139, 13 January 2004 citing *Wigberto E. Tañada, et al. v. Edgardo Angara, et al.*, G.R. No. 118295, 2 May 1997

⁵ Section 23.7 of the IRR of RA 9184.

have conflicting interests shall be disqualified to participate in the procurement, without prejudice to the imposition of appropriate administrative, civil, and criminal sanctions⁶.

Based on your representation, one of your bidders is a direct competitor of the PHILPost in the courier/delivery of mails. This notwithstanding, it is incumbent upon the PE to determine whether the attending circumstances warrant the disqualification of that bidder. In any event, the disqualification shall always be in accordance with the relevant provisions of RA 9184, its IRR and associated issuances, and should not be couched on unfounded, capricious, arbitrary or whimsical basis, including rivalry in business.

Summary

All told, it is our considered view that the BAC shall determine, using non-discretionary pass/fail criterion, the bidder's eligibility and qualifications to participate and to be awarded a contract based on the relevant provisions of RA 9184, its IRR and associated issuances, and all the requirements and conditions as specified in the Bidding Documents. The BAC cannot act capriciously, arbitrarily or whimsically, more so on the basis of business rivalry, in declaring the ineligibility or disqualification of the bidder without being charged of committing grave abuse of discretion.

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

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⁶ Accordingly, conflict of interests exists in the following cases:

1. A bidder has controlling shareholders in common with another bidder;
2. A bidder receives or has received any direct or indirect subsidy from any other bidder;
3. A bidder has the same legal representative as that of another bidder for purposes of this bid;
4. A bidder has a relationship, directly or through third parties, that puts them in a position to have access to information about or influence on the bid of another Bidder or influence the decisions of the PE regarding this bidding process. This will include a firm or an organization who lends, or temporarily seconds, its personnel to firms or organizations which are engaged in consulting services for the preparation related to procurement for or implementation of the project if the personnel would be involved in any capacity on the same project;
5. A bidder submits more than one bid in this bidding process. However, this does not limit the participation of subcontractors in more than one bid; or
6. A bidder who participated as a consultant in the preparation of the design or technical specifications of the Goods and related services that are the subject of the bid.