

**NPM No. 124-2015**

27 November 2015

[REDACTED]

**Re: Mandatory Periods; Declaration of Failure of Bidding by the  
Head of the Procuring Entity (HOPE)**

Dear [REDACTED]:

This refers to your letters dated 27 August 2015 and 9 September 2015 seeking our opinion on the validity of the actions of the procuring entity, Information and Communications Technology Office (ICTO), in its procurement projects.

In your first letter, you represented that PMTI raised a question for clarification on 21 April 2015 to the members of the Bids and Awards Committee for the Integrated Government of the Philippines (BACIGOV) on whether PMTI may submit Certificate of Registration and Certificate of Tax Exemption as equivalent documents of a Mayor's Permit for establishments principally located in the Subic Bay Freeport Zone (SBFZ). BAC4IGOV issued Supplemental/Bid Bulletin No. 7 as a reply, which was twenty one (21) days after the request for clarification. Unsatisfied with the reply, PMTI wrote BAC Chairman, Dennis F. Villoriente, requesting for an extension of the deadline for submission of bid documents pending the answer of the Government Procurement Policy Board-Technical Support Office (GPPB-TSO) on the same query. The BAC4IGOV pushed through with the submission and opening of bids on 18 May 2015 without resolving the issues, which is less than seven (7) days after the issuance of the said Bid Bulletin on 12 May 2015. As such, PMTI was not able to participate in the bidding.

In another letter, you ask for the validity of the declaration by the Head of the Procuring Entity (HOPE) of a failure of bidding due to the Bids and Awards Committee's (BAC) non-compliance with the bidding procedures, which you strongly object to since you were the lone bidder and claim to have taken great pains in preparing your bid only to be cancelled due to the inadvertence of the BAC. In both instances, you ask our office to look at the possible irregularities committed by the BAC.

At the outset, we wish to inform you that the Government Procurement Policy Board and its Technical Support Office render policy and non-policy 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 or investigatory powers under the law.

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Moreover, we adhere to the position that apart from courts having actual jurisdiction over the subject matter of a case, we cannot, nor any other government agency, authority, or official, encroach upon or interfere with the exercise of the functions of the BAC, since these duties and responsibilities fall solely within the ambit of its authority and discretion sanctioned by law.<sup>1</sup> Hence, this office has consistently refrained from passing upon decisions of the BAC at any stage of the procurement process, including the determination of compliance with the bidding documents for a particular project or the decision to declare a failure of bidding. Accordingly, we shall limit our discussion on the interpretation of relevant procurement laws, rules and regulations pertinent to the issues presented.

### **Mandatory Nature of the Procurement Rules and Timelines**

As regards the first issue, as we have discussed in a previous opinion<sup>2</sup>, Republic Act (RA) No. 9184 having been enacted for the advancement of public welfare undoubtedly contains mandatory provisions. Failure to follow such rules generally renders the proceeding to which it relates illegal and void, or the violation of which makes the decision rendered therein invalid.

Section 22.5.1 of the revised Implementing Rules and Regulations (IRR) of RA 9184 provides that the BAC shall respond to the request for clarification(s) by issuing a Supplemental/Bid Bulletin, duly signed by the BAC chairman, to be made available to all those who have properly secured the Bidding Documents, at least seven (7) calendar days before the deadline for the submission and receipt of bids.

The said provision contains the word "shall" which is mandatory in character. Non-compliance thereto shall affect the validity of the bidding process.<sup>3</sup> Likewise, 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".

From the foregoing, the interval of 7 calendar days between the issuance of the Bid Bulletin and the deadline for the submission and receipt of bids shall be observed. The first day excluded, and the last day included.

### **Declaration of Failure of Bidding by the HOPE**

Anent the issue on the declaration by the HOPE of a failure of bidding due to the BAC's failure to follow the prescribed bidding procedures, it is explicit under Section 41 of the revised IRR of RA 9184 that the HOPE reserves the right to reject any and all bids, declare a failure of bidding, or not to award the contract based on such ground. To support this provision, the Invitation to Bid for all procurement projects includes a *Reservation Clause* to properly apprise the public and the prospective bidders this reserved right of the HOPE.

Thus, Section 41 of RA 9184 and its IRR bestows upon the HOPE or his duly authorized representative, the right to reject any and all bids, declare a failure of bidding, or not award a contract in the following situations: (a) there is prima facie evidence of collusion; (b) the BAC is found to have failed in following the prescribed bidding procedures; or (c) for

<sup>1</sup> NPM No. 111-2014 dated 7 November 2014.

<sup>2</sup> NPM No. 026-2005 dated 25 April 2005

<sup>3</sup> *Jacomille v. Abaya*, G.R. No. 212381, 22 April 2015.

any justifiable and reasonable ground where the award of contract will not redound to the benefit of the government.


The decision to declare a failure of bidding, reject any and all bids, or not award the contract under any of the situations enumerated in Section 41 lies within the sole authority and jurisdiction of the procuring entity through the HOPE. As mentioned, the GPPB and its TSO cannot encroach upon or interfere with the exercise of the functions of the HOPE or the BAC in the conduct of bidding, since these duties and responsibilities fall solely within the ambit of their respective authority and discretion sanctioned by law.

In sum, the 7-day period from the issuance of the supplemental/bid bulletin to the deadline of submission and receipt of bids is a mandatory provision that must be complied with. The procuring entity, through the HOPE, may declare a failure of bidding, reject any and all bids or not award the contract if the BAC is found to have failed in following the prescribed bidding procedures pursuant to Section 41 of RA 9184 and its revised IRR.

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.)

 **DENNIS S. SANTIAGO**  
*Executive Director V*

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