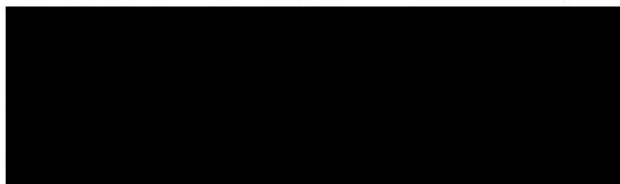


NPM No. 141-2015

27 November 2015



Re: HOPE Declaration of Failure of Bidding

Dear [REDACTED]

This refers to your letter inquiring on the validity of the action of the Campus Director, the Head of the Procuring Entity (HOPE), of declaring a failure of bidding for the reason that the said project is no longer applicable.

It is represented that the BAC recommended the award of the contract to the bidder with the Lowest Calculated and Responsive Bid (LCRB) to the HOPE, but the latter declared a failure of bidding claiming that the said project was no longer applicable pursuant to the PSHS Infra Roadmap. You are inquiring if such declaration is valid and if rebidding such project would violate the procurement law.

As discussed in a previous opinion¹, the Government Procurement Policy Board (GPPB) and its Technical Support Office (TSO) only render policy and non-policy matter opinions, respectively, on issues 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. Thus, the decision on whether to declare a failure of bidding and to subsequently rebid the project is within the authority and jurisdiction of the procuring entity.

It must be emphasized, however, that it is explicit under Section 41 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 that the HOPE reserves the right to reject any and all bids, declare a failure of bidding, or not to award the contract:

(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;

¹ NPM 045-2014 dated 13 October 2014, citing NPM 044-2009 dated 18 August 2009.

(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 government as defined in the IRR.

Under Section 41(c), the instances identified in the IRR are as follows:

a) 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;

b) if the project is no longer necessary as determined by the Head of the Procuring Entity; and

c) if the source of funds for the project has been withheld or reduced through no fault of the procuring entity.

As the approving authority, the HOPE is given discretionary power to approve or disapprove the recommendations made by the BAC.² The HOPE reserves the right to reject any and all bids, declare a failure of bidding, or not award the contract based on the grounds provided in Section 41 of RA 9184 and its IRR, which is also reflected in the Invitation to Bid of the Philippine Bidding Documents (PBDs). Nonetheless, when the HOPE exercises its power under the Reservation Clause, he must be able to clearly show the existence of the ground/s relied upon. Moreover, the same is not without any sanction if exercised capriciously. Thus, Section 65 of RA 9184 and its IRR provides penal sanctions to the HOPE if he abuses his power to reject any and all bids as mentioned under Section 41 of RA 9184 and its IRR, with manifest preference to any bidder who is closely related to him in accordance with Section 47³ of the Act and the IRR.

Accordingly, we wish to clarify that the exercise of the Reservation Clause exclusively belongs to the HOPE. It may be exercised by the HOPE upon determination of the existence of situations provided in Section 41 of RA 9184 and its IRR. Pointedly, the exercise of such reserved right must not be with manifest preference to any bidder who is closely related to the HOPE pursuant to Section 47 of the procurement law and its IRR.

As for the rebidding of the project, it is also within the procuring entity's authority, function, and discretion to decide, whether the procurement should be eventually pursued according to its needs and budget availability. Caveat must be made, however, that when a

² NPM 118-2004, dated 27 August 2004.

³ Section 47. Disclosure of Relations

All bids shall be accompanied by a sworn affidavit of the bidder that it is not related to the Head of the Procuring Entity, members of the BAC, the TWG, and the BAC Secretariat, the head of the PMO or the end-user unit, and the project consultants, by consanguinity or affinity up to the third civil degree. Failure to comply with the aforementioned provision shall be a ground for the automatic disqualification of the bid in consonance with Section 30 of this IRR. For this reason, relation to the aforementioned persons within the third civil degree of consanguinity or affinity shall automatically disqualify the bidder from participating in the procurement of contracts of the procuring entity. On the part of the bidder, this provision shall apply to the following persons:


- a) If the bidder is an individual or a sole proprietorship, to the bidder himself;
- b) If the bidder is a partnership, to all its officers and members;
- c) If the bidder is a corporation, to all its officers, directors, and controlling stockholders; and
- d) If the bidder is a joint venture, the provisions of items (a), (b), or (c) of this Section shall correspondingly apply to each of the members of the said joint venture, as may be appropriate.

project has been cancelled by the HOPE for reason provided for under Section 41 of the procurement law and its IRR, the rebidding of the same project must be carefully studied.

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