

NPM No. 054-2016

2 November 2016

MS. MA. SOLEDAD G. DOLOIRAS
Director, BMB for Security, Peace and Justice Sector
DEPARTMENT OF BUDGET AND MANAGEMENT
Malacanang, Manila

Re: Request of the Department of National Defense (DND) to Repeal Executive Order (EO) No. 235, s. 2003

Dear Director Doloiras:

This refers to your letter endorsing to our office the letter¹ of Acting Deputy Executive Secretary Michael P. Ong, Office of the President, seeking comment and recommendation on the request of DND to repeal EO 235, s. 2003² to facilitate actions on procurement contracts and expedite the implementation of the projects of DND and its bureaus and agencies.

We have noted that the request of DND pertains to the delegation of the signing/approval of contracts and the creation of separate Bids and Awards Committees (BACs) in the procurement activities of the DND.

Creation of Separate BACs

Section 11 of Republic Act (RA) No. 9184 enunciates the general policy that each procuring entity shall establish a single BAC for its procurement. The purpose of such policy is expounded in Section 11.1.1 of the revised Implementing Rules and Regulations of RA 9184, thus:

“Each procuring entity shall establish in its head office a single BAC to undertake the functions specified in Section 12 of this IRR in order to facilitate professionalization and harmonization of procedures and standards. In line with the standardization of procurement procedures and the thrust towards strengthening the procurement function to increase operational

¹ Copy of the following documents attached:

- (1) Endorsement Letter of Acting Deputy Executive Secretary Michael P. Ong dated 26 September 2016;
- (2) Request Letter of DND Secretary Delfin N. Lorenzana dated 14 August 2016;
- (3) Draft EO repealing EO 235, s. 2003;
- (4) DND Department Circular Nos. 12, s. 2014 and 07, s. 2015; and
- (5) EO 235, s. 2003, EO 423, s. 2005 and EO 645, s. 2007.

² Entitled *Streamlining the Rules and Procedures of Defense Contractors* and issued on 11 September 2003.

efficiency and effectiveness, Heads of Procuring Entities shall aim to consolidate or unify all procurement activities of the organization, whether locally-funded or foreign-assisted, and whether pertaining to goods, infrastructure projects, or consulting services.”

This notwithstanding, Section 11 of RA 9184 also provides for an exemption on the establishment of a single BAC. Hence, as may be deemed fit by the Head of the Procuring Entity (HOPE), there may be separate BACs where the number and complexity of the items to be procured so warrant. Further, similar BACs for decentralized and lower level offices may be formed when deemed necessary by the HOPE. Section 11.1.2 of the IRR of RA 9184 provides guidance on the matter, thus:

“However, to expedite the procurement process for practical intents and purposes, the Head of the Procuring Entity may create separate BACs where the number and complexity of the items to be procured shall so warrant. The BACs may be organized either according to: (a) geographical location of PMO or end-user units of the procuring entity; or (b) nature of procurement. Similar committees for decentralized and lower level offices may also be formed when deemed necessary by the Head of the Procuring Entity.”

Based on the foregoing, while the general policy is to have a single BAC for each procuring entity, the HOPE may create separate BACs where the number and complexity of the items to be procured shall so warrant, or establish similar committees for decentralized and lower level offices when deemed necessary.

Delegation of Signing/Approval of Contracts

The authority of the HOPE to delegate the approval of award of contract finds support in the following provisions of RA 9184, thus:

1. “**Section 5. Definition of Terms.** – For purposes of this Act, the following terms or words and phrases shall mean or be understood as follows:

x x x

(j) *Head of the Procuring Entity* – refers to: (i) the head of the agency or his **duly authorized official**, for national government agencies; x x x. *Provided*, That in a department, office or agency where the procurement is decentralized, the Head of each decentralized unit shall be considered as the HOPE **subject to the limitations and authority delegated by the head of the department, office or agency.**”

2. “**Section 12. Functions of the BAC.** – The BAC shall have the following functions: advertise and/or post the invitation to bid, conduct pre-procurement and pre-bid conferences, determine the eligibility of prospective bidders, receive bids, conduct the evaluation of bids, undertake post-qualification proceedings, **recommend award of contracts to the Head of the Procuring Entity or his duly authorized representative** x x x.”

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3. “**Section 37. Notice and Execution of Award.** – Within a period not exceeding fifteen (15) calendar days from the determination and declaration by the BAC of the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid, and the recommendation of the award, the Head of the Procuring Entity **or his duly authorized representative shall approve or disapprove the said recommendation.** In case of approval, the Head of the Procuring Entity **or his duly authorized representative shall immediately issue the Notice of Award** to the bidder with the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid.

x x x. (Emphasis supplied)

Section 5(j) of RA 9184 recognizes the authority of the Head of the Agency to delegate, in general, the functions of a HOPE. Accordingly, the Head of the Agency is authorized to delegate the approval of the resort to any of the alternative methods of procurement³, the imposition of administrative penalty⁴ and the approval of the Annual Procurement Plan⁵, among others. Further, the same Section also allowed the Head of the Agency to delegate its authority to the Head of decentralized units, subject to such limitations that the concerned Head of the Agency may impose.

On the other hand, Sections 12 and 37 of RA 9184 specifically allows both the HOPE and his duly authorized representative to approve award of contracts. It conveys the fact that the authority to approve BAC Resolutions recommending award of contract and the authority to sign Notices of Award are not confined to the Head of the Agency alone. The duly authorized representative of the Head of the Agency can perform such functions as well, subject to the scope and coverage of the authority given.

Relatedly, Section 7(8), Chapter 2, Book IV of Executive Order No. 292 or the *Administrative Code of 1987*, states that one of the functions of a Department Secretary is to “[d]elegate authority to officers and employees under the **Secretary’s direction** in accordance with this Code.” Accordingly, the rule on delegation of authority is found in Section 40, Chapter 8 of the same Book, thus:

“The Secretary or the head of an agency shall have authority over and responsibility for its operation. He shall **delegate such authority** to the bureau and regional directors as may be **necessary for them to implement plans and programs adequately. Delegated authority shall be to the extent necessary for economical, efficient and effective implementation of national and local programs** in accordance with policies and standards developed by each department or agency with the participation of the regional directors. The delegation shall be in writing; shall indicate to which officer or class of officers or employees the delegation is made; and shall vest sufficient authority to enable the delegate to discharge his assigned responsibility.”
(Emphasis supplied)

In this regard, the Head of the Agency, in accordance with the relevant provisions of RA 9184 and its IRR, may delegate the functions of the HOPE such as the approval of the

³ RA 9184, Section 48.

⁴ *Ibid*, Section 69.

⁵ IRR of RA 9184, Section 7.2.

recommendation to award a contract and the signing of Notice of Award, among others. The decision, however, to delegate such functions lies solely on the sound discretion of the Head of the Agency taking into consideration the aspects of economy, efficiency and accountability, and the need to effectively implement plans and programs.

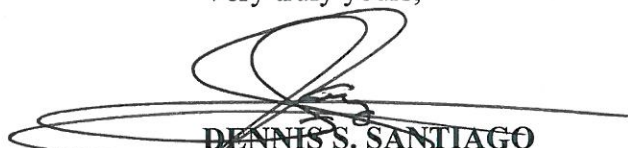
Summary

Anent all the foregoing, we submit the following:

1. Section 12 of RA 9184 and its IRR enunciates the general policy of having a single BAC for each procuring entity. This notwithstanding, the same Section allows the HOPE to create separate BACs where the number and complexity of the items to be procured shall so warrant, or establish similar committees for decentralized and lower level offices when deemed necessary; and
2. In accordance with Sections 5(j), 12 and 37 of RA 9184, the Head of Agency may delegate the functions of the HOPE, such as the approval of the recommendation to award a contract and the signing of Notice of Award, among others. The decision, however, to delegate such functions lies solely on the sound discretion of the Head of the Agency taking into consideration the aspects of economy, efficiency and accountability, and the need to effectively implement plans and programs.

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,


DENNIS S. SANTIAGO
Executive Director V 