



Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 05-2015

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HON. JANETTE LORETO-GARIN, MD, MBA-H

Acting Secretary

DEPARTMENT OF HEALTH (DOH)

Building 1, San Lazaro Compound,
Rizal Avenue, Sta. Cruz, Manila 1003

*received by
Miguel
10/3/2015*

Re: Cluster Bids and Awards Committee (CBAC)

Dear Secretary Garin:

This refers to the letter¹ of the Honorable Secretary pertaining to the creation of CBAC for the procurement of infrastructure projects and equipment of DOH under the Health Facilities Enhancement Program (HFEP).

As represented, DOH Department Personnel Order (DPO) No. 2013-4064 was issued on 24 July 2013 thereby creating CBAC for four (4) clusters² and appointing a Cluster Head who shall be the Head of the Procuring Entity (HOPE). During the course of its implementation, some of the DOH Regional Offices³ raised concerns particularly on the legality of CBAC composition, the validity of the appointment of HOPE and specific problems encountered in the CBAC procurement. Initially, the concerns were endorsed to DOH Legal Service which in turn issued its legal opinion; however, the DOH has not yet made a definitive ruling on the issues. Hence, the request for opinion on the following:

1. Whether the provision in DPO No. 2013-4064 creating CBACs that are composed of members from different Procuring Entities (PEs) to conduct the procurement activities for DOH Regional Offices is sanctioned by Republic Act (RA) No. 9184;
2. Whether the provision in DPO No. 2013-4064 appointing an Undersecretary or Assistant Secretary as the HOPE for each cluster is allowed under RA 9184; and

¹ Attached is a copy of the following documents:

- (1) Department Personnel Order Nos. 2013-4064, 2013-4424, and 2013-4436;
- (2) Hospital Order No. 031, s. 2014;
- (3) Letters dated 25 November 2014 and 15 January 2015 from Dr. Tan, together with all the supporting documents;
- (4) Letter dated 15 December 2014 from Dr. Tobrizo; and
- (5) Memorandum dated 22 December 2014 from Atty. Lutero.

² NCR and Southern Luzon Cluster, Northern and Central Luzon Cluster, Visayas Cluster, and Mindanao Cluster.

³ Letters from DOH Regional Office X dated 25 November 2014 and 15 January 2015, and letter from DOH Regional Office IX dated 15 December 2014.

3. What are the courses of action to be made by DOH on the pending procurements that were already paid, issued with Purchase Orders or Notices of Award, and those which were bid out.

Cluster Bids and Awards Committee

As represented, the Cluster BAC of DOH does the procurement for several DOH Regional Offices, such that, there is a single BAC whose membership is composed of officials/personnel from different DOH PEs (Regional Offices and Hospitals). Elsewise put, the PEs are aggregated to form a cluster, which is tantamount to the creation of an artificial PE having its own BAC that is responsible for the procurement requirements of individual DOH PEs.

Section 11 of RA 9184 provides that each PE shall establish a single BAC for its procurement. However, when the number and complexity of the items to be procured shall so warrant, the procurement law and its IRR permits the creation of separate BACs, as may be deemed fit by the HOPE. In such a situation, the PE conducts its procurement activities through separate BACs created within the PE. The creation of separate BACs within the PE does not contemplate the creation of a Cluster BAC where the members are drawn from offices or agencies of the PE that are in themselves treated as separate PEs.

In a previous opinion⁴, we stated that the creation of a Multi-Agency BAC or Special BAC composed of officials from various PEs will run counter to, and does not find support in RA 9184 and its IRR. It must be emphasized that under Section 11.2 of the revised Implementing Rules and Regulations (IRR) of RA 9184, the BAC must be composed of permanent officials of the PE, *i.e.*, those occupying *plantilla* position within the organizational structure and staffing complement of the PE itself, and not outside its organizational set-up. Hence, in a decentralized set-up, such as in the case of DOH, the Central Office may create separate BACs with membership coming from plantilla personnel from within the DOH Central Office, and the same is true in DOH Regional Offices and Hospitals where separate BACs may also be created with members coming from the DOH Regional Offices or Hospitals, as the IRR mandates that the BAC must be composed of permanent officials of the PE. Consequently, a Cluster BAC where members come from different DOH PEs does not fit the requirements of Section 11.2 of the IRR of RA 9184.

In this regard, it is our considered view that the creation of a Cluster BAC that is composed of officials from various DOH PEs (Regional Offices and Hospitals) as members will run counter to, and does not find support in RA 9184 and its IRR.

Appointment of HOPE

In each PE, the law identifies the corresponding official who shall be considered as the HOPE. For National Government Agencies (NGAs), HOPE refers to the head of the agency or his duly authorized official; 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.⁵


⁴ NPM No. 131-2013 dated 27 December 2013.

⁵ Section 5, RA 9184.

While the cited provision of RA 9184 permits the head of the agency to duly authorize an official who will exercise the duties, responsibilities and functions of the HOPE, it does not explicitly authorize the head of the agency to create a cluster PE and appoint a HOPE. The creation of an artificial PE or a cluster PE is not sanctioned by RA 9184 and its IRR. Under RA 9184 and its IRR, a PE is defined as any branch, office, agency or instrumentality of the government, including state universities and colleges, government-owned and/or –controlled corporations, government financial institutions, and local government units procuring goods, consulting services and infrastructure projects.⁶ PEs, in contemplation of the provisions of RA 9184 and its IRR, exist as a creation of law and cannot be created *motu proprio* by aggregating PEs to form a singular or cluster PE. Under existing rules, PEs have their own respective HOPEs, and in the case of DOH, the HOPE for the Regional Offices and Hospitals shall be the Regional Directors and Chief of Hospitals, respectively.

Specific Courses of Action

Anent the third query, we wish to inform the Honorable Secretary that the Government Procurement Policy Board (GPPB) and its Technical Support Office (GPPB-TSO) only renders policy and non-policy matter opinions, respectively, on issues pertaining to the interpretation and application of our procurement laws, rules and regulations. It does not give specific courses of action to be undertaken by the PEs in completed and on-going procurement projects as the conduct of procurement activities, with reference to existing procurement rules and regulations, is within the sole authority and accountability of the PE, which we cannot encroach upon or interfere with, since the duties and responsibilities fall solely within the ambit of the PE's authority and discretion as sanctioned by law.

Nonetheless, we take note of the fundamental rule that acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity.⁷ At this juncture, it will be worthy to revisit cases decided by the Supreme Court relative to the inquiry. In one case⁸, the High Court, in holding that petitioner entered into the two contracts in good faith for the good and interest of the government, allowed the private contractor, on the basis of *quantum meruit*, to recover for the work already accomplished. It even recognized the good faith of petitioner who promptly suspended work on the project when he learned of the irregularity in the proceedings to secure contract. In another case⁹, the Supreme Court, after declaring the subject contract null and void due to findings of illegal transactions, further ordered the concerned government entity to refrain from implementing any other contract or agreement entered into with regard to the project. In these two cases, the importance of adopting legal, valid and regular processes and procedures in entering into a public contract was established and clearly pointed out, and the consequences of a void contract will depend on the particular facts surrounding the case. 

⁶ *Ibid.*

⁷ Article 5 of the New Civil Code of the Philippines.

⁸ *Eslao v. COA*, G.R. No. 89745, April 8, 1991.

⁹ *Information Technology Foundation of the Philippines, et al. v. Commission on Elections, et al.*, G.R. No. 159139, January 13, 2004.

Summary

In sum, we wish to clarify that the creation of an artificial PE or a cluster PE, the appointment of HOPE to this cluster PE, and the creation of a Cluster BAC that is composed of officials from various PEs will run counter to, and does not find support in RA 9184 and its IRR.

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.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director V

1/14/23