



Department of Budget and Management
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE

NPM No. 14-2013

1 March 2013

HON. MANUEL A. ROXAS III

Secretary

DEPARTMENT OF THE INTERIOR AND LOCAL GOVERNMENT (DILG)

A. Francisco Gold Condominium II, EDSA cor. Mapagmahal Street,
Diliman, Quezon City

Re: Concerns on the Procurement of Sixty Eight (68) Units Fire Trucks by the Bureau of Fire Protection (BFP)

Dear Secretary Roxas:

This respectfully refers to the Honorable Secretary's letter dated 27 November 2012, which we received on 6 December 2012, seeking the opinion of the Government Procurement Policy Board (GPPB) on several issues relative to the procurement of sixty eight (68) units of Fire Trucks, Power Take Off (Project), which has an Approved Budget for the Contract (ABC) in the amount of Four Hundred Sixteen Million Three Hundred Nineteen Thousand Seven Hundred Twenty Nine and 75/100 Pesos (PhP 416,319,729.75).

In addition, due to the similarity of subject matter and the issues involved, this opinion also addresses the letter of Assistant Secretary Ester A. Aldana of DILG dated 3 September 2012.

As represented in the letters, the facts and circumstances attending the BFP procurement on 3 November 2011, may be summarized as follows:

1. During bid opening for the Project on 15 November 2011, the Joint Venture of Kolonwel Trading and Hubei Jiangnan Special Automobile Co. Ltd. (JV) was declared the bidder with the Lowest Calculated Bid (LCB) by the BFP-Bids and Awards Committee (BFP-BAC), chaired by then BFP Deputy Chief for Operations CSUPT Ruben F. Bearis, Jr.
2. The BFP-BAC determined the JV as Post Disqualified based on the Post Qualification Evaluation Report on 31 January 2012.
3. On 12 March 2012, the BFP-BAC issued Resolution No. 2012-001R, disqualifying the JV from the Project.

4. The Notice of Post Disqualification dated 15 March 2012 was received by the JV on 19 March 2012. In the same notice, the JV was advised of its right to file a motion for reconsideration within three (3) days from receipt of notification.
5. On 19 March 2012, the JV filed a notarized request for reconsideration countering all the findings of the BFP-BAC in the Notice of Post Disqualification.
6. On 21 March 2012, the BFP-BAC conducted a meeting to resolve the request for reconsideration filed by the JV. Only five (5) out of the seven (7) members of the BFP-BAC were present. Based on the minutes, majority of the members actually present voted to grant the motion for reconsideration filed by the JV.
7. On 26 March 2012, BFP-BAC issued Resolution No. 2012-PBM-02 recommending the award of contract to the JV for having been determined to be the bidder with the Lowest Calculated and Responsive Bid (LCRB).
8. On 10 May 2012, the subject procurement was brought to the attention of the late Secretary Jesse M. Robredo through a Memorandum submitted by CSUPT Samuel Perez (CSUPT Perez), Officer-in-Charge (OIC)-BFP Chief, recommending the disapproval of the BFP-BAC Resolution that recommended the award of contract to the LCRB (JV) based on the following grounds:
 - (i) Kolonwel Trading, one of the JV partners failed to comply with the requirements of Revenue Regulation No. 3-2005, specifically on the filing of Annual Income Tax Return thru electronic filing and payment system (EFPS).
 - (ii) The BFP-BAC did not verify and validate Kolonwel's track record before issuing an Order declaring the latter as Post Qualified.
9. On 22 May 2012, the late Sec. Robredo issued a Memorandum directing the BFP-BAC to submit a comprehensive written explanation on the matters alleged by CSUPT Perez within forty (48) hours.
10. On 31 May 2012, the BFP-BAC complied with the directive and maintained that it did not err in resolving the issues concerning the post disqualification of the JV.
11. In a Memorandum dated 3 July 2012, the late Sec. Robredo cited the opinion of the DILG Legal Service, in that, the BFP Chief should first approve or disapprove the recommendation of the BAC before elevating the matter to the Secretary of the DILG (SILG).
12. The DILG Legal Service, in a Memorandum dated 1 August 2012 addressed to the SILG, opined that the import of Section 37.3 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 is that in case the BFP Chief disapproves the BAC Resolution, said decision need not be elevated to the SILG since what is required to be elevated under said provision is a decision seeking "further approval".

13. On 17 September 2012, CSUPT Perez was preventively suspended by the Ombudsman pursuant to a case filed by Kolonwel in relation to a separate procurement conducted by the agency.
14. On 9 October 2012, CSUPT Bearis was designated as the OIC-BFP Chief by the SILG.
15. On 12 October 2012, CSUPT Bearis approved BFP-BAC Resolution recommending award of contract to the JV, and likewise issued a Notice of Award.
16. In a Memorandum dated 15 October 2012, CSUPT Bearis submitted the BFP-BAC Resolution and the Notice of Award to the SILG for further approval, pursuant to Section 37.3 of the IRR of RA 9184.
17. In a letter to the SILG dated 5 November 2012, Kolonwel claimed that the BAC resolution declaring the JV as the winning bidder remains unchanged and the position taken by the Legal Service is to the effect that it had complied with all the requirements set forth by RA 9184. In a Memorandum dated 8 November 2012, the DILG Legal Service maintained its initial evaluation.

Based on the foregoing facts and circumstances, the DILG seeks clarification on the following issues:

1. Whether the BFP Chief may be considered the HOPE for the subject procurement despite DILG Circular No. 2010-13 which limits its authority to approve BAC Resolutions for procurements involving amounts not exceeding Seven Million Pesos (PhP7,000,000.00).
2. Whether an official designated as OIC, and not as Chief or Acting Chief of BFP, can exercise the duties, powers and functions of the HOPE.
3. Whether only those recommendations that are "for approval" (and not for disapproval) are required to be elevated to the higher approving authority under Section 37.3 of the IRR.
4. Whether there is conflict of interest where the OIC of the Procuring Entity (PE) approves the BAC Resolution and issues the Notice of Award for a procurement activity where the OIC was then a member of the BAC that issued the same Resolution.
5. Whether findings¹ of "substantial compliance" with the technical specifications provides sufficient basis for a recommendation for award of contract.
6. Whether the decisions to grant the motion for reconsideration and issue a BAC Resolution declaring the bidder to be the LCRB and recommending award of contract are proper despite the bidder's non-compliance with the 120-day delivery schedule. 10

¹ BFP Technical Committee Certification No. 2012-001 dated 20 January 2012

HOPE in BFP

Section 5(t) of the IRR of RA 9184 defines the HOPE in national government agencies as the head of the agency, and provides that in an agency, department, or office where the procurement is decentralized, the head of each decentralized unit may be considered as the HOPE, subject to the limitations and authority delegated by the head of the agency. Pursuant to RA 6975², the BFP, a decentralized unit under the DILG, is headed by the BFP Chief. Thus, following Section 5(t) of the IRR of RA 9184, the BFP Chief is the HOPE of the BFP.

We note that the SILG as the Department head, in line with his power to delegate authority in the exercise of any substantive or administrative functions, in order to achieve efficient and effective operations within the Department, issued Circular No. 2010-13 dated 16 September 2010, delegating authority as follows:

[T]he DILG Undersecretary for Peace and Order and Transnational Crime; the Chief, **Bureau of Fire Protection**; the Chief, Bureau of Jail Management and Penology; The President, Philippine Public Safety College; and the Department's Regional Directors **are hereby authorized, on behalf of the Secretary to act on, sign and/or approve papers/documents covering or dealing with Department's personnel, resources, and other concerns stipulated in the attached Delegation Matrix,** subject to the usual accounting and auditing rules and regulations. (Emphasis supplied)

Under said DILG Circular, the BFP Chief's authority to approve procurement of goods/services/equipment is limited to projects not exceeding Seven Million Pesos (PhP7,000,000.00).

In this regard, considering the limitation on the authority of the BFP Chief, imposed by virtue of DILG Circular 2010-13, and taking into account that the ABC for the subject procurement is over and above the authority bestowed, it is our opinion that while the BFP Chief is, and remains the HOPE for BFP, he does not have the authority to approve the subject procurement; more so issue a Notice of Award (NOA), as his authority to approve is confined only within the identified threshold of PhP 7 Million, such that those projects with ABCs beyond this threshold should be endorsed to the SILG for approval.

Official Designated as OIC Can Exercise the Duties, Powers and Functions of the HOPE

As held in the case of *Binamira v. Garrucho*³, designation "connotes merely the imposition by law of additional duties on an incumbent official". This was reiterated in *Triste v. Leyte State College Board of Trustees*⁴, which states that to "designate" a public officer to another position may mean to vest him with additional duties while he performs the functions of his permanent office. Thus, designation results in the bestowal and imposition of functions,

² An Act establishing the Philippine National Police under a Reorganized Department of the Interior and Local Government Act of 1990 dated 13 December 1990.

³ G.R. No. 92008. 30 July 1990.

⁴ G.R. No. 78623. 17 December 1990.

duties and responsibilities in addition to what is currently being exercised by the designee by reason of his present position. Also, the designation to perform the duties and responsibilities of a particular office entails the exercise and execution of actual, related and incidental power and authority inherent in the office, *unless* the designation contains specific reservations, limitations, or qualifications on the functions, duties, and responsibilities to be performed, such as the limitation on the approval authority of the BFP Chief promulgated by the SILG through DILG Circular No. 2010-13.

Consequently, the designation of CSUPT Bearis as OIC-BFP Chief, although temporary in nature, entails the assignment of additional functions bestowed upon him – functions which otherwise would have been performed by a duly appointed regular BFP Chief. Needless to say, the purpose of such designation is to prevent hiatus in the operations of the BFP, such that during the interregnum that there is no regular head of office, the duties, responsibilities, and functions of the office are continuously performed and exercised, such as those involving procurement activities, so that service to the public is not tolled or affected despite the vacancy in the office of the head of agency, in this case the BFP Chief.

Accordingly, we are of the view that the OIC-BFP Chief is authorized to make decisions on procurement activities of the BFP, subject to the limits stated in DILG Circular No. 2010-13.

Recommendations to be Elevated to Higher Approving Authority

Section 37.3 of the IRR of RA 9184 recognizes that there are decisions on procurement activities that may require further approval by higher authority. However, this rule should be read side by side with the enabling law, rules, guidelines, or orders that required such “further approval of higher authority”, in this case, DILG Circular No. 2010-13, which did not only require further approval, but likewise provided for a threshold amount, *i.e.*, PhP 7 Million that effectively limits the authority of the BFP Chief or the OIC to approve contracts, such that his authority to approve is limited and confined only to contracts with an amount of PhP 7 Million and below, clearly not covering the amount of the contracts involved in the procurement of sixty eight (68) units Fire Trucks. Accordingly, by reason of DILG Circular No. 2010-13, the BFP Chief or the OIC, has no authority at all to approve or disapprove the contract for the sixty eight (68) units Fire Trucks, more so issue the NOA, as the amount of the contract is way beyond his approving authority. Pointedly, the authority to approve the contract belongs solely to the SILG.

When a decision requires approval by higher authority, the recommending official is bereft of prerogative to exercise discretion whether to raise the matter to the approving authority or not. To interpret that the recommending official is only required to elevate those matters it favorably recommends weakens the mandate of the higher approving authority to take full jurisdiction and cognizance of the matter.

In exercising the power to approve, the approving authority is likewise deemed to have the mandate to disapprove any recommendation on the matter. This principle was adopted in the case of *Alinsugay v. Court of Appeals*⁵ where the Supreme Court pronounced that “by force of logic, the power and authority conferred by law on a body to approve appointments, carries with it the corresponding power to disapprove”.

⁵ G.R. No. L-48639. 16 March 1987.

Pursuant to DILG Circular No. 2010-13, the authority of the BFP Chief is limited to contracts with ABC not exceeding PhP 7 Million. Thus, the BFP Chief or OIC is only considered as a recommending official for contracts with ABC above said amount, he is not expected to approve or disapprove.

In this regard, regardless of the recommendation of the BFP-BAC or the BFP Chief, whether for approval or for disapproval, all decisions relative to contracts with an ABC exceeding Seven Million Pesos (PhP7,000,000.00) must be elevated to the SILG for approval or disapproval.

Conflict of Interest

Section 11.2.5 of the IRR of RA 9184 is clear and categorical in providing that in no case shall the HOPE and/or the approving authority be the Chairman or a member of the BAC. It bears stressing that the prohibition is intended to avoid any conflict of interest between the person who undertakes procurement and recommends the award of the contract and the one who approves said transaction. This approach finds solace in the adage that *one cannot have his cake and eat it too*.

The conflict arises when, in the case of the subject matter of the inquiry, the Chairman of the BFP-BAC that conducted the earlier procurement was eventually designated as OIC-BFP Chief. In this case, the subject procurement is deprived of checks and balances as one of the persons conducting the bid evaluation and post-qualification, who is no less than the BAC Chairman, may have that degree of proclivity towards the recommended action of the BAC; thus, the subsequent award of contract may no longer enjoy the cold neutrality of an impartial HOPE.

In addition, allow us to point out that, the OIC-BFP Chief has no authority to approve the subject procurement as it is over and above the limits of his approving authority. Under the peculiar circumstance attending the procurement, prudence dictates that the OIC-BFP Chief, who was then the Chairman of the BFP-BAC that made the earlier recommendation to award the contract to the JV, should divorce himself from any action or decision relating to such recommendation in order to maintain the neutrality and impartiality of the transaction and avoid would be negative perceptions.

Substantial Compliance and Failure to Comply with Delivery Schedule

Section 34.1 of the IRR of RA 9184 requires a determination that the bidder complies with and is responsive to all the requirements and conditions specified in the bidding documents. Hence, the function of post-qualification is to verify, validate, ascertain, inspect and test whether the technical specifications of the goods offered comply with the requirements of the contract and the bidding documents. In *COA v. Link Worth*⁶, the High Tribunal held that the technical specifications, once laid down, does not give occasion for the PE to arbitrarily exercise its discretion and brush aside the very requirements it specified as vital components of the goods it bids out.

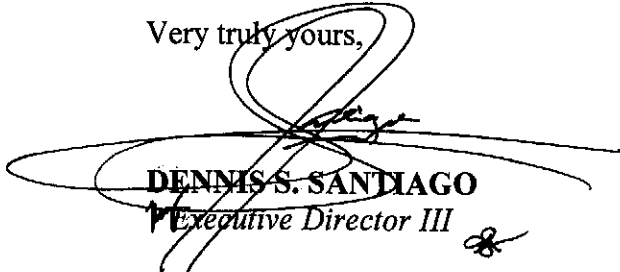
⁶ G.R. No. 182559. 13 March 2009.

In addition, Section 37.1.1 of the IRR of RA 9184 provides that the BAC shall recommend to the HOPE the award of the contract to the bidder with the LCRB after the post qualification process has been completed. This means that there has been a determination of full compliance with the technical specifications and requirements stated in the bidding documents; otherwise, the bidder should be declared post-disqualified.

In this regard, the finding of substantial compliance and the non-compliance with the 120-day delivery schedule required in the bidding documents, if this is indeed the requirement in the bidding documents as originally crafted, and that no revision or change of the 120-day delivery requirement was made through a validly issued supplemental/bid bulletin, are valid grounds for the disqualification of the bidder and the rejection of the request for reconsideration, respectively.

We hope that our advice provided sufficient guidance on the matter. Please note that this opinion is being rendered on the basis of the facts and particular situations presented, and may not be applicable given a different set of facts and circumstances. Should the Honorable Secretary have additional questions, please do not hesitate to contact us.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director III

