



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

NPM No. 36-2014

09 October 2014

MS. TERESITA M. MISTAL
17 Sapphire Road,
Emerald Valley Homes Subdivision,
Dela Paz, Pasig City

Re: Application of RA 9184 to Local Government Units (LGUs)

Dear Ms. Mistal:

This refers to your letter dated 20 May 2014 seeking our opinion on various issues relative to the implementation of Republic Act No. (RA) 9184 to LGUs.

It is represented that you are currently engaged in consultancy services with some LGUs and one of the areas of your study is the review of the current operations of the LGUs in implementing RA 9184, particularly the Bids and Awards Committee (BAC) operations. It is in this light that you seek the opinion of our office to provide clearer insights on RA 9184 and its revised Implementing Rules and Regulations (IRR).

On BAC Composition

The list of offices mentioned in Sec 11.2.3¹ of the IRR of RA 9184 is not exclusive. Members of the BAC may come from offices other than those included in the enumeration, except the Chief Accountant and any personnel from the Accounting Unit because of the existence of conflict of interest². But it is necessary that the members shall come from the regular offices under the Office of the Local Chief Executive (LCE). Hence, in case of non-availability of personnel from the offices mentioned in Sec 11.2.3, the LCE may designate other personnel from any other regular office under the LCE's office subject to the above-mentioned exception. Further, the following are all mandatory:

1. The Chairman of the BAC shall be at least a third ranking permanent official of the BAC;
2. The members of the BAC shall be personnel occupying plantilla positions of the Procuring Entity (PE) concerned;
3. The members to be designated by the LCE to the BAC shall be at least five (5), but not more than seven (7); and

¹ Officer of the Administrator, Budget Office, Legal Office, Engineering Office and General Services Office.

² COA Circular 2003-004 dated 30 July 2003.

4. In no case shall the LCE and/or the approving authority be the Chairman or a member of the BAC.³

The authority to fill-up the positions in the enumerated offices under Sec.11.2.3 is beyond the ambit of RA 9184 and is covered by RA 7160, the Local Government Code, and existing Civil Service Laws, Rules and Regulations. Consequently, refusal to fill-up the said positions, including the corresponding applicable liability, shall also be governed by the Local Government Code and the Civil Service Laws, Rules and Regulations.

On the Term of Office of BAC Members

RA 9184 and its IRR are clear on the limit of the term of office of BAC Members. The Law and the rules gave the LCE the discretion to designate the members of the BAC for the period of one (1) year, and to extend the terms of office of BAC Members granting that the extension will be most desirable and advantageous for the PE. More so, the designation of the BAC members is within the exclusive prerogative and discretion of the LCE⁴ and inevitably, the extension as well.

The Government Procurement Policy Board (GPPB) is without authority to encroach upon the discretion granted to the LCE by RA 9184. Such being the case, GPPB cannot issue a Resolution that will limit the terms of office of BAC Members, without unlawfully encroaching upon the authority of the LCE.

On the Period of Action on Post Qualification Process

On similar questions, we have previously opined that it is implicit in Section 65.1(b) of the IRR of RA 9184 that post qualification process beyond the prescribed period of action may be recognized for justifiable causes, such that, although the period of action required under the rules are mandatory in character, penal sanctions or liability will not set in against the concerned public officers provided that, valid, reasonable, and justifiable causes exist to warrant a delay in the procurement process⁵.

In this wise, we wish to clarify that the application of mandatory periods under the IRR of RA 9184, such as the seven (7) calendar day and thirty (30) calendar day period mentioned in Section 34.8 thereof, must be complied with. Should the BAC decide to extend the same, it must show and provide compelling, sufficient, valid, reasonable, and justifiable cause for such extension. Such valid justification, however, will only free officials from penal sanction or liability, but not from applicable administrative and civil sanctions or liabilities under existing laws, rules and regulations.⁶

On Determination of the Type of Procurement

The PE is in the best position to determine the correct classification of its procurement based on its identified needs, guided by the parameters and conditions in the relevant

³ GPPB Resolution 01-2004 issued on 10 March 2004.

⁴ Local Government Unit Procurement Manual approved by the GPPB on 29 November 2007.

⁵ NPM Nos. 152-2012 dated 14 December 2012 and 57-2013 dated 26 June 2013.

⁶ *Id.*

provisions of RA 9184 and its IRR on what should be considered as goods, infrastructure project or consulting services procurement.⁷

For guidance, the PE should take note of Sections 5(r) and (u) of the IRR of R.A. 9184, for the categorical definitions of goods procurement and infrastructure procurement, respectively. Further, Section 5(aa)⁸ of the same IRR offers an answer to questions of classification in cases involving mixed procurements. Whether an intended requisition is in the nature of goods or infrastructure procurement, the issue necessarily involves the determination of the primary purpose or intention for which the contract is sought to be undertaken. While the procurement may have been conceived for a number of purposes or uses, that which is primary or foremost shall dictate in identifying its true nature⁹ guided by the relevant provision of the procurement law and the rules.

On the Purchase of Bidding Documents for Re-bidding

Each bidding activity is distinct and separate from each other, even if the subject matter of the bidding activity is one and the same - as in the case of a second bidding after the failure of the first.¹⁰

In the case of a failed bidding, the BAC shall conduct a mandatory review and evaluation of the terms, conditions, and specifications in the Bidding Documents, including its cost estimates, in order to determine the reason for the failed bidding.¹¹ The BAC may then revise the terms, conditions, and specifications of the Bidding Documents.¹² Thus, it is the responsibility of the bidders to determine if the Bidding Documents to be used in the re-bidding is the same or different from that used in the first failed bidding.

Considering that the preparation and development of a revised Bidding Documents may entail another set of costs and expenses upon the PE, they may deem it necessary to charge bidders anew. Therefore, the PE can still charge for the acquisition of Bidding Documents in the second bidding to cover the cost and expenses for its development after the conduct of the mandatory review and evaluation. On the other hand, the PE may likewise decide to simply distribute the bidding documents for free.

On Retention Money

Retention money is applicable only to Procurement of Goods and Infrastructure Projects as can be deduced from Section 62 of RA 9184 and its IRR.

On the release of retention money, it varies based on the type of procurement. For procurement of goods, the retention money shall only be released after the lapse of the warranty period or in the case of Expendable Supplies, after consumption thereof; provided that the supplies delivered are free from patent and latent defects and all the conditions

⁷ NPM No. 138-2013 dated 27 December 2013.

⁸ In case of projects involving mixed procurements, the nature of the procurement, i.e., goods, infrastructure projects, or consulting services, shall be determined based on the primary purpose of the contract.

⁹ NPM No. 029-2008 dated 23 September 2008.

¹⁰ NPM No. 68-2013 dated 27 June 2013.

¹¹ Section 35.2 of the IRR of RA 9184.

¹² Section 35.3 of the IRR of RA 9184.

imposed under the contract have been fully met.¹³ In the case of Infrastructure Projects, the total retention money shall be due for release upon final acceptance of the civil works.¹⁴

Lastly, refusal by the PE to release the retention money may be justified if all the conditions for its release are not fully met. However, unjust refusal to release the retention money when the required conditions are all present will subject the concerned official to applicable administrative and civil sanctions or liabilities under existing laws, rules and regulations.

On the Adjustment of Approved Budget for the Contract (ABC)

In the case of a failure of bidding, mandatory review and evaluation of the terms, conditions, and specifications in the bidding documents, including its cost estimates should be conducted by the BAC. Should the reason for the failed bidding be due to a low Approved Budget for the Contract (ABC), the BAC can adjust the ABC, subject to the required approvals and conduct of re-bidding with re-advertisement.

Summary

In sum, we wish to clarify the following matters relative to your concerns:

1. While the list of offices mentioned in Sec 11.2.3 of the IRR of RA 9184 is not exclusive, it is necessary that the BAC members shall come from the regular offices under the Office of the Local Chief Executive (LCE), except the Chief Accountant and any personnel from the Accounting Unit;
2. The LCE was given the discretion to designate the members of the BAC for the period of one (1) year, and to extend the terms of office of BAC Members granting that the extension will be most desirable and advantageous for the PE;
3. The periods for post qualification process mentioned in Section 34.8, *i.e.*, seven (7) calendar day and thirty (30) calendar day period, are mandatory in nature;
4. It is the PE who is in the best position to determine the correct classification of its procurement based on its identified needs, guided by the parameters and conditions in the relevant provisions of RA 9184 and its IRR on what should be considered as goods, infrastructure project or consulting services procurement;
5. The PE can charge fees to the bidders for the acquisition of Bidding Documents in the second bidding to cover the cost and expenses for its development after the conduct of the mandatory review and evaluation or it may decide to simply distribute the bidding documents for free;
6. Retention money is applicable only to Procurement of Goods and Infrastructure Projects, and may only be released to the contractors after satisfying the requirements of the IRR of RA 9184; and

¹³ Sec. 62.1 of the IRR of RA 9184

¹⁴ Section 6.2, Contract Implementation Guidelines for the Procurement of Infrastructure Project.

7. After the first failure of bidding, the BAC shall conduct mandatory review and evaluation of the terms, conditions, and specifications in the bidding documents, including its cost estimates, and can adjust the ABC, subject to the required approvals and conduct of re-bidding with re-advertisement.

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 you have further questions, please do not hesitate to contact us.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director V

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