

NPM No. 05-2008

30 April 2008

ROMEO S. REYES

Vice Chairman, BOD

**MARIKINA POLYTECHNIC COLLEGE TEACHER'S
AND EMPLOYEES' MULTI-PURPOSE COOPERATIVE**
Marikina City

Dear Mr. Reyes:

We respond to your letter dated 7 February 2008 requesting for opinion on whether the actions adopted by the Marikina Polytechnic College - Bids and Awards Committee (MPC-BAC) in the procurement of the canteen services for the college is in accordance with Republic Act 9184 (R.A. 9184) and its Implementing Rules and Regulations Part A (IRR-A).

At the outset, please be advised that the determination of the legality and/or propriety of the actions and decisions of the BAC, through the conduct of an investigation, is not within the express mandate of this office. The Government Procurement Policy Board (GPPB), likewise, has no authority to act for and decide in behalf of the BAC or the Head of the procuring entity concerned.

The GPPB is an administrative body imbued with *quasi-legislative* or rule-making power¹ to determine policy directions in the area of public procurement. Although under the law, it is the function of the GPPB to ensure the proper implementation of R.A. 9184, and its IRR-A and all other relevant rules and regulations pertaining to public procurement, it must be noted that the GPPB has no *quasi-judicial*² powers. It has no jurisdiction to rule over actual controversies with regard to the conduct of the bidding. Considering that the issues raised, based on the representations you made, would necessarily call for an adjudication upon the merits and an examination of the veracity of the events that transpired during the bidding, we believe that the matters are beyond the GPPB's jurisdiction to resolve.

¹ Rule-making power of administrative agencies refers to the power to issue rules and regulations which result from delegated legislation in the administrative level. (See Agpalo, *Philippine Administrative Law*, 1999 Ed., p.137).

² Quasi-judicial is defined as a term applied to the actions or discretions of public administrative officers or bodies required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature. (See Agpalo, *Philippine Administrative Law*, 1999 Ed., p. 216 citing *Lupangco v. CA*, 160 SCRA 848 [1988]).

Consequently, the aforementioned issue is within the BAC's primary authority and discretion to resolve. However, aggrieved parties are not left without recourse because R.A. 9184 and its IRR-A provides for the protest mechanism to settle issues arising from its implementation.

Section 55 of R.A. 9184 specifically states that the decisions of the BAC with respect to the conduct of bidding may be protested in writing to the head of the procuring entity (HOPE), provided that a motion for reconsideration has first been filed and resolved. Thereafter, the regional trial court shall have jurisdiction over final decisions of the HOPE. These court actions shall be governed by Rule 65 of the 1997 Rules of Civil Procedure³.

We trust that this clarifies matters. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,


EMILUISA C. PEÑANO
Executive Director II

³ Section 58, IRR-A of R.A. 9184



Marikina Polytechnic College Teachers' and Employees' Multi-Purpose Cooperative
Marikina C

February 7, 2008

LEGAL DEPARTMENT
Government Procurement Policy Board
Manila

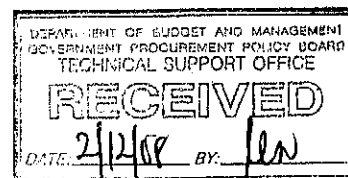
Envy,
Pls. handle. Begin on
behalf of the office.
RJ 2/25/08

Sir:

The Marikina Polytechnic College Teachers' and Employees' Multi-Purpose Cooperative (MPCTEMPC) would like to seek your opinion regarding the procurement procedure that the MPC-BAC implemented for the procurement of canteen services of our college—Marikina Polytechnic College—during the second bid proceedings as well as the third bid proceedings of this particular procurement project. The first bid proceeding was declared a failure because nobody participated in the bidding due to the Php 40,000.00 ABC that BAC set for the canteen concessionaire procurement project.

1. MPCTEMPC ...

- a. ...participated in the second bid proceedings
- b. ...asked to see the concessionary contract during the pre-bid conference because this was not included in the bid documents; MPC-BAC said it will just follow
- c. ...was found eligible by MPC-BAC
- d. ...was given the Notice of Award on June 26, 2007 but the date on the NOA reflects June 22, 2007
- e. ... accepted and signed the ante-dated (June 22, 2007) Notice of Award on June 26, 2007 and was verbally instructed to post the Performance Security before the contract is to be released
- f. ...paid the Performance Security on June 26, 2007
- g. ...was given the Lease Contract on June 26, 2007 and was asked to sign the contract with strict instructions to immediately sign and not to let anyone see the contract. The contract did not bear the signature of the LCE at that time. There was also no provision or section in the Contract where witnesses could affix their signature.
- h. ...reacted strongly regarding the manner with which the LCE is obtaining the signature of the cooperative by writing a letter pointing out that the contracting parties need to sit down in order to negotiate the stipulations in the Lease Contract. The cooperative also pointed out that the advertisement of this procurement project categorically states CANTEEN CONCESSIONAIRE therefore a CONCESSIONARY CONTRACT should be given and not a LEASE CONTRACT
- i. ...earned the ire of the LCE so he forwarded the letter to MPC-BOARD OF TRUSTEES; MPC-BOT, on their August 11, 2007 letter informed the cooperative that the AWARD IS JUST AN OFFER and that it is withdrawing the AWARD because of the comments and suggestions that are unacceptable to them
- j. ...met with the LCE on August 30, 2007 and was instructed to write a position paper appealing the decision of the BOT to withdraw the AWARD
- k. ...appealed to the MPC-BOT to reconsider
- l. ...attended the meeting with the canteen core committee where the stipulations in the contract were discussed
- m. ...complied and submitted a new copy of the Lease Contract this time reflecting the consensus of the group; the cooperative even submitted a proposed concessionary contract for the canteen core committee's perusal
- n. ...received another letter on November 14, 2007 informing the cooperative that the MPC-BOT has reiterated its resolution to withdraw the award and to proceed with the rebidding of the canteen concessionaire.
- o. ...board of directors pass a resolution to write a letter to the LCE as response to the November 14, letter but due to a lot of activities in the college especially so that the christmas break is almost upon us, letter did not reach the LCE
- p. ...learned that the MPC-BAC has posted another readvertisement for the canteen concessionaire procurement project on December 22, 2007—Saturday and first day of the Christmas Break



- q. ...wrote a letter of inquiry addressed to the chairman of MPC-BAC on January 3, 2008 reminding it that the project has already been awarded to the cooperative and that the cooperative has already posted the Performance Security and that the matter is under dispute and further discussion if the exchange of letters between the cooperative and the LCE were any indication
- r. ...received the answer of the LCE reminding the cooperative that the award has been withdrawn as per August 11 letter and informed the cooperative that the MPC-BAC has passed a resolution declaring failure of bidding
- s. ...found out that the resolution declaring failure of bidding was ante-dated and that there was no formal meeting when BAC declared this. Further, the resolution to declare failure of bidding happened after the posting of the re-advertisement to a newspaper on December 22, 2008. This means that this was done during the christmas break.

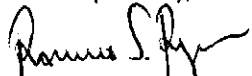
2. MPC-BAC...

- a. ...posted the third IAEB for the canteen concessionaire on December 22, 2007 and passed a resolution to declare failure of bidding for the second bid proceedings afterwards. Below is the IEAB that MPC-BAC posted.
- b. ...conducted bid activities even on a Sunday
- c. ...opened bid envelopes eventhough there was no quorum since there were only two BAC members present
- d. ...declared a winner eventhough there were only two BAC members present
- e. ...BAC secretary gave access and even accompanied the 'winning bidder' last **January 24-25, 2008, a Thursday and a Friday**, to the canteen premises so the 'winning bidder' can personally tell a faculty who has been using the area as a foods laboratory classroom for this semester to vacate the premises because they will clean the premises and they will bring in their own equipment and utensils
- f. ...opened the canteen premises on **January 26, 2008, Saturday**, to give way to the 'winning bidder' to clean the area and to bring in his/her own equipment and utensils inside the canteen premises eventhough the 'winning bidder' has not signed the contract yet, has not posted the Performance Security yet, and has no NOTICE TO PROCEED yet
- g. ...allowed the 'winning bidder' to start canteen operations on **January 28, 2008** with only three (3) tables and a number of chairs only despite the absence of the proper documents and non-payment of Performance Security
- h. ...BAC Secretary verbally admitted to the fact that indeed there were only two BAC members present at the time the bid envelopes were opened and a 'winner' was declared.
- i. ...the 'winning bidder' verbally admitted too last **January 26, 2008** the fact that there was no contract signing yet since they were trying to negotiate some stipulations in the contract and that the Performance Security has not been posted yet

Are the foregoing in accordance with the established procedure in the conduct of the procurement of services? A reading of the Procurement Manual has taught us the PROPER PROCEDURE that MPC-BAC should have done in this procurement project but we do not profess to be an expert in this field so the cooperative thought it best to seek your advise regarding the best way to proceed. If it is within your mandate to intervene in this particular case, we would like to seek your help so this matter can finally be settled. We feel helpless though because we have read in the PROCUREMENT MANUAL that investigations to be conducted involving BAC activities would rely solely on the documents in BAC's possession. Given our experience that BAC, in actual and in fact, antedates documents, we are greatly apprehensive that they may have already ante-dated the documents to cover their tracks. We hope you could help set this right.

We pray for immediate response.

Yours respectfully,


 ROMEO S. REYES
 Vice Chairman, BOD, MPCTEMPC


 MARIA ROSARIO C. SOMERA
 Chairman, BOD, MPCTEMPC