

**NPM No. 08-2009**

2 February 2009

**MR. ALFREDO G. GABOT**  
*Member, Board of Directors*  
*Chairman, Bids and Awards Committee*  
**PHILIPPINE POSTAL CORPORATION**  
Liwasang Bonifacio, Manila

**Re : Constitution of the BAC, BAC Secretariat and TWG**

Dear Mr. Gabot:

This pertains to your letter dated January 7, 2009 requesting clarification as to whom, the power to constitute and appoint membership in the Bids and Awards Committee (BAC), BAC Secretariat and Technical Working Group (TWG) in a government corporation such as the Philippine Postal Corporation (Philpost), is vested.

Based on your letter, we gather the following factual antecedents:

1. The one (1) year term<sup>1</sup> of the Philpost BAC, including the TWG and the Secretariat ended last 14 December 2008 pursuant to Philpost Office Order No. 07-83-85;
2. On 11 December 2008, Postmaster General and Chief Executive Officer Hector RR. Villanueva, reconstituted and designated the members of the new BAC through a Memorandum, whose terms took effect last 15 December 2008, and which are bound to expire one (1) year thereafter;
3. That in the aforecited Memorandum, the Postmaster General designated the Chairman, the four (4) members of the BAC, the head and the four (4) members of the TWG, and the head of the BAC Secretariat and the four (4) members thereof;
4. That contrary to the provisions of R.A. 9184<sup>2</sup>, the said Memorandum designating the members of the BAC was allegedly issued without the prior authorization and approval of the Philpost Board of Directors.

<sup>1</sup> In compliance with Section 11, Rule V of R.A. 9184 prescribing the fixed term of the BAC members to one (1) year to be reckoned from the date of appointment

<sup>2</sup> Section 5, (j), Rule I; and Sections 11, 11.2.1.5 and 14, Rule V of the IRR-A of R.A. 9184.

Thus, Philpost now seeks to clarify whether, the Head of the Procuring Entity (HOPE) authorized to designate the members of the BAC,<sup>3</sup> refers to the head of the government corporation, the Postmaster General in this case, or the Board of Directors.

Further, you wish to inquire on the legal ramifications of the designations made by the Postmaster General should the Board of Directors be adjudged as the HOPE duly authorized to make the said appointments.

### **Constitution of the BAC, Secretariat and TWG**

The *Implementing Rules and Regulations Part- A (IRR-A) of Republic Act No. 9184 (R.A. 9184)* otherwise known as the *Government Procurement Reform Act* is clear under Section 11.2.1.5 par. 2, that,

*“The members of the BAC, including the Chairman and the Vice-Chairman, shall be designated by the head of the procuring entity.”*

Likewise, it is the HOPE that shall also create a permanent BAC Secretariat which will serve as the main support unit of the BAC. For this purpose, it has the discretion of creating a new office or merely designating an existing organic office with such functions.<sup>4</sup>

With regard to the creation of the TWG, however, it is within the legal mandate of the BAC to create the same from a pool of technical, financial and/or legal experts to assist in the procurement process.<sup>5</sup> TWG members tasked to aid, particularly, in the eligibility screening, evaluation of bids and post-qualification, may be selected on the basis of the proficiency required and the nature of the procurement to be undertaken.<sup>6</sup>

### **Definition of “Head of the Procuring Entity”**

As to your first query, the definition of the HOPE is clearly stated in the law. Witness Section 5 (m) Rule I of the IRR-A:

Section 5 (m) *Head of the Procuring Entity*. Refers to: (i) the head of the agency or body, or his duly authorized official, for NGAs and the constitutional commissions or offices, and branches of government; (ii) **the governing board or its duly authorized official, for GOCCs, GFIs and SUCs**; or (iii) the local chief executive, for LGUs; *Provided, however*, That in an agency, department or office where the procurement is decentralized, the Head of each decentralized unit shall be considered as the head of the procuring entity subject to the limitations and authority delegated by the head of the agency, department or office. (Emphasis ours)

It is manifest from the abovementioned provision that for government-owned and – controlled corporations (GOCCs), the “Head of the Procuring Entity” mentioned in the Rules,

<sup>3</sup> As mentioned in Section 11.2.1.5 par. 2 of IRR-A.

<sup>4</sup> Section 14.1, IRR-A.

<sup>5</sup> Section 12.1, IRR-A.

<sup>6</sup> Generic Procurement Manual – Guidelines on the Establishment of Procurement Systems and Organizations, p. 18. July 2006.

including the provisions on the designation of the BAC and BAC Secretariat members, refers to the governing board or the Board of Directors, or its duly authorized official.

Thus, it is the Board of Directors, which has the authority to make the appointments in question, provided that the qualifications<sup>7</sup> of the BAC members required under the law are validly complied with. The Postmaster General, therefore, cannot legitimately designate members of the BAC unless he is armed with the Board resolution duly authorizing him for said purpose.

### **Designations by the Postmaster General**


In light of the foregoing, the Postmaster General may be said to have committed an *ultra vires* act, or an act beyond the scope of his authority, since it is the Board of Directors which is mandated by R.A. 9184 to perform the said task. This is in accordance with the primary rule under the corporate set-up that in the absence of authority from the board of directors, no person, not even the officers of the corporation, can validly bind the corporation.<sup>8</sup>

An *ultra vires* act refers to an action committed outside the object for which a corporation is created as defined by the law of its creation,<sup>9</sup> or an act beyond the scope or in excess of the legal power or authority of a corporation, corporate officer, etc.<sup>10</sup> It should be distinguished from an illegal act for the former is merely voidable which may be enforced by performance, ratification, or estoppel, while the latter is void and cannot be validated.<sup>11</sup> This ratification, however, that would bind the corporation would have to come from the board of directors or a properly authorized representative.<sup>12</sup>

In relation to the foregoing, and in view of the facts presented, it is the opinion of this Office, without prejudice to the proviso of Republic Act No. 7354 (R.A. 7354) or the *Postal Service Act of 1992, its By-laws*, and other relevant laws, that the designation of the BAC members made by the Postmaster General, shall be deemed voidable, unless they are ratified by the Board of Directors. Correspondingly, the designations of the TWG members are likewise annulable, unless ratified by the BAC members to be selected by the Board of Directors.

We trust that this clarifies matters.

Very truly yours,

  
for **RUBY U. ALVAREZ**  
Executive Director III

<sup>7</sup> Section 11.2.1, Items 1 to 5, IRR-A.

<sup>8</sup> Villanueva, Cesar L. *Philippine Corporate Law* (2001), p. 171.

<sup>9</sup> Agpalo, Ruben E. *Agpalo's Legal Words and Phrases*. 1997, p. 765.

<sup>10</sup> Randomhouse Webster's Unabridged Dictionary. 2001.

<sup>11</sup> Republic of the Philippines vs. Acoje Mining Co., Inc. G.R. No. L-18062. February 28, 1963.

<sup>12</sup> Villanueva, Cesar L. *Philippine Corporate Law* (2001), p. 168.



*Pls. finalize*  
*14.01.09*

## TECHNICAL SUPPORT OFFICE

Unit 2506 Raffles Corporate Center,  
F. Ortigas Jr. Avenue, Ortigas Center,  
Pasig City, Philippines 1605

15 January 2009

**MR. ALFREDO G. GABOT**  
Member, Board of Directors  
Chairman, Bids and Awards Committee  
**PHILIPPINE POSTAL CORPORATION**

**Re : Constitution of the BAC, BAC Secretariat and TWG**

Dear Mr. Gabot:

This pertains to your letter dated January 7, 2009 requesting clarification as to whom, the power to constitute and appoint membership in the Bids and Awards Committee (BAC), BAC Secretariat and Technical Working Group (TWG) in a government corporation such as the Philippine Postal Corporation (Philpost), is vested.

Based on your letter, we gather the following factual antecedents:

1. The one (1) year term<sup>1</sup> of the Philpost BAC, including the TWG and the Secretariat ended last 14 December 2008 pursuant to Philpost Office Order No. 07-83-85;
2. On 11 December 2008, Postmaster General and Chief Executive Officer Hector RR. Villanueva, reconstituted and designated the members of the new BAC through a Memorandum (footnote), whose terms took effect last 15 December 2008, and which are bound to expire one (1) year thereafter;
3. That in the aforementioned Memorandum, the Postmaster General designated the Chairman, the four (4) members of the BAC, the head and the four (4) members of the TWG, and the head of the BAC Secretariat and the four (4) members thereof;

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<sup>1</sup> In compliance with Section 11, Rule V of R.A. 9184 prescribing the fixed term of the BAC members to one (1) year to be reckoned from the date of appointment

4. That contrary to the provisions of R.A. 9184<sup>2</sup>, the said Memorandum designating the members of the BAC was allegedly issued without the prior authorization and approval of the Philpost Board of Directors.

Thus, Philpost now seeks to clarify whether, the Head of the Procuring Entity (HOPE) authorized to designate the members of the BAC,<sup>3</sup> refers to the head of the government corporation, the Postmaster General in this case, or the Board of Directors.

Further, you wish to inquire <sup>on</sup> the legal ramifications of the designations made by the Postmaster General should the Board of Directors be adjudged as the HOPE duly authorized to make the said appointments.

### **Constitution of the BAC, Secretariat and TWG**

The *Implementing Rules and Regulations Part- A (IRR-A)* of Republic Act No. 9184 (R.A. 9184) otherwise known as the *Government Procurement Reform Act* is clear under Section 11.2.1.5 par. 2, that,

*“The members of the BAC, including the Chairman and the Vice-Chairman, shall be designated by the head of the procuring entity.”*

Likewise, it is the HOPE that shall also create a permanent BAC Secretariat which will serve as the main support unit of the BAC. For this purpose, it has the discretion of creating a new office or merely designating an existing organic office with such functions.<sup>4</sup>

With regard to the creation of the TWG, however, it is within the legal mandate of the BAC to create the same from a pool of technical, financial and/or legal experts to assist in the procurement process.<sup>5</sup> TWG members tasked to aid, particularly, in the eligibility screening, evaluation of bids and post-qualification, may be selected on the basis of the proficiency required and the nature of the procurement to be undertaken.<sup>6</sup>

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Section 5 (m) *Head of the Procuring Entity*. Refers to: (i) the head of the agency or ~~the~~ body, or his duly authorized official, for NGAs and the

<sup>2</sup> Section 5, (j), Rule I; and Sections 11, 11.2.1.5 and 14, Rule V of the IRR-A of R.A. 9184.

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<sup>4</sup> Section 14.1

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constitutional commissions or offices, and branches of government; (ii) **the governing board or its duly authorized official, for GOCCs, GFIs and SUCs**; or (iii) the local chief executive, for LGUs; *Provided, however*, That in an agency, department or office where the procurement is decentralized, the Head of each decentralized unit shall be considered as the head of the procuring entity subject to the limitations and authority delegated by the head of the agency, department or office. (Emphasis ours)

It is manifest from the abovementioned provision that for government-owned and -controlled corporations (GOCCs), the "Head of the Procuring Entity" mentioned in the Rules, including the provisions on the designation of the BAC and BAC Secretariat members, refers to the governing board or the Board of Directors, or its duly authorized official.

Thus, it is the Board of Directors, which has the authority to make the appointments in question, provided that the qualifications<sup>7</sup> of the BAC members required under the law are validly complied with. The Postmaster General, therefore, cannot legitimately designate members of the BAC unless he is armed with the Board resolution ~~therefor~~ *duly authorizing him for said purpose*.

#### **Designations by the Postmaster General**

In light of the foregoing, the Postmaster General may be said to have committed an *ultra vires* act, or an act beyond the scope of his authority, since it is the Board of Directors which is mandated by R.A. 9184 to perform the said task. This is in accordance with the primary rule under the corporate set-up that in the absence of authority from the board of directors, no person, not even the officers of the corporation, can validly bind the corporation.<sup>8</sup>

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In relation to the foregoing, and in view of the facts presented, it is the opinion of this Office, without prejudice to the proviso of Republic Act No. 7354 (R.A. 7354) or *Postal Service Act of 1992, its By-laws*, and other relevant laws, that the designation of

<sup>7</sup> Section 11.2.1, Items 1 to 5, IRR-A.

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the BAC members made by the Postmaster General, shall be deemed voidable, unless they are ratified by the Board of Directors. Correspondingly, the designations of the TWG members are likewise annulable, unless ratified by the BAC members to be selected by the Board of Directors.

We trust that this clarifies matters.

Very truly yours,

**RUBY U. ALVAREZ**  
*Executive Director III*

Atty. Alvarez,

~~Re~~ draft reply. Answer in the Board - Directors, as the HOPE.

Check also the possibility of the BOD ratifying the actions of the Postmaster Gen/GO.

FROM : PPC-BOD/CORSEC

FAX NO. : 5270045

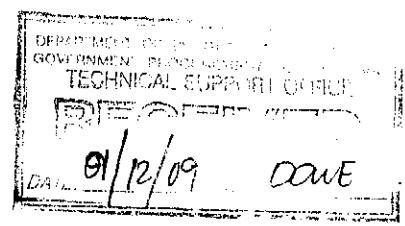
Enrico, 74 pp/1/10/09  
Also handle. Let's  
prioritize. begin in my behalf  
1/10/09

Republic of the Philippines  
**PHILIPPINE POSTAL CORPORATION**

**PHILPOST**  
OFFICE OF THE BOARD OF DIRECTORS

January 7, 2009

**HON. ROLANDO G. ANDAYA**  
Secretary of Budget and Management &  
Chairman of Government Procurement Policy Board  
Unit 2506 Raffles Corporate Center  
F. Ortigas Jr. Road, Ortigas Center  
Pasig City



Attn: Atty. Ruby U. Alvarez

Re: Request for Opinion on Head of Procuring Entity

Dear Secretary Andaya,

May we request for clarification on the issue as to who has the power to constitute and appoint membership in the Bids and Awards Committee, BAC Secretariat and Technical Working Group in a government corporation like the Philippine Postal Corporation.

On December 11, 2008, Postmaster General and Chief Executive Officer Hector RR. Villanueva, without due consultation with the Board of Directors, which is the Head of Procuring Entity (HOPE) as provided for by Republic Act RA 9184, headed by its Chairman of the Board, Atty. Franco L. Loyola, or its members, issued a memorandum (a copy of which is attached) to the Chairman and Members, Board of Directors, on the subject "Reconstitution of the Bids and Awards Committee Philippine Postal Corporation," in which he stated:

"The term of the present Bids and Awards Committee including the Technical Working Group and Secretariat shall end on 14 December 2008 pursuant to Philpost Office Order Nos. 07-83-85 and in compliance to item 11.2.4, Section II of RA 9184 (Government Procurement Reform Act) which states the Committee shall have a fixed term of one (1) year.

Relative to this, the Bids and Awards Committee has been reconstituted xxx"

The Postmaster General also stated in the memorandum:

"The designation of the BAC members including the TWG and Secretariat shall be effective 15 December 2008 and shall also be for a



fixed term of one (1) year. Xxx For the information of the Board of Directors.”

In the above-cited memorandum, the Postmaster General in effect designated, instead of the Board of Directors as Head of Procuring Entity, the Chairman and the four (4) members of the BAC; the head of the Technical Working Group and four (4) members; and the BAC Secretariat head and four (4) members.

The Postmaster General had also designated the previous Chairman and Members of the BAC as well as the head and members of the BAC TWG and BAC Secretariat. **May we point out that the same designation was made only by the Postmaster General and was not passed upon and approved by the Board of Directors.**

Upon perusal of The New Government Procurement Law of 2003, Republic Act No. 9184, the Board believes it has the power to constitute and appoint membership in the BAC based on the following:

Article I Section 5 (j) of the said law provides:

(j) Head of Procuring Entity – refers to: (i) the head of the agency of his duly authorized official, for national government agencies; (ii) **the governing board or its duly authorized official, for government-owned and/or controlled corporation; xxx.**

The Implementing Rules and Regulations of RA 9184 on the same states:

(m) Head of Procuring Entity. Refers to: (i) the head of the agency or body, or his duly authorized official, for NGAs and the constitutional commissions or offices, and branches of government; (ii) **the governing board or its duly authorized official, for GOCCs, GFIs and SUCs; xxx**

Article V, Section 11 of RA 9184 provides:

“Sec. 11. The BAC and its Composition. Each procuring entity shall establish a single BAC for its procurement. The BAC shall have at least five (5) members, but not more than seven (7) members. **Xxx The members of the BAC shall be designated by the Head of Procuring Entity.xxx**”

Section 14 of Article V also provides:

“Sec. 14. BAC Secretariat. To assist the BAC in the conduct of its functions, **the Head of Procuring Entity shall create a Secretariat** that will serve as the main support unit of the BAC. The Head of Procuring Entity may also designate an existing organic office within the agency to serve as the Secretariat.”

The IRR on the subject, Section 11.2.1.5 states:

***"The members of the BAC, including the Chairman and the Vice-Chairman, shall be designated by the head of procuring entity.xxx In addition, Section 11.2.4 also states: "Unless sooner removed for a cause, the members of the BAC shall have fixed term of one (1) year reckoned from the date of appointment, renewable at the discretion of the head of procuring entity."***

In the Philippine Postal Corporation, it is the Board of Directors which has been exercising the duties and responsibilities of a HOPE or Head of Procuring Entity in keeping with RA 9184.

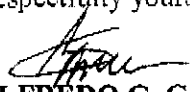
In light of the above-cited facts and consideration, we, the Board of Directors, the Head of Procuring Entity (HOPE) in our Corporation, deemed it fit to submit this query on the matter so that the Board of Directors and the Postmaster General, who is the Vice Chairman of the Board of Directors, and this Corporation maybe guided accordingly in the coming months of our official functions and operations.

May we also inquire, in the event of finding the Board of Directors as HOPE as mandated by RA 9184 and has authority to constitute the BAC and designate or appoint its head and members, what will be the consequence and effect of designation made by the Postmaster General on December 11, 2008 and the prior year?

We hope that you could guide us as soon as possible on the matters in question so that we, as responsible officers of our Corporation, can work together harmoniously in the interest and good of our Corporation all in accordance with law.

By authority of the Board of Directors, I remain.

Respectfully yours,

  
**ALFREDO G. GABOT**  
Member, Board of Directors  
Chairman, Committee on BAC

cc: Chairman Franco I. Loyola  
Board of Directors  
Corporate Secretary  
File