

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

NPM No. 102-2014

3 November 2014

HON. JOSEPH Y. DELA CRUZ

Assistant Administrator

Chairman, Bids and Awards Committee (BAC)

NATIONAL FOOD AUTHORITY (NFA)

Philippine Sugar Center Bldg., North Avenue,
Diliman, Quezon City

Re: Officer-in-Charge as Head of Procuring Entity

Dear Assistant Administrator Dela Cruz:

This refers to the Honorable Assistant Administrator's letter, requesting opinion regarding the approving authority of the NFA Officer-in-Charge (OIC).

It is represented that before the designation as the NFA-OIC, Assistant Administrator Efren J. Sabong was the Vice-Chairperson of NFA-BAC. Thus, the following issues were raised:

1. Whether the NFA-OIC is considered as the Head of the Procuring Entity (HOPE) of NFA?
2. Whether the NFA-OIC can sign/approve BAC Resolutions (i.e. recommending the change of procurement modality or amendment of APP), Notices of Award (NOA), Contract Agreements and Notice to Proceed, that were undertaken when he was the Vice-Chairperson of the BAC;
3. Whether the NFA-OIC can approve NOA, Contract Agreements, NTP and other documents related to NFA's on-going and future bidding activities?

OIC as HOPE

HOPE under Section 5(t) of the IRR of RA 9184 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 supplied)

On the other hand, Section 6 of Presidential Decree No. 1770¹ vests upon the Administrator the management of NFA, thus:

The Management of the Authority shall be vested in an Administrator who shall have the rank of a Minister and shall be assisted by two (2) Deputy Administrators and as many Assistant Administrators as may be determined by the Council and whose respective qualifications shall be the same as those provided for in the said Decree. (Emphasis supplied.)

As held in the case of *Binamira v. Garrucho*², 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*³, 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.

In a previous opinion⁴, this office explained that 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 contain specific reservations, limitations, or qualifications on the functions, duties, and responsibilities to be performed.

The Assistant Administrator designated as the NFA-OIC could be considered as the HOPE, but his powers and authority shall depend on the nature of his designation, that is, whether the designation contains specific reservations, limitations or qualifications on the functions, duties, and responsibilities to be performed as NFA-OIC, which could validly affect his functions or authority as a HOPE.

Approval of BAC Resolutions, NOA and NTP

Supposing that there is no reservation on the designation as NFA-OIC that limits his authority as HOPE, the NFA-OIC may approve or sign BAC Resolutions, NOA and NTP of procurement projects undertaken by the new Bids and Awards Committee, provided that such were made in accordance with RA 9184 and its IRR.

However, the foregoing policy may not be applicable to procurement activities that were undertaken when the incumbent HOPE was a member of the BAC in light of Section 11.2.5 of the IRR of RA 9184, that reads:

In no case shall the Head of the Procuring Entity and/or the approving authority be the Chairman or a member of the BAC.

a. Award of Contract

Under Section 37.1.2 of the IRR of RA 9184, within a period not exceeding seven (7) calendar days from the date of receipt of the recommendation of award of contract from the BAC, the HOPE shall approve or disapprove the recommendation. In case of approval, the HOPE

¹ Reconstituting the National Grains Authority to the National Food Authority, Broadening its Functions and Powers and for other Purposes.

² G.R. No. 92008, dated 30 July 1990.

³ G.R. No. 78623, dated 17 December 1990.

⁴ NPM No. 14-2013, dated 1 March 2013.

shall immediately issue the NOA to the bidder with the Lowest Calculated Responsive Bid/Highest Rated Responsive Bid⁵.

In NPM No. 16-2009⁶, this office opined that the HOPE or his duly authorized authority may approve or disapprove the recommendation of the BAC as long as he is neither the Chairman nor a member of the BAC that rendered the recommendation. It bears stressing that the prohibition is intended to avoid any conflict of interest between the person who undertakes the 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 too⁷. We also noted that [t]he subject procurement is deprived of checks and balances as one of the persons conducting the bid evaluation and post-qualification, 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 HOPE⁸.

b. Change of the Mode of Procurement and Amendment of APP

Subject to prior approval of the HOPE, and whenever justified by the conditions provided in RA 9184 and its IRR, the procuring entity may, in order to promote economy and efficiency, resort to any of the alternative methods of procurement. Under Section 48.3 of the IRR of RA 9184, the method of procurement to be used shall be indicated in the approved APP. If the original mode of procurement recommended in the APP was public bidding, but cannot be ultimately pursued, the BAC, through a resolution, shall justify and recommend the change of mode of procurement, to be approved by the HOPE. This is to ensure that the conditions set forth by the IRR of RA 9184 on the resort to any of the alternative modalities are present.

Thus, similar to the recommendation of award of contract, the HOPE or his duly authorized representative may approve or disapprove the BAC's recommendation to change the mode of procurement and amendment of APP.

c. Notice to Proceed

As regards the issuance of NTP under Section 37.4.1⁹ of the IRR of RA 9184, distinction must be made between the approval, signing of contracts and NTP, such that the first refers to the affirmation by the HOPE of the BAC's recommendation, while the second and third pertain to the act of the HOPE in affixing his signature in the contract and the NTP. In an earlier opinion, this Office explained that the BAC Chairman, in his capacity as OIC General Manager, although bereft of authority to approve the award of contract, may sign the contract and issue the NTP, provided, that, the proper resolution is previously issued for the purpose¹⁰. Thus, the OIC as HOPE may sign the NTP of a project that was procured when he was a BAC member, as long as the contract has been duly awarded by the previous HOPE.

⁵ Section 37.1.3, IRR of RA 9184.

⁶ Dated 11 March 2009.

⁷ NPM No. 14-2013, dated 1 March 2013.

⁸ *Ibid.*

⁹ Section 37.4.1. The procuring entity shall issue the Notice to Proceed (NTP) together with a copy of the contract to the successful bidder within three (3) calendar days from the date of approval of the contract by the appropriate government approving authority. However, for infrastructure projects with an ABC of Fifty Million Pesos (P50,000,000) and below, the maximum period is two (2) calendar days. The contract effectivity date shall be provided in the Notice to Proceed by the procuring entity, which date shall not be later than seven (7) calendar days from its issuance.

¹⁰ NPM No. 16-2009, dated 11 March 2009.

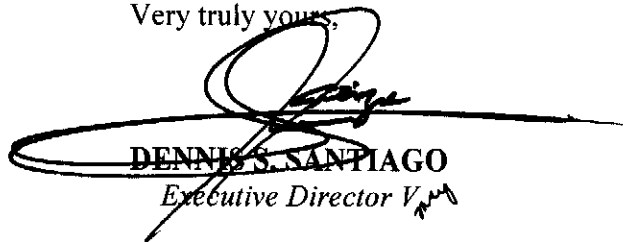
Summary

All told, it is the opinion of this Office that:

1. An Officer-In-Charge of an Agency may be considered as the Head of the Procuring Entity (HOPE) in accordance with Section 5(t) of the IRR of RA 9184, provided that his designation does not contain specific reservations, limitations or qualifications which may run counter to the functions or authority of a HOPE;
2. The incumbent HOPE may approve or disapprove the recommendation of the BAC, such as award of contract, as long as the HOPE is neither the Chairman nor a member of the BAC that rendered the recommendation pursuant Section 11.2.5 of the IRR of RA 9184.
3. The incumbent HOPE may sign the Notice to Proceed for a project that was awarded when he was a BAC member, but the contract must have been duly awarded by the previous HOPE.

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 there be other concerns, please do not hesitate to contact us.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director

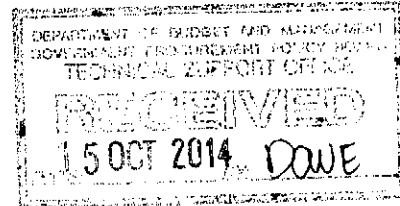
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NATIONAL FOOD AUTHORITY

Philippine Sugar Center Bldg., North Avenue, Diliman, Quezon City
Tel. No. (02) 453-3900/981-3800 to 30
Website: <http://www.nfa.gov.ph>

13 October 2014



ATTY. DENNIS S. SANTIAGO
Executive Director III
Department of Budget and Management
Government Procurement Policy Board (GPPB)
Technical Support services
Unit 2506 Raffles Corporate Center
F. Ortigas Jr. Road, Ortigas Center
Pasig City

*Koron,
who is assigned to prepare
the OPINION? Can we prioritize
this today? Send me the draft
opinion through email so I could
review ~~it~~ accordingly. Tsk. OS*

Dear Atty. Santiago,

This is a follow up anent our letter dated 01 October 2014 which was received by your office on 02 October 2014, seeking GPPB opinion regarding BAC matters as a result of the resignation of former NFA Administrator Arthur O. Juan, and the appointment of Assistant Administrator and the former BAC Vice Chairperson, Atty. Efren J. Sabong, as the Officer-in-Charge of the National Food Authority (NFA), effective 30 September 2014.

Hereunder are the issues which need immediate GPPB opinion:

1. Can Atty. Sabong, the newly appointed Officer-in-Charge of NFA, be considered as Head of the Procuring Entity (HOPE) of NFA's procurement activity?
2. If so, as HOPE, can Atty. Sabong sign/approve the following pending documents related to the biddings conducted by the BAC:
 - a. BAC Resolutions, such as, Resolution Recommending Approval in the Change of Mode of Procurement and Resolution Recommending Amendment in the 2014 APP, wherein he is one of the signatories as Vice Chairperson of the previous BAC?
 - b. Contract Agreements and Notices to Proceed (NTP) pertaining to the projects wherein only Notices of Award were signed by the former Administrator?
 - c. Notice of Award, Contract Agreement, Notice to Proceed of the project wherein he was a member of the BAC when the bidding was conducted?
3. As OIC, can Atty. Sabong now sign/approve as Head of the Procuring Entity (HOPE), Notice of Award, Contract Agreements, Notice to Proceed and other documents related to our on-going and future bidding activities?

NATIONAL FOOD AUTHORITY
Bids & Awards Committee – Secretariat
Quezon City

FAX COVER SHEET

TO : GPPB - DBM

ATTENTION : ATTY. DENNIS S. SANTIAGO

FAX NO : 900 6741-44

SUBJECT : LETTER OF CLARIFICATION (GPPB
OPINION)

No. of Pages incl. this Page: 3

Received By:

Printed Name & Signature

Name of Company

Date

Kindly acknowledge receipt and refax this to NFA-PPMD at tel. no. **9285573**.



NATIONAL FOOD AUTHORITY

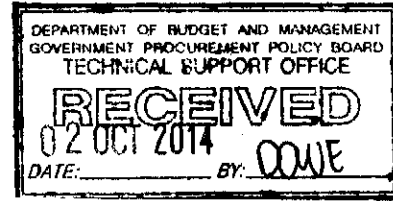
Philippine Sugar Center Bldg., North Avenue, Diliman, Quezon City
Tel. No. (02) 453-3900/981-3800 to 30
Website: <http://www.nfa.gov.ph>

NPM 16-2009
NPM 14-2013

01/15/15

01 October 2014

ATTY. DENNIS S. SANTIAGO
Executive Director III
Department of Budget and Management
Government Procurement Policy Board (GPPB)
Technical Support Services
Unit 2506 Raffles Corporate Center
F. Ortigas Jr. Road, Ortigas Center
Pasig City



Jan [unclear]
please prepare opinion.
The OIC in the HOPE, but
the authority to sign Ks shall be
limited to the powers granted.

Dear Atty. Santiago,

The irrevocable resignation of Administrator Arthur O. Juan and the recent appointment of Assistant Administrator, Atty. Efren J. Sabong, as Officer-in-Charge (OIC) of the National Food Authority, has created a vacuum in the composition of NFA's procurement arm, being the Vice Chairperson of the Bids and Awards Committee (BAC).

As such, may we seek you opinion regarding the following issues:

1. As the OIC, can Atty. Sabong be considered as the Head of the Procuring Entity (HOPE)?
2. If so, as HOPE can he sign/approve the pending documents, like the BAC Resolutions, such as, Resolution Recommending Approval in the Change of Mode of Procurement and Resolution Recommending Amendment in the 2014 APP, wherein he is one of the signatories as Vice Chairperson of the BAC? Likewise, can he also sign/approve the Notice of Award and Notice to Proceed pertaining to the projects undertaken by the BAC which were left unsigned by the former Administrator?
3. As the OIC, can he now sign/approve as Head of the Procuring Entity (HOPE), Notice of Award, Contract Agreements, Notice to Proceed and other documents related to our on-going and future bidding activities?

We will appreciate it very much if we could hear from you the soonest time.

Thank you very much and more power.

JOSEPH Y. DELA CRUZ
Chairman, Bids and Awards Committee &
Assistant Administrator



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. Magambal 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. Beards, 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".

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 Bears 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 NQA, 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 *Alinsagay 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 World*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.