

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

NPM No.115-2014

7 November 2014

MR. REYNULFO A. JUAN, CESO V
Regional Director
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
REGIONAL OFFICE NO. IV-A (DENR IV-A)
DENCRI Business Center, National Highway
Brgy. Halang, Calamba City, Laguna

Re: Contract Approval and the Reservation Clause

Dear Director Juan:

This refers to your letter requesting clarification on the application of Section 38.3 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184.

Per your representation, on 12 May 2014, DENR IV-A BAC forwarded its Resolution dated 31 March 2014 recommending award for the construction of DENR IV-A Regional Office Building. Before taking any final action, as Head of Procuring Entity (HOPE) you consulted experts from DENR Central Office and the Department of Public Works and Highways (DPWH), and inquired from the BAC on its compliance with the required bidding process as part of due diligence. The Chief of the Legal Division was also instructed to review the documents submitted and the processes undertaken. The HOPE then returned the Resolution to the BAC through a Memorandum dated 9 June 2014, reiterating previous verbal instructions to clarify issues on – 1) the qualification of bidders; 2) the Resolution recommending the declaration of failure of bidding; 3) the presence of observers during the course of the bidding process; and, 4) the post qualification process. Meanwhile, the Chief of the Legal Division recommended approval of the award of contract through a Memorandum dated 6 June 2014, which you returned with instructions to specify certain issues particularly the lapses observed in the bidding process. As of 30 June 2014, no final action on the BAC recommendation has been made, as the BAC and the Legal Division have not yet submitted the clarifications sought from them.

It is further represented that in a letter dated 17 June 2014, AQA Global Construction Inc. (AQA) demanded for the approval of the BAC recommendation to award within three (3) days in order that the Notice of Award be issued in its favor, citing Section 37.1.2¹ of the IRR of RA 9184. You likewise noted AQA's disclosure of its awareness of the

¹ Within a period not exceeding seven (7) calendar days from the receipt of the recommendation of the BAC, the Head of the Procuring Entity shall approve or disapprove the said recommendation. xxx .

recommendations of the BAC and the Legal Division to approve the award, which you consider as a violation of the “No Contact” rule. It is in this light that you raise the following issues for clarification:

1. Whether the inability of the Head of the Procuring Entity (HOPE) to take final action on the recommendation of the Bids and Awards Committee (BAC) within the prescribed period of the revised Implementing Rules and Regulations (IRR) of Republic Act No. (RA) 9184 will render the said recommendation impliedly approved;
2. Whether after the lapse of the period prescribed by the IRR of RA 9184, it is ministerial for the HOPE to approve BAC recommendation despite previous issues raised with regard to the bidding procedures; and
3. Whether the HOPE can invoke the Reservation Clause provided under Section 41 of the IRR of RA 9184 as legal justification for cancelling the contract, in case the HOPE disapproves the BAC recommendation to award a project based on the findings that the BAC failed to comply with the required bidding procedures.

Contract Approval

Under Section 38.3 of the revised IRR of RA 9184, a contract may be considered as deemed approved, only if **no action was taken by the HOPE** or the appropriate approving authority within the periods specified in the IRR of RA 9184.

Upon submission of the BAC’s Resolution recommending award of contract, the HOPE shall approve or disapprove the recommendation within a period not exceeding seven (7) calendar days from the date of its receipt.² As an initial action, the HOPE may conduct further review of the recommendation of the BAC during the same period, but it is mandatory that a decision of approval or disapproval be laid down before the lapse of the seven (7)-day period.

If after the lapse of the seven (7)-day mandatory period, no action was taken by the HOPE, application of Section 38.3 of the IRR of RA 9184 may, but not automatically, set in. It requires positive and unequivocal proof of inaction before the same may be rendered operative.³ The fact that said provision is by itself clear and unambiguous does not merit its automatic application *sans* evidence of the inaction relied on.⁴

The presence of the HOPE’s initial actions to the BAC recommendation controverts the requirement that **no action was taken by the HOPE**. The sole fact that the HOPE failed to make a final decision cannot be considered total inaction without unduly disregarding the initial actions already undertaken by the HOPE.

From the foregoing, it is our considered view that in the absence of the HOPE’s final action or decision relative to the recommendation of the BAC, a contract cannot be considered as deemed approved if the HOPE has taken initial steps or actions on the said recommendation.

² Section 37.1.2 of the IRR of RA 9184.

³ NPM NO. 64-2009 dated 14 December 2009.

⁴ *Ibid.*

Power to Approve/Disapprove Recommendation of the BAC

On the power of the HOPE to approve or disapprove the recommendations made by the BAC on the entire procurement process, we wish to stress that it is a discretionary act as distinguished from a purely ministerial act⁵. Thus, the nature of the power or function being performed by the HOPE is determined by the presence or absence of discretion as conferred by law, and not by the lapse of periods indicated in the rules.

The power is discretionary if the law confers to the HOPE the power to act officially according to the dictates of its own judgment and conscience, and not controlled by the judgment or conscience of others.⁶ On the other hand, it is ministerial if nothing is left to the discretion of the HOPE and the power is a simple definite duty arising under conditions admitted or proved to exist, and imposed by law.⁷ Considering that RA 9184 gives the HOPE the discretion to approve or disapprove the recommendation of the BAC to award a contract, such power is considered discretionary.

Moreover, the lapse of the period does not convert an originally discretionary act to a ministerial one, except for the rule on “approval” when the HOPE fails to take action on the BAC recommendation. This can be inferred from the fact that delay in actions to procurement activities is implicitly recognized under Section 65.1(b) of the IRR of RA 9184. In that, although the periods of action under RA 9184 and its IRR 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 delay⁸.

Based on the foregoing, the decision to approve or disapprove the recommendation of the BAC remains a discretionary act of the HOPE even after the lapse of the mandatory period. To argue otherwise would mean that the HOPE will be obligated to approve the recommendation of the BAC despite the existence of possible irregularities in the bidding process, which is not the intention of RA 9184.

Reservation Clause

It is explicit under Section 41 of the revised IRR of RA 9184 that the HOPE reserves the right to reject any and all bids, declare a failure of bidding, or not to award the contract if the BAC is found to have failed in following the prescribed bidding procedures among other grounds. To support this provision, the Invitation to Bid for all procurement projects includes a *Reservation Clause* to properly apprise the public about this reserved right of the HOPE.

In this regard, if it is determined that the BAC failed to comply with the required bidding processes and procedures, the HOPE can exercise its reserved right not to award the contract.⁹

⁵ NPM No. 118-2004 dated 27 August 2004.

⁶ De Leon, Hector S. and De Leon, Hector M. Jr., *Administrative Law: Text and Cases*, 2001 Edition, p. 65.

⁷ *Ibid.*

⁸ NPM No. 10-2012 dated 16 January 2012.

⁹ Section 41 of RA 9184 and its IRR.

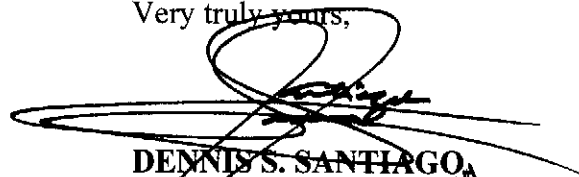
Summary

In sum, we wish to clarify the following matters, thus:

1. Failure or inability of the HOPE to take final action or decision on the recommendation of the BAC will not render such recommendation deemed approved when the HOPE has taken initial actions on the said recommendations within the prescribed period;
2. The HOPE may still exercise its discretion to approve or disapprove the recommendation of the BAC even after the lapse of the mandatory period; and
3. Failure of the BAC to comply with the prescribed procurement processes and procedures entitles the HOPE to avail of the Reservation Clause under Section 41 of the IRR of RA 9184.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is being 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 V

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