

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

Mezzanine 125, Mabini Hall, Malacañang, Manila
Telefax Nos. (02) 735-4962; (02) 736-5758

NPM No. 118-2004

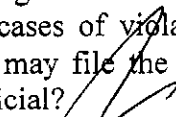
August 27, 2004

HON. FLORENTINA L. CONGSON
Acting City Mayor
General Santos City

Re : Queries on Republic Act No. 9184 (R.A. 9184) and its Implementing Rules and Regulations Part A (IRR-A)

Dear Mayor Congson:

This refers to your letter dated August 16, 2004, which we received through facsimile on August 18, 2004, requesting for clarification on the following issues:

1. Whether or not the act of changing the method that shall be used for a certain procurement by the Bids and Awards Committee (BAC), which method has already been approved by the head of the procuring entity is valid without passing through the latter again for approval or disapproval; (For e.g., from Alternative Mode of Procurement to Public Bidding.)
 2. Whether or not the head of the procuring entity has the discretion to disapprove the recommendations made by the BAC as regards the method of procurement to be used for all the agency's procurements;
 3. Whether or not the BAC may authorize an observer to negotiate and/ or source out suppliers;
 4. Whether or not the BAC may be subject to the legal sanctions prescribed in Section 65 of R.A. 9184 and its IRR-A in cases of violation of the provisions of the said Act. Consequently, who may file the appropriate complaints or actions against any erring BAC official?
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The BAC has recommendatory functions only

Section 12 of R.A. 9184 and its IRR-A is clear in illustrating the nature of the functions of the BAC as it provides that:

The BAC shall have the following functions: advertise and/or post the invitation to bid, conduct pre-procurement and pre-bid conferences, determine the eligibility of prospective bidders, receive bids, conduct the evaluation of bids, undertake post-qualification proceedings, resolve motions for reconsideration, **recommend award of contracts to the head of the procuring entity or his duly authorized representative; Provided, however, That in the event the head of the procuring entity shall disapprove such recommendation, such disapproval shall be based only on valid, reasonable and justifiable grounds to be expressed in writing, copy furnished the BAC; recommend the imposition of sanctions in accordance with Article XXIII / Rule XXIII of R.A. 9184 / IRR-A;** and perform such other related functions as may be necessary, including the creation of a Technical Working Group (TWG) from a pool of technical, financial and/or legal experts to assist in the procurement process, particularly in the eligibility screening, evaluation of bids and post-qualification. In proper cases, the BAC shall also **recommend to the head of the procuring entity the use of Alternative Methods of Procurement as provided for in Rule XVI hereof.**¹

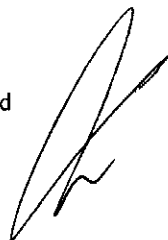
As can be gleaned from the aforequoted provision, the BAC does not perform the final act of awarding the contract to the winning bidder; neither does the BAC decide by itself that resort to alternative methods shall be made for a given procurement; nor does it have the authority to impose the administrative sanctions prescribed in Article XXIII and Rule XXIII of R.A. 9184 and its IRR-A, respectively, to those bidders who may have committed any of the offenses enumerated in the said provisions except in cases where such authority is delegated to the former by the head of the procuring entity.

It is observed that the BAC has recommendatory functions only; and the power to arrive at a legal, advantageous, and reasonable decision for the procuring agency is given to its head.

As such, it is clear that the BAC may only recommend that resort to alternative methods of procurement be made in certain cases; *while such recommendation is still subject to the approval of the head of the procuring entity as justified by the conditions set forth in R.A. 9184 and its IRR-A, and if consistent with the policy to promote economy and efficiency.*²

¹ Emphasis and Underscoring supplied

² See Section 48.1 of the IRR-A



On the other hand, there is no categorical mention in the law that the BAC shall also recommend to the head of the procuring entity the use of competitive bidding considering that, such being the general rule, it is always presumed that *all procurement shall be done through competitive bidding save only in cases provided under Rule XVI of the IRR-A*³. However, in a case where it has been approved by the head of the procuring entity that resort to alternative mode of procurement shall be made, but the BAC subsequently identifies that competitive bidding is more appropriate, and hence, recommends it, said recommendation should still be subject to the approval of the head of the procuring entity. This is so since any change in the procurement methods to be adopted as indicated in the Project Procurement Management Plan (PPMP) and the approved Annual Procurement Plan (APP), shall be reflected as an amendment or an update of the said PPMP and APP, which require and should bear the approval of the head of the procuring entity or a second-ranking official designated by him to act on his behalf.⁴

The Head of the Procuring Entity has the Discretion to Approve or Disapprove the Recommendations made by the BAC

It is readily inferred from the discussion above that the power of the head of the procuring entity to approve or disapprove the recommendations made by the BAC in the entire procurement process is a "discretionary act" as distinguished from a purely "ministerial act," as these terms are applied to public functionaries.

*If the law imposes a duty upon a public officer and gives him the right to decide how or when the duty shall be performed, such duty is discretionary and not ministerial. The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion or judgment.*⁵

Considering that the said function of the head of the procuring entity to approve any recommendation from the BAC is obviously one that requires the exercise of official discretion or judgment, it necessarily follows that it is incumbent upon the former to approve or disapprove the recommendations made by the BAC based on reasonable and justifiable grounds provided in the same procurement law, rules and regulations.

Observers Cannot Negotiate and/or Source Out Suppliers for the Procuring Agency

Section 13.4 of the IRR-A provides for the responsibilities of the Observers as follows:

1. Preparation of the report either jointly or separately indicating their observations made on the bidding activity conducted by the BAC for submission to the Head of the Procuring Entity;

³ Ibid., Section 10

⁴ See Section 7.2 of the IRR-A

⁵ Regalado, *Remedial Law Compendium Volume I*, Seventh Revised Ed. p. 714 citing *Samson vs. Barrios*, 63 Phil. 198, *Lemi vs. Valencia*, L-20768, Nov. 29, 1968, *Meralco Securities Corp. vs. Savellano et al.*, L-36181, Oct. 23, 1982

2. To sign the abstract of bids if, in their independent observation, the bidding activity conducted by the BAC followed the correct procedure as indicated in the IRR-A;
3. To sign the post-qualification summary report if, in their independent observation, the BAC followed the procedure as indicated in the IRR-A and that the observer is amenable to the results of the post-qualification.

Nowhere from the aforementioned responsibilities can the function of negotiating or dealing with prospective bidders in behalf of the procuring agency be associated. It must be noted that the role of the observers is to sit and monitor, as an independent body, in all stages of the procurement process conducted by the BAC. Observers are supposed to have independent reports and observations as to the procurement activities of the procuring agency, particularly, with respect to the compliance of the BAC with the prescribed procurement law, rules and regulations.

As such, the policy behind the law that the observers should be independent and free from undue influence of the procuring agency which they are tasked to monitor would be weakened and undermined if these observers would be allowed to have direct and active participation in the procurement negotiations and dealings of the same procuring agency.

Members of the BAC, including its Chairman, if warranted, are subject to the Penal Sanctions Prescribed in Rule XXI of the IRR-A

Section 65.1 of the IRR-A is quoted hereunder, to wit:

Without prejudice to the provisions of R.A. 3019 and other penal laws, **public officers** who commit any of the following acts shall suffer the penalty of imprisonment of not less than six (6) years and one day (1) day, but not more than fifteen (15) years:

1. Opening any sealed Bid including but not limited to Bids that may have been submitted through the electronic system and any and all documents required to be sealed or divulging their contents, prior to the appointed time for the public opening of Bids or other documents.
2. Delaying, without justifiable cause, the screening for eligibility, opening of bids, evaluation and post evaluation of bids, and awarding of contracts beyond the prescribed periods of action provided for in this IRR-A.
3. Unduly influencing or exerting undue pressure on any member of the BAC or any officer or employee of the procuring entity to take a particular action which favors, or tends to favor a particular bidder.
4. Splitting of contracts which exceed procedural purchase limits to avoid competitive bidding or to circumvent the limits of approving or procurement authority.

5. Abuse by the head of the procuring entity of his power to reject any and all bids as mentioned under Section 41 of the Act and this IRR-A, with manifest preference to any bidder who is closely related to him in accordance with Section 47 of the Act and this IRR-A.

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In addition, **the public officer involved shall also suffer the penalty of temporary disqualification from public office**, while the private individual shall be permanently disqualified from transacting business with the Government.

(Emphasis and Underscoring supplied)

Undoubtedly, the members of the BAC including its Chairman are covered by the term "*public officers*"⁶ who are being referred to in the aforequoted provision, considering that the aforementioned offenses basically relate to the responsibilities and functions of the BAC as provided under R.A. 9184 and its IRR-A. Hence, any member of the BAC including its Chairman, who is proved to have committed any of the offenses specified above shall be subject to the principal and accessory penalties so provided.

In this connection, further, any person who has a "*cause of action*"⁷ against the erring BAC officials may file the appropriate complaint with the regular courts of justice.

Conclusion

In view of the foregoing, we conclude as follows:

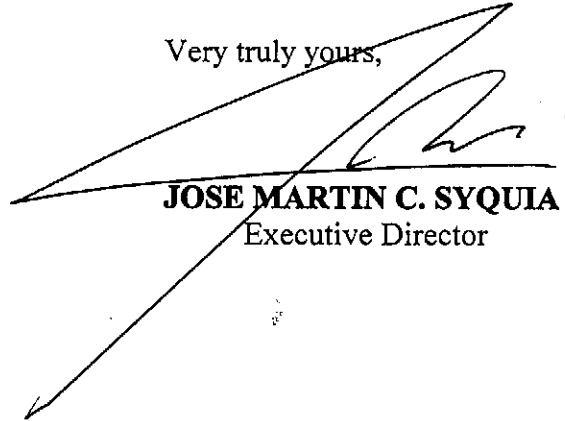
1. The act of the BAC in changing the method that shall be used for a certain procurement, which method has been approved by the head of the procuring entity, will be reflected as an amendment or an update in the PPMP and APP, that require another approval from the latter;
2. The head of the procuring entity may approve or disapprove the recommendations made by the BAC as regards the method of procurement to be used for all the agency's procurement based on reasonable and justifiable grounds and conditions provided under R.A. 9184 and its IRR-A;
3. Observers cannot negotiate and/or source out suppliers in behalf of the procuring agency even by virtue of an authority from the BAC; and
4. The members of the BAC including its Chairman, if proved to have committed any of the specific offenses mentioned in Section 65.1 of the IRR-A shall be subject to the legal sanctions provided therein. In this connection, any person who has a cause of action may validly file the appropriate complaint with the regular courts of justice against the said erring BAC officials.

⁶ See Article 203 of the Revised Penal Code of the Philippines

⁷ See Section 2, Rule 2 of the 1997 Revised Rules on Civil Procedure

With the foregoing elucidations, we trust that your issues have been clarified. Please bear in mind that this opinion is rendered on the basis of the facts and particular circumstances as represented. It may not be necessarily applicable upon a different set of facts or circumstances.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director

Gse / gppb-tso

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GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office
Mezzanine 125, Mabini Hall, Malacañang, Manila
Telefax Nos. (02) 735-4962; (02) 736-5758

August 18, 2004

HON. FLORENTINA L. CONGSON

Acting City Mayor
Office of the City Mayor
General Santos City

Dear Ms. Congson:

This refers to your letter dated August 16, 2004, which we received through facsimile on August 18, 2004, addressed to Executive Director Jose Martin C. Syquia, requesting for clarification on Republic Act 9184 and its Implementing Rules and Regulations Part A.

We wish to inform you that we shall respond to your concerns either through phone or in writing at the earliest possible opportunity, or raise the same to the Government Procurement Policy Board for appropriate resolution should referral thereto becomes necessary.

Very truly yours,


ATTY. SALVADOR C. MALANA III
Procurement Management Officer V