

NPM No. 120-2012

28 September 2012

ENGR. ADOLFO L. ESCALONA
Executive Director
ROAD BOARD (RB)
2F, Ave Maria Building,
1517 Quezon Ave. cor. Examiner St., Quezon City

Re: Composition of the Road Board Secretariat Special Bids and Awards Committee (RBS-SBAC)

Dear Executive Director Escalona:

This refers to your letters dated 31 May 2012 and 22 July 2012 seeking further clarification of the following issues:

- a) Whether the RBS can appoint its Chief Accountant as SBAC member;
- b) Whether the Department of Public Works and Highways, National Capital Region (DPWH-NCR) Regional Director who does not occupy a *plantilla* position in RBS can be validly designated as SBAC member;
- c) Whether it is permissible to appoint a substitute member of the SBAC outside of the RB or the RBS in case of absence or incapacity of the regular member, and there are no other qualified officials within the RB or RBS who can act as substitute member;
- d) Whether contractual-*plantilla* personnel of the RBS can form part of the SBAC in lieu of the RBS Chief Accountant or DPWH official; and,
- e) Whether the RB¹, through the RBS, can cause the implementation of the National Road Lighting Program (project).

It is represented that RBS-SBAC was tasked by the RB to conduct bidding for the project, and intends to appoint its Chief Accountant as RBS-SBAC member on the premise that no conflict of interest exists, while the DPWH-NCR Regional Director will be appointed as member because he is the representative of the end-user or implementing agency, which is the DPWH.

rec. 10/3/12
Road Board

¹Created by RA 8794 on 27 June 2000.

Designation of the RBS Chief Accountant as SBAC member

For your guidance, COA Circular 2003-004 states in clear and unequivocal terms that the Chief Accountant and the personnel of the Accounting Unit of any agency of government are prohibited from being regular members of the agency's BAC to ensure that the procurement and payment functions are segregated. The prohibition is not limited to accountants whose functions involve actual processing of any billing or payment in favor of a bidder. In fact, the prohibition is absolute and all-encompassing as it covers not only the Chief Accountant, but even all staff or personnel in the accounting unit.

Since the COA Circular does not make a distinction between accountants who participate in the processing of payment and those who do not, the prohibition must be deemed absolute, and cannot be selectively applied to a limited class of accountants. *Ubi lex non distinguit nec nos distinguere debemus* (when the law does not distinguish, neither should we). Thus, the sole exception to the prohibition is when accounting personnel would be provisional members, in case the Accounting Unit is the end-user².

Moreover, the circular not only seeks to prevent actual existence of conflict of interest, but even intends to avert would be or potential conflicts. Hence, any situation which may create an opportunity for conflict of interest, albeit remote, should be avoided.

Designation of DPWH-NCR Regional Director and/or substitutes who do not occupy plantilla positions in RB as SBAC member

Please note that Section 11.2.2 of the Revised Implementing Rules and Regulations (IRR) of Republic Act (RA) 9184 mandates that the BAC Chairperson must be at least a third ranking official, and the regular members must be at least a fifth ranking permanent official in National Government Agencies, and the term "permanent" shall refer to a *plantilla* position within the procuring entity concerned.

Thus, the BAC composition should be limited to those officials of the procuring entity concerned.³ Designation as BAC member would be valid only when she holds a position existing within the organizational structure of the procuring entity and possesses the required ranking, without prejudice to other disqualifications⁴, such as those provided under COA Circular 2003-004.

A closer examination of Sec. 11.2.2 would clearly show that a regular BAC member should be an "officer" while a provisional member is a "representative of the end user unit". In this case, the DPWH-NCR Regional Director cannot be appointed as regular member since he is not an official of RBS. Moreover, he cannot be designated as provisional member since he is not an end-user representative. We reiterate that the end-user may not be the actual beneficiary of the project, but the unit within the procuring entity which requested the procurement.

Based on the foregoing, it would not be permissible to appoint the DPWH-NCR Regional Director and/or any substitute member of the SBAC if such personnel do not occupy *plantilla* positions in the RBS. All members of the BAC, whether regular or

² COA Circular 2003-004

³ NPM 60-2012

⁴ NPM 034-2011

provisional, must occupy a *plantilla* position in the procuring entity⁶. Consequently, all RBS-SBAC members should be selected from within the RBS, being the procuring entity concerned. In addition, those designated as alternate members or substitutes should possess the same qualifications as the regular members themselves. Since members of the SBAC should be officials of the procuring entity concerned, logic dictates that the same limitation applies to their respective substitutes or alternates.

Designation of contractual *plantilla* personnel as SBAC member

We wish to stress that the *plantilla* position contemplated by the rules may be occupied by a contractual, regular, designated or appointed official or personnel. The nature and tenure of employment is inconsequential. Rather, the concern specifically refers to whether such position is included in the list of authorized positions created by the Department of Budget and Management, and whether said position is existing within the organizational structure of the procuring entity concerned.⁷

Accordingly, a contractual personnel of the RBS occupying a permanent position, that is, a *plantilla* position, can be a member of the SBAC in lieu of the RBS Chief Accountant or DPWH official.

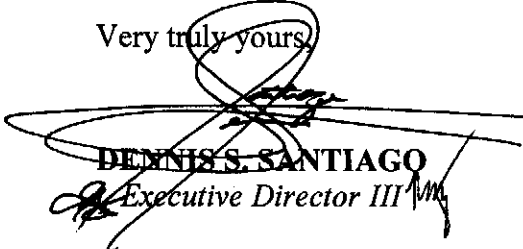
Implementation of the RB project by the RBS

In as much as the conduct of actual project implementation involves a review of the mandate and functions of RB and RBS, we regret that it is outside the purview of our authority to pass upon. It is best to refer to the enabling law creating the RB to determine whether it may exercise such function, or refer the matter to the relevant government authority, such as the Department of Justice or the Office of the Government Corporate Counsel for appropriate guidance.

On the other hand, if what was referred to as "implementation" meant the conduct of the procurement activities by the RBS-SBAC. *i.e.*, from pre-procurement conference until recommendation of the contract award to the Head of the Procuring Entity, the RBS-SBAC being the procurement arm of RB may validly commence and conduct the relevant procurement activities and recommend award of contract to the RB; in this situation, actual project implementation is to be performed by the winning contractor or the bidder with the Lowest Calculated and Responsive Bid, and not by the RB or the RBS.

We hope our advice provided sufficient guidance on the matter. Note that this opinion is being issued on the basis of facts and particular circumstances presented, and may not be applicable to a different set of facts and circumstances. Should you have further questions, please do not hesitate to contact us.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director III

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⁶ NPM 047-2008

⁷ NPM 33-2007 citing NPM 25-2004