

NPM No. 006-2019

16 April 2019

HON. ELISEO M. RIO, JR.

Acting Secretary

Department of Information and Communications Technology (DICT)

DICT Building, C.P. Garcia Avenue

Re: Bids and Awards Committee Composition

Dear Acting Secretary Rio:

This refers your letter inquiry¹ on the membership of the Bids and Awards Committee (BAC) of the DICT relative to its procurement of "Supply, Installation and Delivery of Cybersecurity Management System."

As represented, the Assistant Secretary and Supervising Administrative Officer of the Cybersecurity Bureau of the DICT were appointed as the BAC Chairperson and the BAC Secretariat Head, respectively. From pre-procurement conference until the opening of bids, there were only four (4) BAC members, where the BAC Chairperson acted as End-User Representative while the Vice Chairperson presided over the BAC meetings. However, a close scrutiny of the relevant provisions of Republic Act (RA) No. 9184² and its 2016 revised Implementing Rules and Regulations (IRR) prompted your Office to consider the designation of a fifth BAC member before issuing the notice to the bidder with the Lowest Calculated Bid (LCB).

We note as well that based on the letter³ from the Integrated Computer Systems, Inc. (ICS), the DICT declared a failure of bidding by virtue of Section 41(b). Upon validation of this fact,⁴ your Office has already granted the request of ICS JV Verint Systems, Inc. to reverse the declaration of failure of bidding and for the BAC to continue with the procurement process.

Prior to the above developments, you would like to be clarified if a fifth BAC member may be designated before issuing the notice to the bidder with the LCB or should failure of bidding be declared by virtue of Section 41(b) of the 2016 IRR of RA No. 9184.

Section 11 of RA No. 9184 and Section 11.2.1 of its 2016 IRR state that the Head of Procuring Entity (HoPE) shall designate at least five (5) but not more than seven (7) members to the BAC of unquestionable integrity and procurement proficiency. Provisional members are designated to sit in the BAC for a particular procurement activity, while regular members sit in all the procurement activities of the agency.

The use of the word "shall" makes the designation of at least five (5) but not more than seven (7) members to the BAC mandatory.⁵ Thus, the designation of less than five (5) BAC

¹ Dated 20 August 2018 and received on 23 August 2018.

² Entitled "Government Procurement Reform Act."

³ Dated 28 August 2018.

⁴ Through letter dated 5 April 2019.

⁵ The word "shall" means ought to, must, or an obligation used to express a command or exhortation used in laws, regulations or directives to express what is mandatory. (Non-Policy Matter Opinion [NPM] No. 37-2012 dated 19 April 2012, citing *Baranda vs. Gustilo*, 165 SCRA 757 1988).

members is not compliant with what the law and rules require as sufficient to constitute a valid BAC authorized to undertake procurement proceedings under RA No. 9184 and its IRR. Decisions made by a BAC with less than the required number of members are therefore ineffective⁶ in accordance with Article 5 of RA No. 386,⁷ which provides that acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity. Note however, that the Government Procurement Policy Board (GPPB) and its Technical Support Office (TSO) cannot adjudicate the validity or invalidity of actions taken by the HoPE or the BAC as we have no jurisdiction to rule over actual controversies with regard to the conduct of bidding as this require the exercise of quasi-judicial functions or investigatory powers under the law.

In sum, a minimum of five (5) members **constituting** the BAC is required for every procurement proceeding, while a majority vote of those present during the deliberations, at which there is a quorum and presided over by either a Chairperson or Vice-Chairperson, is needed for a valid exercise of its powers and functions.⁸

On the other hand, the determination by the HoPE that there exists any of the grounds for a declaration of a failure of bidding under Section 41 (b) cannot be supplanted by an opinion by the GPPB or its TSO, as doing so would encroach upon or interfere with the exercise of the authority reserve by law to the HoPE. Moreover, considering that the HoPE had already exercised the reservation clause under Section 41(b)⁹ of the 2016 IRR of RA No. 9184 and thereafter reversed the same paving the way for the continuation of the procurement at hand, the issues raised are now moot and academic.

The above opinion was made on the basis of the particular facts presented and circumstances availing, and may not, therefore, be applicable given a different set of facts and circumstances.

We hope to have sufficiently clarified the matter at hand.

Sincerely yours,


ROWENA CANDICE M. RUIZ
Executive Director V 

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In common or ordinary phraseology, the term "shall" is a word of command, one which has a compulsory meaning, and is generally imperative or mandatory, unless the contrary intent appears. *Gonzales vs. Chavez*, 205 SCRA 816 (1992).

⁶ NPM No. 170-2012 dated 28 December 2012 and NPM No. 026-2005 dated 25 April 2005.

⁷ Entitled "Civil Code of the Philippines."

⁸ Sections 12.3 and 12.4, 2016 IRR of RA No. 9184.

⁹ Section 41. Reservation Clause . The HoPE reserves the right to reject any and all bids, declare a failure of bidding, or not award the contract in the following situations:

...

b) If the BAC is found to have failed in following the prescribed bidding procedures; or

...