

NPM No. 008-2019

17 April 2019

ALLAN S. CABANLONG
Assistant Secretary
**Department of Information and
Communications Technology (DICT)**
DICT Building, C.P. Garcia Avenue,
Diliman, Quezon City, 1101

Re: Bids and Awards Committee (BAC) Composition

Dear Assistant Secretary Cabanlong:

This refers to your letter¹ seeking clarification on the issues relative to the "Supply, Installation and Delivery of Cybersecurity Management System Project" (Cybersecurity Project) undertaken by the DICT Bids and Awards Committee for Goods and Services (BAC4G&S), composed of:

BAC Chairperson	Asec Allan S. Cabanlong
Vice Chairperson	Atty. Jiezel Reotutar
Member	Engr. George Tardo
Member	Aquilina Empestan
Provisional End User	-

As represented, the designation of the provisional member was left vacant as the member would depend on the project being procured. As regards the above-mentioned project, the implementing unit or project owner is the Cybersecurity Bureau that you supervise. With respect thereto, you opted to inhibit as the BAC Chairperson and instead act as the provisional end user. Considering that only four (4) members deliberated during all BAC meetings with which Atty. Jiezel Reotutar, Vice Chairperson of the BAC4G&S, presided over, you would like to be clarified on the following issues:

- a. Can the BAC validly conduct business and make decision with four (4) members, three (3) of which are regular members and one (1) is a provisional member?
- b. What is the proper remedy that DICT may exercise in order to continue with the procurement project?

It bears emphasis that Section 11 of Republic Act (RA) No. 9184 and its 2016 revised Implementing Rules and Regulations (IRR) provide that members of the BAC shall be composed of at least five (5) members but not to exceed seven (7). Of the five (5) members, three (3) must be regular members and two (2) must be provisional members. 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.

¹ Dated 12 September 2018 and received on 19 September 2018.

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.² Thus, the designation of less than five (5) BAC members is not compliant with what the law and rules require as sufficient to constitute a valid BAC that is 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 ineffective³ in accordance with Article 5 of RA No. 386,⁴ 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 and its Technical Support Office 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 requires 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.⁵

As regards the proper remedy to continue on with the procurement project, in light of the instruction by the HoPE, DICT Acting Secretary Eliseo M. Rio, Jr., to proceed with the bid evaluation,⁶ after a previous declaration of a failure of bidding,⁷ the matter had already become 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 

//rdc 

² 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).

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).

³ NPM No. 170-2012 dated 28 December 2012 and NPM No. 026-2005 dated 25 April 2005.

⁴ Entitled "Civil Code of the Philippines."

⁵ Sections 12.3 and 12.4, 2016 revised IRR of RA No. 9184.

⁶ Letter of Acting Secretary Eliseo M. Rio, Jr. to bidder Integrated Computer Systems, Inc. dated 22 October 2018.

⁷ Memorandum of DICT Acting Secretary Eliseo M. Rio, Jr. on "Cancellation and Declaration of Failure of Bids for the Procurement Project, Supply, Installation and Delivery of Cybersecurity Management System" dated 10 August 2018.