

NPM No. 009-2019

17 April 2019

MERIBETH SANCHEZ
Authorized Representative
Integrated Computer Systems, Inc.
3/F Limketkai Building, Ortigas Avenue, Greenhills
P.O. Box 483 San Juan City

Re: Declaration of a Failure of Bidding

Dear Ms. Sanchez:

This refers to your letter¹ seeking clarification on the declaration of failure of bidding by the Head of the Procuring Entity (HoPE) under Section 41 of Republic Act (RA) No. 9184 and its 2016 revised Implementing Rules and Regulations (IRR).²

As represented, the HoPE declared a failure of bidding because the Bids and Awards Committee (BAC) did not follow the prescribed bidding procedure, in particular compliance with the mandatory number of BAC members. It is your position, however, that the declaration of a failure of bidding was null and void because the invocation of Section 41 of RA No. 9184 is misplaced. In this regard, you would like to be clarified on the following:

- a. What is the effect of the declaration of failure of bidding by the HoPE when the ground relied upon is not one of the instances under Section 41 of RA No. 9184?
- b. What is the effect of the oral manifestation by the BAC Chairperson during the opening of bids that he is acting as a member only representing the end-user unit, without official declaration by the HoPE to that effect?

On the first issue, we must emphasize that the authority to determine the existence of ground for the invocation of Section 41 of RA No. 9184 rests upon the sole discretion of the HoPE. The said determination by the HoPE cannot be supplanted by an opinion by the Government Procurement Policy Board or its Technical Support Office, as doing so would encroach upon or interfere with the exercise of the authority reserve by law to the HoPE.

In any case, considering that the HoPE, Department of Information and Communications Technology (DICT) Acting Secretary Eliseo M. Rio, Jr., had already exercised the above-mentioned reservation clause³ and thereafter reversed the same in consideration of your letter⁴ which led to the eventual award of contract,⁵ the matter raised is now moot and academic.

¹ Dated 28 August 2018, received on 29 August 2018.

² Sec. 41. Reservation Clause. – The Head of the Agency 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
...

³ 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.

⁴ Letter to the DICT Acting Secretary Eliseo M. Rio, Jr. dated 15 August 2018.

⁵ Notice of Award to Integrated Computers Systems Inc. JV Verint System Ltd. Dated 13 December 2018.

Anent your second query, the oral manifestation by the BAC Chairperson during the opening of bids that he is acting as end-user representative converts his membership from a regular to a provisional member for the subject procurement on the basis of the DICT Special Order No. 97, dated 12 March 2018⁶ wherein, in reconstituting the three (3) BACs of the DICT,⁷ the HoPE left the provisional member vacant as the same depends on the project being procured.⁸

Section 11 of RA No. 9184 and its 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.

What is material therefore is that the total BAC members should be at least five (5), and composed of at least three (3) regular members and two (2) provisional members. 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.⁹ Consequently, the change in the nature of the membership of the Chairperson from a regular to a provisional member is of no moment if the BAC composition complies with the minimum five (5) members, with at least three (3) regular and two (2) provisional members.

Conversely, the designation of less than five (5) BAC members contravenes the express and mandatory provision of Section 11 of RA No. 9184 thereby rendering the actions and decisions made by the said BAC ineffective in accordance with Article 5 of RA No. 386¹⁰ which provides that acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity.

Finally, allow us to note 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 require the exercise of quasi-judicial functions or investigatory powers under the law.

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 GONZALEZ M. ROSA
Executive Director V 

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⁶ Amendment of Special Order (SO) Numbers 22, 42 and 82 series of 2018 and Designation of Members of the Bids and Awards Committees and its Respective Technical Working Group.

⁷ DICTBAC, BAC for Goods and Services, and BAC for Infrastructure and Consulting Services.

⁸ Letter of DICT Asec Allan S. Cabanlong to GPPB-TSO, dated 12 September 2018, received on 19 September 2018.

⁹ 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).

¹⁰ Entitled "Civil Code of the Philippines."