

NPM No. 168-2015

29 December 2015



Re: Decision of the Bids and Awards Committee (BAC); Qualification of BAC Chairman; Internal Check and Balance; Conflict of Interest

Dear 

This refers to your letter dated 12 November 2015¹, requesting our opinion on the following issues:

1. Will the Decision of the BAC to recommend award be considered valid even without the presence and participation of the BAC Chairman? Can the Chair, by himself, invalidate the decision of the BAC?
2. Is the University Engineer qualified as BAC Chairman on the basis of the organizational structure²? Can the designation as BAC Chairman be based on trust, confidence and discretion of the University President?
3. Can the University Engineer be disqualified as BAC or TWG member on the grounds of violation on the rule on internal check and balance, and conflict of interest, as he approves the Statement of Work Accomplished (SWA) by the contractors and issues the Certificate of Completion (COC), and allegedly continues to be a consultant to the contractors and suppliers who participate in the procurement activities of the University?

BAC Decision

The BAC is a collegial body, the act of the head of the collegial body cannot be considered as that of the entire body itself³. Pursuant to Sections 12.3 and 12.4 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, in order to transact business and validly pass upon any act or resolution, the BAC being a collegial body, must have a quorum that requires participation of the majority of its members. As a collegial body, the agreement or consent of a majority of the BAC members constituting a quorum is regarded as a singular representative act of the body, which has legal and binding effect in fact and in law.

Thus, notwithstanding the absence of the BAC Chairman, the decision of at least majority of those present at the meeting, at which there is quorum, shall be valid and binding as

¹ Received on 15 December 2015.

² Please note that the Organizational Structure is not attached to the letter dated 12 November 2015.

³ NPM No. 136-2012 dated 29 October 2012.

an act of the BAC, provided that the Vice-Chairman is present to preside the meeting. On the other hand, the BAC Chairman cannot, by himself, overturn a decision of the BAC, as the power to approve or disapprove a BAC recommendation is vested solely upon the HOPE in accordance with Sections 37.1.2 and 37.1.3 of the IRR of RA 9184.

Qualification of a BAC Chairman

The authority to designate an official to the BAC necessarily entails the exercise of judgment and discretion. The HOPE has the discretion as to who will be designated as BAC Chairman, provided that the same shall possess the qualifications prescribed under the procurement law and its associated rules and regulations.

Pursuant to Section 11.2.2(a) of the IRR of RA 9184, an official maybe designated as a BAC Chairman, provided that he or she is at least a third ranking permanent official of the procuring entity. Please note that the determination of a procuring entity's compliance with the "ranking" requirement is based on the term "permanent", which refers to a plantilla position within the procuring entity concerned. Accordingly, the University Engineer is qualified as BAC Chairman, provided that he is at least a third ranking permanent official of the Pangasinan State University.

Check and Balance

There seems to be no conflict between the functions of a BAC member who is at the same time the University Engineer. Decisions/recommendations of the BAC, as a collegial body, rests upon the compliance of the lowest calculated/highest rated and responsive bidder with the legal, technical and financial requirements of the project, subject to HOPE's approval. On the other hand, the approval of SWA and issuance of COC by the University Engineer depends on the contractor's compliance with the Program of Work prescribed in the contract. Please note that even an official from the Engineering Office may be designated as a BAC member of the Local Government Unit⁴, even though its office approves the SWA and COC.

Under the current rules, the following personnel are prohibited from BAC membership due to the nature of the office s/he occupies and in order to strike a good balance, a check and balance mechanism so to speak, between procurement and payment of contract:

1. HOPE or the approving authority, pursuant to Section 11.2.5 of the IRR of RA 9184; and
2. Chief Accountant and the personnel of the Accounting Unit, in accordance with Commission on Audit Circular No. 2003-004.

Conflict of Interest

It is incumbent upon the BAC to determine and ascertain whether the relationship of the bidder to the Head of the Procuring Entity or any of the BAC, TWG, Secretariat, or officers or employees having direct access to information that may substantially affect the result of the bidding or any procurement processes, puts it [the bidder] in a position to unduly influence or be given preference in the award of the contract⁵.

⁴ Section 11.2.3 of the IRR of RA 9184.

⁵ NPM No. 34-2009 dated 14 July 2009.

Relative thereto, and consistent with the *Rules Implementing the Code of Conduct and Ethical Standards for Public Officials and Employees* pursuant to Republic Act No. 6713, a conflict of interest occurs, when the official or employee is a member of the Board of Directors and the interest of such corporation or business, or the official or employee's rights or duties therein, are opposed to or affected by the faithful performance of official duty.

In any case, it shall be incumbent for any public official or employee to avoid conflict of interest at all times. In the event that a conflict of interest arises, the official or employee involved shall resign from his position and/or divest himself of his shareholdings or interests within the prescribed period, reckoned from the date when the conflict of interest had arisen.

Summary


All told, we wish to clarify the following:

1. Notwithstanding the absence of the BAC Chairman, the decision of at least majority of those present at the meeting, at which there is quorum, shall be valid and binding as an act of the BAC, provided that the Vice-Chairman is present to preside the meeting.
2. The HOPE has the discretion to designate the University Engineer as BAC Chairman as long as he has complied with the qualifications prescribed under Sections 11.2.1, 11.2.2 and 11.2.3 of the IRR of RA 9184.
3. A public official or employee shall avoid conflict of interest at all times. The BAC shall ascertain whether the relationship of the bidder to the Head of the Procuring Entity or any of its BAC, TWG, Secretariat, or officers or employees having direct access to information that may substantially affect the result of the bidding or any procurement processes, puts the bidder in a position to unduly influence or be given preference in the award of the contract

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Please note that this opinion is being rendered on the basis of the facts and particular situation presented, and may not be applicable given a different set of facts and circumstances. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,

(sgd.)

 **DENNIS S. SANTIAGO**
Executive Director V

skp 