

**Inter-Parliamentary Forum on Security Sector Governance (IPF-SSG)
in Southeast Asia**

**Explanatory Background Note
on the Role of Parliament in Defence Procurement in the Philippines
(IPF-SSG) Regional Parliamentary Workshop
Phnom Penh, 12-13 October 2008**

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Legal Framework

Government procurement in the Philippines is administered on the basis of the Government Procurement Reform Act (GPRA) of 2003 or R.A. No.9184. It was enacted on 10 January 2003, while its Implementing Rules and Regulations Part A (IRR-A) came into effect on 8 October 2003. From its inception, the law integrated all procedures for all types of procurement in all sectors of government, thus addressing the problem of the proliferation of uncoordinated and ambiguous procedural rules and regulations in public sector procurement. This law applies to all forms of procurement activities (*i.e.*, the procurement of infrastructure projects such as civil works; the procurement of goods including supplies, materials, and equipment; and the procurement of consultancy services) at all levels of government, including state universities and colleges; GOCCs and government financial institutions; and LGUs including provinces, cities, municipalities, and barangays), regardless of the source of their funding.¹

R.A. No. 9184 provides for the “modernisation, standardisation, and regulation” of all procurement activities, identifies “transparency, accountability, competitiveness, efficiency, economy, and uniformity” as the guiding principles that all government agencies should follow.² It also declares that the primary mode of procurement for all government branches and agencies is through competitive public bidding, except as stated in its Article XVI.³ Article XVI provides for alternative methods of procurement such as selective bidding, single source procurement, shopping, negotiated procurement, and repeat orders. These methods may only be resorted to in special cases, such as for the procurement of highly specialised types of goods or services.⁴

Likewise, the law provides for the establishment of a Government Procurement Policy Board (GPPB) for the purpose of protecting the national interests in all matters affecting public procurement, formulation and amendments. Whenever necessary, the IRR and the corresponding standard forms for procurement ensure that the procuring entities regularly

¹ Section 4, R.A. No. 9184.

² Section 3, R.A. No. 9184.

³ Section 10, R.A. No. 9184.

⁴ Section 48-53, R.A. No. 9184 and its IRR-A.

conduct procurement training programmes and prepare procurement operations manuals for all offices and government agencies⁵; conduct an annual review of the effectiveness of R.A. No. 9184 and recommend amendments thereto;⁶ and essentially ensure that all agencies and branches uniformly abide with the stipulations of R.A. No. 9184.

Defence Procurement in the Philippines

Being a branch of the Philippine Government, the DND, which has jurisdiction over the state's entire Armed Forces, adheres to this law in conducting its procurement activities. The overall Head of the Procurement Entity (HOPE) for the DND is the Secretary. The SND is the final approving authority in terms of awarding contracts for amounts of ₱50,000,000 as recommended by the DND Bids and Awards Committee (DNDBAC). However, for the purpose of streamlining the process, the AFP Chief of Staff (CSAFP) was also given the authority to award contracts involving sums of less than ₱50,000,000. Similarly, the CSAFP bases his or her decision on the recommendation of an AFP counterpart Bids and Awards Committee called the Single AFPBAC. The establishment of a Single BAC for each procuring entity is mandated by R.A. No. 9184.⁷ Alternatively, in order to expedite the process, Section 11 of this law also allows an additional—but limited—number of separate BACs to be formed, should it be deemed appropriate by the HOPE. This only applies to special cases where the number and complexity of items to be procured warrants the creation of extra BACs.

Prior to publishing IRR-A of R.A. No. 9184 in 2003, the AFP had 119 BACs. However, having too many BACs within the AFP created problems, particularly in regard to monitoring and auditing. As a result the AFP decided to combine all of the 119 BACs into a single AFPBAC in 2004.⁸ The creation of a single AFPBAC simplified AFP procurement significantly. However, the handling of all the procurement requirements of the entire AFP proved to be too much for a single BAC. Thus, in 2006, the multi-BAC system for the AFP was adapted. The functions of the previous Single AFPBAC were devolved into two bodies. Firstly, the GHQBAC1⁹, which was assigned the handling of projects costing between ₱50,000,000 and ₱25,000,000; and the secondly, the GHQBAC2 which handles projects costing less than ₱25,000,000. Meanwhile, the Philippine Army (PA), Philippine Air Force (PAF), and the Philippine Navy (PN) were given the authority by the CSAFP to establish their respective BACs.¹⁰ These BACs are called PABAC, PAFBAC, and PNBAC and each of them handles procurement projects for their respective service commands that are worth up to ₱25,000,000.

⁵ In June 2006, the GPPB, through its Technical Support Office, published a series of Generic Procurement Manuals in four volumes. (Volume 1: Guidelines on the Establishment of Procurement Systems and Organizations; Volume 2: Manual of Procedures for the Procurement of Goods and Services; Volume 3: Manual of Procedures for the Procurement of Infrastructure Projects; and, Volume 4: Manual of Procedures for the Procurement of Consultancy Services).

⁶ Section 63, R.A. No. 9184 and Section 63.1 of its IRR-A.

⁷ Article V, Section 11.

⁸ The Single AFPBAC was organised pursuant to Executive Order No. 235 dated 11 September 2003.

⁹ Executive Order No. 235 (11 September 2003).

¹⁰ Department Order No. 12 dated 5 April 2006 is also known as the Creation of the Bids and Awards Committees and the Procurement Service in the Armed Forces of the Philippines (AFP).

Regardless of the number of procurement projects that they are authorised to take charge of, all of the BACs of the DND have the following functions: to advertise and/or post the invitation to bid; to conduct pre-procurement and pre-bid conferences; to determine the eligibility and technical capacity of prospective bidders; to receive and evaluate bids; to undertake post-qualification proceedings and determine the lowest calculated bidders; to resolve motions for reconsiderations; to recommend to the head of the procuring entity or his duly authorised representative that contracts be awarded; to recommend that sanctions be imposed in accordance with Rule XXIII of the IRR-A;¹¹ and in certain specific cases, to recommend to the head of the procuring entity the use of alternative methods of procurement as provided under Article XVI of R.A. No. 9184.¹² Note that each BAC has its own secretariat which assists the BACs in performing these functions.

The defence procurement process usually starts with the formulation of an Annual Procurement Plan (APP), which depends on the annual budget allocated for the DND. The procurement plan, which is a consolidation of all the APPs of the GHQ, PAF, PN, PA and other service commands, is drafted by the AFP and submitted to the Secretary of National Defense for approval. After the Secretary's approval, the APP is forwarded to the Procurement System of the Department of Budget (PS-DBM), which checks that the APP is consistent with the allocated budget of the DND. The approved APP will serve as the AFP's basis for determining what and how many goods and/or services the organisation will procure in a given year.

During a fiscal year, the DND follows a schedule of procurement activities. For each procurement activity, a Project Procurement Management Plan (PPMP), which is a part of the APP, is followed to determine the dates of pre-bidding and bidding conferences, the mode of procurement to be undertaken, and other pertinent information relating to the goods or services to be procured. Each bidding process begins with the issuance of a procurement directive or request for procurement from any AFP unit that requires one. Following this, the BAC announces the upcoming bidding process through the publication of the Invitation to Bid (ITB) in major newspapers, by posting the information on the Government Electronic Procurement System (G-EPS) website as well as the procuring entity's website and office bulletin boards. After the ITB has been advertised, the BAC secretariats prepare the bidding documents for prospective bidders who have declared their intention to participate in the process.

Approximately fifteen days after the invitations to bid have been posted and the acquisition of the relevant bidding documents, a pre-bid conference for each procurement project is held by the BAC to give the proponents the opportunity to pose their questions as well as to clarify any particular aspects of the project. Once all queries have been settled, the deadline for the submission and opening of bids is then announced. This is usually twelve days after the pre-bid conference. Most of the bidding conducted by the

¹¹ Rule XXIII deals with administrative sanctions. Section 69 provides for imposition of administrative penalties; Section 70 covers preventive suspension; and Section 71 deals with the lifting of suspension and the removal of administrative sanctions.

¹² Sections 12.1-12.2. of IRR-A.

BACs of the DND consists of three stages. The first stage is the examination of the participating bidders' eligibility documents. The second stage determines their technical capacity, while the third and last stage determines their financial capacity. In conducting their examination, all AFP BACs follow the non-discretionary "pass/fail" criteria in determining which of participating bidders should move on from one stage to the next. Only bidders who pass the eligibility and technical requirements are allowed to submit their bid tenders or prices during the third stage. It is important to note that bid prices should not exceed the specified approved budget for the contract (ABC). Any bids for amounts exceeding the ABC are automatically disqualified. Once the BAC has received all of the bids, its BAC declares which bidder is the "Lowest Calculated Bidder" or "Highest Rated Bidder" (in the case of procurement for consulting services). Being declared the "Highest Rated Bidder" does not, however, ensure that said bidder has won the contract. The bidder will still have to undergo post-qualification checks during which their documents are verified and their actual technical capacity to undertake the project is assessed. If found to be technically adequate and compliant in all aspects as specified in the bidding documents, the proponent will then be declared to be the "Lowest Calculated and *Responsive Bidder*" or "Highest Rated *Responsive Bidder*". Fifteen days thereafter, the head of the procuring entity will award the contract to the winning bidder. A Notice to Proceed is then issued to the bidder some seven days after receiving the approval, thereby signalling the beginning of the implementation of the project.

Defence Procurement: Issues and Challenges

Despite the existence of a procurement law, defence procurement in the Philippines faces a number of problems arising from a lengthy procedure, the monopolisation of public biddings by a number of bidders, combined with an inadequate or complete lack of procurement knowledge, and corruption. Irregularities such as conversion, rigged bidding, and purchase order splitting have sadly become a feature of defence procurement.

Technically, R.A. No. 9184 requires that the procurement process from the opening of bids to the awarding of a contract¹³ should not exceed three months. Procurement in the DND, however, often exceeds this period due to the occurrence of failed biddings and subsequent holding of re-biddings. The frequency of failed biddings is just one of the many challenges facing defence procurement in the Philippines. The procurement process is, by its very nature, very tedious and time-consuming. It is prone to human errors, such as the issuance of ambiguously stated bidding instructions that is constant source of confusion among participating AFP bidders. Many of the biddings fail because the bidding instructions are misinterpreted. There have been several instances when AFP bidders were disqualified and deemed non-compliant because they misinterpreted some of the details indicated in the bidding documents. BACs members on the other hand, have

¹³This stage of the procurement process involves the submission and opening of bids, evaluation/determination of the Lowest Calculated bid/Highest Rated Bid (and negotiation with Highest Rated Bid), post-qualification and Determination of Lowest Calculated Bid. Highest Rated Bid, Approval or Resolution of Award/Notice of Award, Contract Preparation and Signing, and Approval of Contract (includes issuance of Notice to Proceed).

no choice but to fail these bidders since the BAC is constrained by law to be non-discretionary in its rulings.

The frequency of single bidders monopolising AFP biddings is another noted problem. Ideally, public biddings should be “competitive”, ensuring that the government is not disadvantaged in some way and the taxpayers’ money is spent wisely. In practice however, very few bidders actually turn up to participate in AFP biddings. It is always the same set of bidders who participate in the biddings held by the AFP. A sense of familiarity between the AFP procuring entities and the bidders therefore develops, leading some bidders to try to “sweet talk” or “convince” BAC members to bend or at least “soften” the rules in some cases.

The problem with the lack of knowledge about the procurement process similarly complicates the defence bidding procedures. There is a shortage of procurement specialists in the AFP. Faced with issues that are not specifically provided for in the R.A. No. 9184 or defined in its IRR-A, the AFP BAC members tend to become uncertain and indecisive. Such indecisiveness often leads to executive sessions held by BAC members to resolve issues, further lengthening the already time-consuming bidding procedure. The members of the Technical Working Groups (TWGs), who recommend to the BACs (*i.e.* which bidders pass or fail) were likewise observed to be unfamiliar with the rules on bidding.

A bigger problem than the previously discussed procedural issues faced by defence procurement is the issue of corruption. The Feliciano Commission, which investigated the failed July 2003 Oakwood mutiny led by disgruntled junior officers identified, among others, the following defence procurement practices as being contributory factors to military corruption, namely: conversion, rigged bidding, and purchase order splitting.¹⁴ Conversion is the practice of transforming allocated funds into cash through collusion among suppliers, AFP unit officers, and government auditing officials. Through this practice, AFP officers are able to circumvent the lengthy bidding procedure and obtain what is required by their units in a much shorter period of time. The converted cash is often used to buy supplies that are not programmed in their budgets, but are necessary to fulfil their mission.

Rigged bidding on the other hand, occurs when AFP officers and suppliers collude to “fix” bidding results. The bidding process is manipulated by identifying favoured suppliers or contractors beforehand and awarding the contract to them. The bidding process is only conducted for show since the contract will have been awarded to the favoured bidder before the actual process has even started.

Lastly, purchase order splitting is the practice of breaking down the purchase of goods into several purchase orders with the aim of reducing or decreasing the costs, and giving the unit commander signing authority. Thus, this does away with the requirement of securing approval from a higher authority. The problem with this practice, however, is

¹⁴ The Feliciano Commission Report dated 17 October 2003.

that it is being used to undertake illegal purchases and serves as a smokescreen for illegitimate bidding practices, such as rigged biddings and “ghost” deliveries.

Problems encountered in the inspection stage of the procurement process consist of irregularities such as ghost delivery, under-delivery, or the delivery of inferior quality goods. As regards infrastructure projects, irregularities include the use of sub-standard materials or low quality labour, or reporting unfinished projects as completed projects. At the acceptance stage of the procurement,¹⁵ the irregularities take the form of outright bribery of senior officers, usually in connivance with the procurement inspectors.

Defence Procurement Oversight

Article V, Sections 11 and 12 of R.A. No.9184 provide for the composition and functions of the BAC. To enhance the transparency of the procurement process, Section 13 provides that in all stages of the procurement process, the BAC shall invite, in addition to the representative of the Commission on Audit (COA)¹⁶, at least two observers to sit in on its proceedings. One of the observers must be from a duly recognised private group in a sector or discipline relevant to the procurement at hand;¹⁷ and the other representative from a non-governmental organisation (NGO). Both observers are required not to have any direct or indirect interest in the contract to be bid out. Furthermore the observers are to be duly registered with the Securities and Exchange Commission (SEC).¹⁸

Section 13.4 of IRR-A provides for the responsibilities of BAC observers, which include: firstly, to prepare a report either jointly or separately indicating their observations of the bidding activity conducted by the BAC. This report is to be submitted to the HOPE. The report is designed to assess the extent of the compliance with the provisions of IRR-A and their shortcomings. Secondly, to sign the abstract of bids¹⁹ if the bidding activity was conducted in accordance with the law; and thirdly, to sign the post-qualification summary

¹⁵ This is the stage when the procuring entity has to certify that the goods delivered or the completed infrastructure project is in accordance with the contract specifications.

¹⁶ In the case of *COA v. RTC National Capital Judicial Region et. al.*, G.R. No. 85285, 28 July 1989, the Supreme Court held that the role of the COA representative is to serve as a witness to ensure documentary integrity, *i.e.*, by ensuring that every document is properly identified and/or marked and that the records of the bidding are securely kept. The COA in its Opinion No. 322 (1982) stated that the absence of the COA auditor in a bid opening does not invalidate the award contract.

¹⁷ Section 13.1 of the IRR-A provides the following example. For infrastructure projects, such a representative can come from the National Constructors Associations duly recognised by the Construction Industry Authority of the Philippines (CIAP) – *i.e.*, Philippine Construction Association, Inc.—and the Philippine Institute of Civil Engineers (PICE). For goods, a specific relevant chamber-member of the Philippine Chamber of Commerce and Industry (PCCI) and for consulting services, a project-related professional organisation accredited or duly recognised by the Professional Regulation Commission (PRC) or the Supreme Court of the Philippines, and the Philippine Confederation of Filipino Consulting Organizations (COFILCO).

¹⁸ Section 13.2 of the IRR-A requires that such observers from organisations registered with the SEC must have knowledge, experience or expertise in procurement or in the subject matter of the contract to be bid out; must not have any direct or indirect interest in the contract to be bid out; and other criteria that may be determined by the BAC.

¹⁹ An abstract of bids is a summary of the bidding results, which shows the participating bidders and their corresponding bids.

report if, whilst acting as independent observers, they find that the BAC followed the proper procedures in accordance with IRR-A and if the observer is amenable to the results of the post-qualification.

An offshoot of the Feliciano Commission investigation and report is the creation of an office under the Office of the President of the Philippines known as the Office of the Presidential Adviser to Implement the Feliciano Commission Recommendations (OPAIFCR). This office is mandated to monitor the implementation of the various reforms in the AFP. One of the tasks of the office is to monitor how the DND and the AFP are implementing the reforms, including the prosecution of cases both in the Regional Trial Court and the General Court Martial. Its task includes monitoring the defence procurement. However, in February 2007, the Head of the OPAIFCR resigned after President Gloria Macapagal-Arroyo appointed a retired military/police officer as SND, contrary to one of the principal recommendations of the Feliciano Commission.²⁰ To date, the OPAIFCR exists only on paper.

Within the DND, the Office of the Under-Secretary for Internal Control (OUSIC), was created under E.O. No. 240 (on 24 September 2003), and is mandated to institutionalise reforms in the procurement and fund disbursement systems in the DND and AFP.²¹ In line with the government's programme of good governance, there is a need to streamline procedures for defence contracts for the expeditious implementation of defence projects and speedy response to security threats whilst at the same time promoting transparency, impartiality, and accountability in government transactions. Thus, as part of an effort to institutionalise and sustain the initiatives of the AFP in its procurement and fund disbursement systems, the OUSIC was created to rationalise the operational systems and reporting procedures within the DND.²² However, even this office has not been filled when the official was transferred to the Presidential Anti-Graft Commission (PAGC), also an anti-corruption office but only for presidential appointees.

The role of parliament in defence procurement oversight is mostly in budget deliberations and approvals. At the beginning of the fiscal year, each department presents its annual budget for approval by both Houses of Congress. The Department of Budget and

²⁰ The Feliciano Commission recommended the appointment of a "civilian" SND without strong military ties as a security sector reform (SSR) measure.

²¹ Section 1, E.O. No. 240.

²² Section 2 of E.O. No. 240 provides the duties and functions regarding institutional reforms in the procurement and fund disbursement system in the DND and AFP, which includes the following: (i) to recommend and implement improvements in the Procurement and Fund Disbursement Systems of the DND and AFP, and to ensure timely delivery of logistical requirements with the right quality and quantity; (ii) to ensure the efficiency of the Procurement and Fund Disbursement of the DND and AFP *vis-à-vis* the delivery of the respective mandate and functions of these institutions; (iii) to ensure and fund disbursement systems, to determine adherence to existing rules and regulations and their responsiveness to operational requirements; (iv) to coordinate with concerned government and non-government institutions the conduct of capacity-building activities and skills enhancement training in the areas of procurement and fund disbursement to concerned entities of the DND and AFP, to equip the latter with appropriate tools and techniques on the same; and (v) to facilitate the establishment of a single Bids and Awards Committee (BAC) in the DND and AFP procurement contracts over Pts50'000'000 such as centrally managed and peculiar items.

Management (DBM) issues a “Budget Call for Estimates,” which is essentially a document that reminds the different departments, such as the DND, to prepare budgetary estimates that fall within the overall budget ceilings and parameters. This budgetary estimate from the DND, which is a compilation of the budgetary requirements of the DND and the entire AFP (GHQ, PA, PN, and PAF), is submitted to the DBM for consolidation into the National government's budget and forwarded to both Houses of Congress. The defence procurement for a given year must be in accordance with the budget as approved.

Conclusions and Recommendations

Despite the provisions of R.A. No. 9184 and its IRR-A, defence procurement in the Philippines remains problematic. The law fails to address the peculiar needs of the AFP (*i.e.*, “hutting in the field”), which results in the practice of short-cutting the process or the “misuse” of funds to immediately procure the required supplies or materials. Congress should look into how R.A. No. 9184 has been implemented over the past five years and undertake the necessary amendments, taking into account the peculiar requirements of each department, which the law lacks.

As regards the problem of familiarity between BAC members and the bidders and having the same bidders participate in the biddings, the problem can be traced back to the provisions of the law. The law states that bidders who bid beyond the ceiling price are disqualified as are those who do not meet the technical requirements. Such requirements inevitably limit those who are able to participate. Thus those who can consistently lower the price of the goods, materials, or equipment to be procured are the same ones who will qualify. However, to compensate for the low bid prices, many bidders who win such contracts often resort to cutting corners in their production and deliver substandard products to the AFP.

Although legislation to promote transparency and accountability in defence procurement exists, including oversight institutions for defence procurement such as the DBM, DND, and Congress (even the Ombudsman and the Sandiganbayan²³), collusion, weak law enforcement, and limited technical knowledge about defence and military procurement needs and processes among oversight institutions remain largely unaddressed in government reform programmes.

²³ The Sandiganbayan is an anti-graft and corruption court.