

NPM No. 001-2018

30 January 2018

MS. KATHY BARBOSA
<kathybrbs@gmail.com >

Re: Liquidated Damages -

Dear Ms. Barbosa:

This refers to your electronic mail inquiring the following, *to wit*:

- (1) Can liquidated damages be deducted from progress billings; and
- (2) Can liquidated damages be imposed after the expiry/completion date but before the termination of the contract or only after the target completion date?

Liquidated Damages Deducted from Progress Billings –

Under the General Conditions of the Contract (GCC) Clause 9 of the 5th Edition of the Philippine Bidding Documents for the Procurement of Infrastructure Projects, Liquidated Damages shall be paid by the Contractor in the following manner:

- 9.1 The Contractor shall pay liquidated damages to the Procuring Entity for each day that the Completion Date is later than the Intended Completion Date. The applicable liquidated damages is at least one-tenth (1/10) of a percent of the cost of unperformed portion for every day of delay. The total amount of liquidated damages shall not exceed ten percent (10%) of the amount of the contract. **The Procuring Entity may deduct liquidated damages from payments due to the Contractor.** Payment of liquidated damages shall not affect the Contractor's liabilities. Once the cumulative amount of liquidated damages reaches ten percent (10%) of the amount of this Contract, without prejudice to other courses of action and remedies available under the circumstances. (Emphasis ours)
- 9.2 If the Intended Completion Date is extended after liquidated damages have been paid, the Engineer of the Procuring Entity shall correct any overpayment of liquidated damages by the Contractor by adjusting the next payment certificate.

As can be gleaned from the foregoing, liquidated damages can be deducted from payments due to the Contractor, which include progress payments and final payment, for each day that the Completion Date is later than the Intended Completion date.

Imposition of Liquidated Damages -

As to when the liquidated damages may be imposed, we wish to note that Section 68 of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, the GPRA, is applicable. Thus,

Section 68. Liquidated Damages

All contracts executed in accordance with the Act and this IRR shall contain a provision on liquidated damages which shall be payable by the contractor in case of breach thereof. For the procurement of Goods, Infrastructure Projects and Consulting Services, the amount of the liquidated damages shall be at least equal to one-tenth of one percent (0.001) of the cost of the unperformed portion for every day of delay. Once the cumulative amount of liquidated damages reaches ten percent (10%) of the amount of the contract, the Procuring Entity may rescind or terminate the contract, without prejudice to other courses of action and remedies available under the circumstances.

Please note that the *Contract Implementation Guidelines for the Procurement of Infrastructure Projects* (Guidelines) provides a more detailed rule on how liquidated damages may be imposed, to wit:

8. Liquidated Damages

8.1. Where the contractor refuses or fails to satisfactorily complete the work within the specified contract time, plus any time extension duly granted and is hereby in default under the contract, the contractor shall pay the procuring entity for liquidated damages, and not by way of penalty, an amount, as provided in the conditions of contract, equal to at least one tenth (1/10) of one (1) percent of the cost of the unperformed portion of the works for every day of delay.

Pointedly, Section 8.1 of the Guidelines provides that when the contractor refuses or fails to satisfactorily complete the work within the specified contract time, plus any time extension duly granted, if any, the contractor shall pay the Procuring Entity liquidated damages. And once the cumulative amount of liquidated damages reaches ten percent (10%) of the contract amount, the Procuring Entity may rescind or terminate the contract, without prejudice to other courses of action and remedies available under the circumstances. In addition, GCC Clause 46.1 provides that:

If the Contract is **terminated because of a fundamental breach of Contract by the Contractor**, the Procuring Entity's Representative shall issue a certificate for the value of the work done and Materials ordered less advance payments received up to the date of the issue of the certificate and less the percentage to apply to the value of the work not completed, as indicated in the Special Conditions of the Contract (SCC). **Additional Liquidated Damages shall not apply.** If the total amount due to the Procuring Entity exceeds any payment due to the Contractor, the difference shall be payable to the Procuring Entity. (Emphasis ours.)

Summary -

All told, liquidated damages can still be imposed after the expiry/completion date or after the target completion date so long as there contractor refuses or fails to satisfactorily complete the work within the specified contract time, plus any time extension duly granted, of at least one-tenth (1/10) of a percent of the cost of unperformed portion for every day of delay or each day that the Completion Date is later than the Intended Completion date. As already explained, it may be deducted from payments due to the Contractor.

The provision that "*additional liquidated damages shall not apply*" shall be applicable only when the Procuring Entity has already terminated the contract because of fundamental breach of Contract by the Contractor.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this opinion is being issued on the basis of facts and particular situations presented, and may not be applicable given a different set of facts and circumstances. Should there be other concerns, please do not hesitate to contact us.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director V TMM

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