



Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 008-2018

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ATTY. MARIA NORINA S. TANGARO-CASINGAL

Director IV

COMMISSION ON ELECTIONS (COMELEC)

8th Floor, Palacio del Gobernador,
Gen. Luna St. cor. Postigo cor. Soriano St.,
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Re: Warranty Security; Application of 2016 Revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184 -

Dear Director Tangaro-Casingal:

This refers to your letters requesting our opinion on the applicability of Section 77.2 of the 2016 IRR of RA 9184 on a new contract to be executed but which is an offshoot of contracts procured under the 2009 revised IRR of RA 9184.

As represented, for the 9 May 2016 National and Local Elections, COMELEC executed two (2) contracts with SMMT-TIM 2016 Inc. for the lease of an Automated Election System (AES Contracts), one of the components of which is the lease of the Vote Counting Machines (VCMs). The AES Contracts contained an Option to Purchase Clause (OTP Clause), which gave the Commission the option to purchase the VCMs. The OTP Clause further provides that in the event that the Commission exercised the option, a warranty is required to be covered by retention money of 10% of every option to purchase payment made. The AES Contracts were procured under the 2009 revised IRR of RA 9184 and the warranty was based on Section 62.1 thereof.

As pointed out, under the 2016 IRR of RA 9184, the minimum rate of at least 10% warranty security was reduced to at least 1%. However, Section 77.2 of the same IRR provides that “[i]n cases where the advertisements or invitations for bids were issued before the effectivity of this IRR, Procuring Entities may continue adopting the procurement procedures, rules, and regulations provided in the revised IRR of 2009 or other applicable laws, as the case may be.” In relation to this, you are requesting our opinion on whether the rate of at least 1% warranty security provided in Section 77.2 of the 2016 IRR of RA 9184 can be applied in the event that the COMELEC exercises the option.

Rate of Warranty Security -

At the outset, we wish to clarify that the Government Procurement Policy Board (GPPB) issued Resolution No. 30-2017¹ amending Section 62.1 of the 2016 IRR of RA 9184, thus:

¹ Dated 31 July 2017 and published on 4 January 2018.

“For the procurement of Goods, in order to assure that manufacturing defects shall be corrected by the supplier, a warranty security shall be required from the contract awardee for a minimum period of three (3) months, in the case of Expendable Supplies, or a minimum period of one (1) year, in the case of Non-expendable Supplies, after acceptance by the Procuring Entity of the delivered supplies.

The obligation for the warranty shall be covered by either retention money in an amount equivalent to ***at least one percent (1%) but not to exceed five percent (5%) of every progress payment***, or a special bank guarantee equivalent to at least one percent (1%) but not to exceed five percent (5%) of the total contract price. The said amounts shall only be released after the lapse of the warranty period or, in the case of Expendable Supplies, after consumption thereof: Provided, however, That the supplies delivered are free from patent and latent defects and all the conditions imposed under the contract have been fully met.” (Emphasis supplied)

Accordingly, upon the effectivity of GPPB Resolution No. 30-2017, the applicable rate for the warranty security in the procurement of goods, whether in the form of retention money or special bank guarantee, shall be at least one percent (1%) but not to exceed five percent (5%) of every progress payment.

Prospective Application of 2016 IRR of RA 9184 -

Laws shall have no retroactive effect, unless the contrary is provided. In *Philippine National Bank v. Cayetano A. Tejano, Jr.*², the Supreme Court explained this provision of Article 4 of the New Civil Code of the Philippines in this wise:

“It is binding rule, conformably with Article 4 of the Civil Code, that, generally, laws shall have only a prospective effect and must not be applied retroactively in such a way as to apply to pending disputes and cases. This is expressed in the familiar legal maxim *lex prospicit, non respicit* (the law looks forward and not backward.) The rationale against retroactivity is easy to perceive: the retroactive application of a law usually divests rights that have already become vested or impairs the obligations of contract and, hence, is unconstitutional.”

In a number of Non-Policy Matter (NPM) Opinions, we have clarified the prospective application of RA 9184 and its IRRs. Thus, in NPM No. 008-2003, dated 15 May 2003, we opined in the following manner as to the prospective application of RA 9184, thus:

“All on-going procurement activities, including those for which the Invitation to Apply for eligibility and to Bid were already advertised prior to the effectivity of the IRR of R.A. 9184, shall be governed by the laws, rules and regulations applicable at that time, *i.e.* E.O. 40 and its IRR, except where these are contrary to the clear self-executing provisions of R.A. 9184. This is in consonance with the language of Article 4 of the Civil Code of the Philippines. Furthermore, since ***nothing in R.A. 9184 expressly provides for the retroactive application of its provisions, the general rule shall be reckoned with, that is, its provisions shall be applied prospectively.*** Statutory construction dictates that statutes are not to be construed to have a retroactive effect so as to affect pending projects

² G.R. No. 173615, October 16, 2009 citing Land Bank of the Philippines v. De Leon, 447 Phil. 495, 505 (2003) further citing Francisco v. Certeza, 3 SCRA 565 (1961).

or endeavors, unless such intent is expressly declared or clearly and necessarily implied from the language of the legislative enactment. (Emphasis supplied).

As to the first IRR of RA 9184, *i.e.* IRR-A, we explained its prospective application through NPM No. 119-2004, dated 27 August 2004, in the following manner:

“[R]epeal or amendment of existing laws and regulations on procurement and government contracts by R.A. 9184 has ***no retroactive effect in view of the transitory clause of provided under Section 77 of its IRR-A***, x x x

Accordingly, notwithstanding the passage of R.A. 9184 and its IRR-A prior procurement laws, rules and regulations still govern the procurement and implementation of certain government contracts, if its invitation for bids were issued or advertised prior to the effectivity of R.A. 9184 or its IRR-A. Hence, prior to the effectivity of R.A. 9184 and its IRR-A, the implementation of infrastructure projects shall be governed by Presidential Decree 1594 (P.D. 1594) and its Implementing Rules and Regulations (IRR).


We also had the occasion, in NPM No. 049-2012, dated 30 April 2012, to explain the prospective application of the second IRR of RA 9184, which is the revised IRR of RA 9184 issued in 2009, thus:

“[T]he revised IRR took effect on 2 September 2009. Thus, its provisions shall apply to all procurement activities where the invitations to bid (ITB) were posted on or after this date. This reflects the prospective application of laws, which is a basic tenet that “Laws shall have no retroactive effect, unless the contrary is provided.”

[S]ince the ***IRR of RA 9184 does not provide for a retroactive effect, we are of the opinion that Section 62.2.3.4 of the revised IRR should be applied prospectively to DOTC’s infrastructure contracts***. Thus, for the numerous infrastructure projects implemented and completed using IRR-A, it can continue to require the renewal of the warranty based on Section 62.2, on the assumption that the ITBs were posted before 2 September 2009.”

There is no cogent reason to deviate from this established rule on the prospective application of the 2016 IRR of RA 9184. We note that under its Section 78, the 2016 IRR of RA 9184 shall take effect sixty (60) calendar days after its publication in the Official Gazette or in a newspaper of general nationwide circulation and upon filing with the University of the Philippines Law Center of three (3) certified copies of this IRR, *i.e.*, 28 October 2016. Similar with the first two (2) IRRs of RA 9184, the 2016 IRR of RA 9184 does not provide for a retroactive effect, and thus, should be applied prospectively.

We further note that in NPM No. 049-2012 the issue likewise involves the requirement for warranty security, where we opined that the new provision on the warranty security for infrastructure projects shall be applied prospectively. Applying the same opinion in the case of warranty security for goods, the new rate prescribed under the 2016 IRR of RA 9184 shall likewise be applied prospectively.



Transitory Clause of 2016 IRR of RA 9184 -

The use of the word “may” in Section 77.2 of the 2016 IRR of RA 9184 gives the Procuring Entity the authority to continue adopting the procurement procedures, rules and regulations provided in the 2009 IRR of RA 9184 and other applicable laws, in the event that the advertisements or invitations to bid were issued before the effectivity of the IRR. The said provision does not in any way permit a retroactive application of the 2016 IRR of RA 9184. It simply means that if a procurement project was advertised prior to the effectivity of the 2016 IRR of RA 9184, Procuring Entity may continue adopting previous procurement rules as advertised and posted through the Bidding Documents.

Summary -

All told, it is our considered opinion that since the 2016 IRR of RA 9184 does not provide for a retroactive application, the prescribed rate for the warranty security in the procurement of goods under Section 62.1 of the 2016 IRR of RA 9184, including its amendment through GPPB Resolution No. 30-2017, shall be applied prospectively in all government procurement contracts. For contracts procured before the effectivity of the 2016 IRR of RA 9184 and its subsequent amendments, the old rate of at least 10% shall apply.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is issued on the basis of particular facts and 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 *TSAM*

