

NPM No. 01-2006

February 16, 2006

DR. ENRIQUE T. ONA, M.D.
Executive Director
National Kidney and Transplant Institute
East Avenue, Quezon City, 1101

Dear Executive Director Ona:

This refers to your letter-request and the attached documents thereto, dated 27 December 2005, addressed to the Honorable Secretary Romulo L. Neri, of the Department of Budget and Management in his capacity as Chairperson of the Government Procurement Policy Board (GPPB). Subject herein is a request for approval for price escalation on the following contracts of general services of the National Kidney and Transplant Institute (NKTI) due to the increase in the daily minimum wage in the National Capital Region following the issuance of Wage Order No. NCR-11 by the Regional Tripartite Wages and Productivity Board (RTWPB), to wit:

1. Contract for Janitorial Services – Philcare Manpower Services
2. Contract for Security Services – ARM Corporate Security Services Inc.
3. Service Contract for Temporary & Contractual Manpower – Business Trends, Inc.
4. Contract for Engineering and Maintenance Services – L.M. Camus Engineering Corporation

The request stems from the comments and suggestion contained in the contract review¹ conducted by the Office of the Government Corporate Counsel (OGCC) relative to the Supplemental Contract for janitorial services entered into by NKTI with Philcare Manpower Services effective 16 June 2005. In the above-mentioned contract review, OGCC recommend that before NKTI executes the Supplemental Contract between NKTI and Philcare Manpower Services on the matter of rate adjustments owing to the issuance of Wage Order No. NCR-11, it should seek prior approval from the GPPB pursuant to Section 61 of R.A. 9184 and its IRR-A and the Guidelines for Contract Price Escalation², approved and adopted by the GPPB in its Resolution No. 07-2004, dated 22 July 2004.



¹ Contract Review No. 319, series of 2005, dated 14 November 2005, OGCC

² Effective 19 October 2004

Hence, the sole issue for resolution is whether or not NKT I may accommodate all of the request for price escalation of all its service provider mentioned above on the basis of the effect of the issuance of Wage Order NCR-11.

Extraordinary Circumstances under the Guidelines for Contract Price Escalation

Under Section 3.2 of the Guidelines for Contract Price Escalation,³ "Extraordinary Circumstance" refers to an event or occurrence, or series of events or occurrences during contract implementation which gives rise to price escalation as may be determined by the National Economic and Development Authority (NEDA), in accordance with the provisions of the Civil Code of the Philippines. For purposes of the guidelines, the term refers to any or all of these three:

- a) Ordinary Fortuitous Events or those events which ordinarily happen or which could be reasonably foreseen but are inevitable, such as, but not limited to the following, to wit: (a.1) typhoons, (a.2) thunderstorms, (a.3) flooding of lowly areas and (a.4) vehicular accidents;⁴
- b) Extraordinary inflation or deflation;⁵ and
- c) Extraordinary Fortuitous Events or those events which could not be foreseen, or if foreseen, is inevitable.⁶

A fortuitous event, in the context of the Guidelines for Contract Price Escalation, may be produced by two (2) general causes: (1) Nature, such as but not limited to, earthquakes, storms, floods, epidemic, fires, and (2) by the act of man, such as but not limited to, armed invasion, attack by bandits, governmental prohibitions, robbery, provided that they have the force of an imposition which the contractor or supplier could not have resisted. This concept however is not confined to this enumeration in the guidelines, inasmuch as they are merely provided as examples and are merely descriptive of a genus, purported to establish a model or pattern so that others of the same nature or character may be embraced by the definition.

The issuance or promulgation of a valid law, regulation, or governmental order conforms to the pattern established by the aforesaid enumeration of examples. Ordinarily, the same is independent of the will of the parties to the contract and the contractor or supplier is free from any participation inasmuch as the same is presumed to have been done in the course of official functions to achieve a certain purpose or implement a certain policy. Thus, such event is fairly unavoidable and beyond the control of any of the contracting parties. Corollarily, such occurrence may possibly render it difficult for the security agency to fulfill his obligation in a normal manner and/or within the original contemplation of the parties to the contract.

³ Annex "A" of GPPB Resolution No. 07-2004, dated July 22, 2004.

⁴ See Art. 1174 of the New Civil Code of the Philippines; also see Section 3.4 and 4.1 of the Guidelines for Contract Price Escalation.

⁵ See Art. 1250 of the New Civil Code of the Philippines; see also definition under Section 3.3 of the Guidelines for Contract Price Escalation.

⁶ See Art. 1680 of the New Civil Code of the Philippines; also see Section 3.4 and 4.3 of the Guidelines for Contract Price Escalation



The foregoing having been said, it is not hard a task to categorically state that the case under consideration is well within the definition of an extraordinary circumstance. However, the Guidelines for Contract Price Escalation stands to be inapplicable in the case as the same is limited only to address price adjustments in tangible goods. It does not cover under its scope the adjustment of prices for contracts of services.

While it is not categorically mentioned in any of the provisions of the guidelines, the clear intention is to limit its application only to cases where price escalation is warranted in the cases of tangible goods or commodities. Note that in the review of the technical parameters of a request for price escalation, reference is made to price indices and commodities which fact plainly points to the intention of the guidelines.

Section 17.7.4 of the IRR-A of R.A. 9184 is applicable

The foregoing discourse notwithstanding, NKTi is not without any option given the extraordinary circumstances confronting it where a supervening law, regulation, or governmental order is issued or promulgated during the implementation of its subsisting security service contract. Section 17.7.4 of the IRR-A of RA 9184 is responsive and relevant portion of which provides as follows:

*Before submitting their bids, the bidders are deemed to have become familiar with all existing laws, decrees, ordinances, acts and regulations of the Philippines which may affect the contract in any way. However, in cases where the cost of the awarded contract is affected by any applicable new laws, ordinances, regulations or other acts of Government promulgated after the date of bidding, a contract price adjustment shall be made or appropriate relief shall be applied on a no loss-no gain basis, provided such is not covered by the contract provisions on price adjustment.*⁷

The provision above-cited sufficiently provides remedy to the contracting parties in addressing the need for price adjustment because of the issuance or promulgation of a new law, ordinance, regulation, or other Governmental act. The provision is self-executing and does not require elaborate process for its accomplishment; provided, that in the grant of relief or allowing price adjustment shall be on a "no loss-no gain" basis, i.e., the relief or adjustment shall only be to the extent of the actual adjustment or change caused by the supervening issuance or governmental act.

In sum, the NKTi may allow price adjustment relative to its contracts for the above mentioned general support services with its incumbent service providers, in accordance with the new Wage Order No. NCR-11 and on a "no loss-no gain" basis as stated above.


⁷ Italics ours.

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This opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not necessarily be applicable upon a different set of facts or circumstances.

We trust that this clarifies matters.

Very truly yours,


ELMER H. DORADO
Officer-in-Charge