



Department of Budget and Management
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE

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10 October 2014

ATTY. PETER GIAN-MARC R. REYES
Attorney III, Legal Office
Office of the Chancellor
UNIVERSITY OF THE PHILIPPINES LOS BAÑOS (UPLB)
Los Baños, Laguna 4031

Re: Termination of Contracts

Dear Atty. Reyes:

This refers to your electronic mail seeking clarification from our office on the following procurement concerns:

1. Whether the procedures for termination of contracts provided in the General Conditions of Contract (GCC) of the Philippine Bidding Documents (PBDs) for the Procurement of Infrastructure Projects, and in the Guidelines on Termination of Contracts¹ (Guidelines, for brevity) apply to infrastructure projects where the contract time has already expired; and
2. Whether in case of lapse of the original contract time, there is an implied extension of contract time until the sum of liquidated damages of the contractor amounts to 10% of the contract amount.

It is represented that the contract time of one of the infrastructure projects of UPLB has already expired. This caused a quandary to UPLB on whether there is still a need to follow the procedures for termination of contracts in order to terminate the said contract. The confusion on whether the procedures for termination of contracts apply to both on-going contracts and contracts whose contract time has already expired stems from the following grounds for termination of contracts under the GCC of the PBDs for the Procurement of Infrastructure Projects:

1. Due to its own fault and after this Contract time has expired, the Contractor incurs delay in the completion of the Work after this Contract has expired²;
2. The contractor does not execute the Works in accordance with this Contract or persistently or flagrantly neglects to carry out its obligations under this Contract³;
and

¹ GPPB Resolution 18-2004 dated 22 December 2004.

² Clause 16.3.

3. The other party causes a fundamental breach of contract such as when the Procuring Entity (PE)'s representative gives notice that failure to correct a particular defect is a fundamental breach of contract and the contractor fails to correct it within a reasonable period of time determined by the PE's representative, or when the contractor has delayed the completion of the works by the number of days for which the maximum amount of liquidated damages can be paid⁴.

In addition, reference was made to the cases of *Home Development Mutual Fund v. Court of Appeals*⁵ and *National Housing Authority v. First United Constructors Corporation*⁶, where the Supreme Court held that:

As a rule, the method of terminating a contract is primarily determined by the stipulation of the parties. Thus, the requirements of contracts as to notice – as to the time of giving, form, and manner of service thereof – must be strictly observed because in an obligation where a period is designated, it is presumed to have been established for the benefit of both the contracting parties.


It is in this light that you raised the above-mentioned queries.

Applicability of Procedure for Termination of Contracts

We wish to clarify that the procedures for termination of contracts mentioned in Section IV of the Guidelines and in GCC Clause 19.1 of the PBDs for the Procurement of Infrastructure Projects apply to all types of termination of contracts regardless of the grounds for termination. The mentioned Section/Clause of the Guidelines and GCC does not distinguish the grounds to which they shall be made applicable. Similarly, there was no exception mentioned in the application of the procedures for termination of contracts. *Exceptio firmat regulam in casibus non exceptis*. A thing not being excepted must be regarded as coming within the purview of the general rule.

In this regard, whether the ground for termination of contract existed while the project is on-going or after the contract time has expired, the termination of contract should follow the procedures laid down in the Guidelines and in the GCC.

Implied Extension of Contract Time

Section 10 of the Contract Implementation Guidelines for the Procurement of Infrastructure Projects⁷ provides the rules on extension of contract time. The same rules are reiterated in GCC Clause 47 of the PBDs for the Procurement of Infrastructure Projects. As a general rule, all contract time extensions should be duly granted by the PE upon request of the contractor. Moreover, failure on the part of the contractor to notify the PE of its request for contract time extension shall constitute a waiver of the claim. This magnifies the rule on the express approval by the PE before the completion date of a project can be extended. 

³ Clause 16.4(c).

⁴ Clause 18.2 in relation to Clause 18.3(e) and (g).

⁵ G.R. No. 118972 promulgated on 03 April 1998.

⁶ G.R. No. 176535 promulgated on 07 September 2011.

⁷ Annex E of the IRR of RA 9184.

Hence, implied extension of contract time is not recognized under the procurement rules. Should there be no approved contract time extension from the PE, the lapse of contract time without completing the project establishes delay on the part of the contractor and exposes the latter for possible imposition of sanctions including the payment of liquidated damages and termination of contract when threshold percentages are triggered, that is, 1/10 of 1% for every day of delay for the unperformed portion of the works in the case of liquidated damages; and 10% of the contract price for the termination of the contract.

Summary

In sum, we wish to clarify the following matters relative to your concerns:

1. The procedures for the termination of contracts must be observed regardless of whether the ground for termination of contract existed while the project is on-going or after the contract time has expired; and
2. Contract time extensions for infrastructure projects should follow the procedures laid down in Section 10 of the Contract Implementation Guidelines for the Procurement of Infrastructure Projects.

We hope 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 you have further questions, please do not hesitate to contact us.

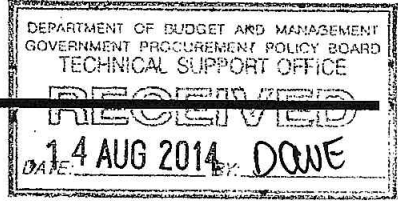
Very truly yours,



DENNIS S. SANTIAGO
Executive Director V

11/27/14

Lora T. Alvarez



From: UPLB Legal Office <upbllegaloffice@gmail.com>
Sent: Wednesday, August 13, 2014 7:04 PM
To: gppb@gppb.gov.ph; legal@gppb.gov.ph; secretariat@gppb.gov.ph
Cc: lalvarez@gppb.gov.ph
Subject: Request for Opinion: Clarification on Procedure for Termination of Contracts

*Sen (Lora), pls 27 Aug 14
 please prepare opinion.
 201408*

Sir/Ma'am:

Good day!

This is to respectfully request the opinion of your good office on the applicability of the "Procedures for Termination of Contracts" provided in the pro forma "General Conditions of Contract" (GCC) of General Construction Agreements (GCA) and in the "Guidelines on Termination of Contracts" (Appendix 4, Revised IRR of RA 9184) on contracts whose contract time has already expired.

Applicability of Procedure for Termination of Contracts

The contract time of one our infrastructure projects has already expired. Our office is at a quandary of whether or not we still need to follow the "Procedure for Termination of Contracts" to terminate the said agreement.

It is not clear, to our office at least, whether the "Procedure for Termination of Contracts" is applicable only for pre-termination of on-going and still effective contracts or even to contracts whose contract time has already lapsed.

The fact that some of the grounds for termination of contract in the GCC appear to exist or may exist after expiration of contract time contribute to our confusion about the applicability of the procedure, i.e.:

1. "Due to its own fault and after the contract time has expired, the Contractor incurs delay in the completion of the Work after this Contract has expired; * * * (16.3, GCC)"
2. "does not execute the Works in accordance with this Contract or persistently or flagrantly neglects to carry out its obligation under the Contract; * * *(16.4 (c), GCC)"; and
3. "The Procuring Entity or the Contractor may terminate this Contract if the other party causes a fundamental breach of this Contract. X X X Fundamental breaches of Contract shall include, but not be limited to, the following: X X X (e) The Procuring Entity's Representative gives Notice that the failure to correct a particular Defect is a fundamental breach of Contract and the Contractor fails to correct it within a reasonable period of time determined by the Procuring Entity's Representative; * * * (g) The Contractor has Delayed the completion of the Works by the number of days for which the maximum amount of liquidated damages can be paid, as defined in the GCC Clause 9; * * (18.2 in relation to 18.3 (e) and (g), GCC)"

Compounding our confusion is the holding in one case, to wit:

"The law mandates that "Obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith.

"Did petitioners comply with their contractual obligation in good faith, when they served the requisite written notice to private respondents nine (9) days after the expiration of the Agreement? The answer to this crucial question is in the negative.

*"The second clause of the contractual provision in dispute is to the effect that written notice of termination should be served at least thirty (30) days in advance. **As a rule, the method of terminating a contract is primarily determined by the stipulation of the parties. Thus, the requirements of contracts as to notice - as to the time of giving, form, and manner of service thereof - must be strictly observed because 'In an obligation where a period is designated, it is presumed to have been established for the benefit of both the contracting parties.'** Thus, the unilateral termination of the contract in question by the herein petitioners is violative of the principle of mutuality of contracts ordained in Art. 1308 of the New Civil Code (Home Development Mutual Fund vs. Court of Appeals, G.R. No. 118972, 3 April 1998)."* (emphasis supplied)

The above ruling was reiterated in the relatively recent case *National Housing Authority vs. First United Constructors Corporation* (G.R. No. 176535, September 7, 2011)

In interrogatory form: Does the "Procedures for Termination of Contracts" provided in the GCC and in the "Guidelines on Termination of Contracts" still apply even if the contract time in an infrastructure project has already expired considering that such procedure is expressly provided in the GCC without distinction or qualification and the guidelines enumerate grounds for termination that exist or may exist after expiration of contract time and ?

Implied Extension of Contract Time

Corollary to this, considering that it appears that there is still no fundamental breach of contract until the sum of liquidated damages of the contractor amounts to 10% of the contract amount, is not there an implied extension of the contract time which is co-extensive with the days equivalent to the maximum amount of liquidated damages allowed?

Your opinion shall be used to guide us in resolving a case pending in our office. Consequently, may we respectfully implore your office to act on our request with immediate dispatch.

Thank you for your time and attention.

Very truly yours,

Peter Gian-marc R. Reyes
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