



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

NPM No. 56-2013

26 June 2013

HON. HERMINIA M. RAMIRO
Governor
PROVINCE OF MISAMIS OCCIDENTAL
Provincial Capitol, Oroquieta City,
Misamis Occidental 7207

Re : Variation Order

Dear Governor Ramiro:

We respond to your letter requesting for a legal opinion on the propriety of the decision of the Bids and Awards Committee (BAC) to undertake Variation Order relative to the Design and Construction/Improvement of Misamis Occidental Provincial Capitol Building (Project).

As represented, as early as 14 April 2011, the Honorable Governor inquired with the National Historical Institute (NHI) whether the Provincial Capitol Building is included in the list of national historic sites and structures, and requested for the approval of plans to improve and develop the same. However, it was only on 11 November 2011 that the Provincial Government received a reply from National Historical Commission of the Philippines (NHCP), in response to an email communication from Architect Neil Ryan E. Manigsaca regarding the proposed expansion of the Provincial Capitol Building, urging the Provincial Government to preserve the building and integrate it into the new development of the government center without denying its historic features. An award of contract was nonetheless made on 28 December 2011.

On 17 February 2012, acting upon the Honorable Governor's request for the ratification of the contract for the Project, the *Sangguniang Panlalawigan* issued Resolution No. 052-12 ratifying said contract. The Notice to Proceed was thereafter issued on 22 February 2012.

The NHCP, in a letter dated 20 February 2012, asked the Provincial Government to stop the demolition of the side wings of the Provincial Capitol Building and preserve the neo-classic edifice. On 29 March 2012, the National Commission for Culture and Arts (NCCA) suggested the restoration of the entire Provincial Capitol Building, including its two wings, and recommended the integration of the old and new structure as one scientific and acceptable approach to help save the building. The same letter of the NCCA stated that since Republic Act No. 10066 was not considered in the approved contract and its terms of

reference (TOR) in the renovation of the Provincial Capitol Building, a variation order and a reworked TOR were deemed necessary for pushing through with the Project.

It is based on the foregoing representation that you are inquiring on the following concerns:

1. Whether the issuance of Variation Order for the Project is proper.
2. Whether Variation Order may be interpreted to include major changes in the design as conceptualized, bid out, and awarded.
3. Whether the contractor may claim 15% mobilization fee pending the completion of the amended contract.
4. Whether it is necessary for the *Sangguniang Panlalawigan* to ratify the contract.
5. Whether the Government Procurement Policy Board (GPPB) can make a categorical declaration that the 2 components of the Project may be made into 2 separate contracts.

Variation Order; Scope and Application

Section 1.1 of the Contract Implementation Guidelines for the Procurement of Infrastructure Projects¹ (Guidelines) provides that Variation Orders may be issued to cover any increase/decrease in quantities of work, thus:

- a) Introduction of new work items that are not included in the original contract (Extra Work Order²); or
- b) Reclassification of work items (Change Order³).

In both instances, Variation Order should be based on the following reasons:

- a) Due to change of plans, design, or alignment to suit actual field conditions resulting in disparity between the preconstruction plans used for purposes of bidding and the “as staked plans”; or
- b) Construction drawings prepared after the joint survey by the contractor and the government after award of contract.

We wish to note that the Guidelines does not qualify whether the introduction or reclassification of work items includes major changes in the design as conceptualized, bid out, and awarded. Section 1.1 thereof, however, requires that the addition/deletion of works under Variation Orders should be within the general scope of the project as bid and awarded.

¹ Annex “E” of the revised Implementing Rules and Regulations (IRR) of Republic Act No. (RA) 9184.

² Section 1.3 of Annex “E” of the IRR of RA 9184 defines Extra Work order as those Variation Orders covering the introduction of new work necessary for the completion, improvement or protection of the project which was not included in the original contract.

³ Section 1.2 of Annex “E” of the IRR of RA 9184 defines Change Order as those Variation Orders covering any increase/decrease in quantities of original work items in the contract.

In addition, the same Section of the Guidelines limits the cumulative amount of positive or additive Variation Orders to not more than ten percent (10%) of the original contract price, and the scope of work should not be reduced so as to accommodate a positive Variation Order.

In view of the foregoing, in order for the Provincial Government to implement Variation Orders for its contract for the Project, it is imperative to establish that Change Orders or Extra Work Orders are within the general scope of the Project as bid and awarded, and are due to the change of plans, design, or alignment to suit actual field conditions resulting in disparity between the preconstruction plans used for purposes of bidding and the "as staked plans" or the construction drawings prepared after the joint survey by the contractor and the government after award of contract. We also wish to stress that the cumulative amount of positive or additive Variation Orders should not exceed ten percent (10%) of the original contract price, and the scope of work should not be reduced so as to accommodate a positive Variation Order.

Mobilization Fee

In infrastructure projects, the procuring entity may grant an advance payment for purpose of mobilization, which amounts to a form of financial assistance extended by the procuring entity to the contractor in order to defray the cost for deployment of equipment and start the works immediately within the specified period in the notice to proceed⁴.

For a contractor to be given an advance payment, Section 4 of the Guidelines requires the following conditions:

- a) The advance payment should not exceed fifteen percent (15%) of the total contract price;
- b) Payment shall be made in lump sum or, at the most, 2 installments according to a schedule specified in the Instructions to Bidders and other relevant bidding documents; and
- c) Made only upon the submission to and acceptance by the procuring entity of an irrevocable standby letter of credit of equivalent value from a commercial bank, a bank guarantee or a surety bond callable upon demand, issued by a surety or insurance company duly licensed by the Insurance Commission and confirmed by the procuring entity.

Based on the foregoing, advance payment in case of infrastructure projects may be granted by the procuring entity upon compliance with the aforementioned conditions, and only for the purpose of mobilization. Thus, if the contractor has already mobilized its equipment and has commenced with the required works under the contract, advance payment can no longer be provided as doing so already negates the very purpose of granting such privilege to the contractor. A

⁴ Policy Matter No. 001-2004, dated 18 February 2004.

**Ratification of the Contract
by the *Sangguniang Panlalawigan***

A reading of Section 22(c) of RA 7160 reveals that the Local Chief Executive (LCE) cannot enter into a contract in behalf of the local government unit without prior authorization by the *sanggunian* concerned. Also, in Section 465(b)(1)(vi) of RA 7160, the Provincial Governor has the power to represent the province in all its business transactions and sign in its behalf all bonds, contracts, and obligations, and such other documents upon authority of the *Sangguniang Panlalawigan* or pursuant to law or ordinance.

In the case of *Vergara v. Ombudsman*⁵, relying on Sections 22(c) and 455(b)(1)(vi) of RA 7160, the Supreme Court held that “when the local chief executive enters into contracts, the law speaks of prior authorization or authority from the *Sangguniang Panlungsod* and not ratification.” The Supreme Court upheld the position of the Ombudsman that “ratification by the City Council is not a condition *sine qua non* for Mayor Lajara to enter into contracts.” The Supreme Court further explained that “[w]ith the resolution issued by the *Sangguniang Panlungsod*, it cannot be said that there was evident bad faith in purchasing the subject lots. The lack of ratification alone does not characterize the purchase of the properties as one that gave unwarranted benefits to Pamana or Prudential Bank or one that caused undue injury to Calamba City.”

Accordingly, as long as there is prior clear and categorical authorization from the *Sangguniang Panlalawigan*, the Provincial Governor may enter into contract for and in behalf of the local government unit.

Authority of the GPPB

We wish to stress that the Government Procurement Policy Board (GPPB) and its Technical Support Office (GPPB-TSO) only render policy and non-policy opinions, respectively, on issues purely relating to the interpretation and application of our procurement laws, rules, and regulations. It has no jurisdiction to rule over actual controversies with regard to the conduct of the bidding since it has no quasi-judicial functions under the law.

Moreover, we adhere to the position that we cannot, nor any other government agency, authority, or official, encroach upon or interfere with the exercise of the functions of the BAC, since these duties and responsibilities fall solely within the ambit of its authority as sanctioned by law. As such, the Provincial Government, through its BAC, is in the best position to determine the details of its Project, and the concomitant responsibility and authority to declare whether the two (2) components of the Project may be made into two (2) separate contracts.

Summary

In view of all the foregoing, we wish to clarify the following matters:

1. Variation Order may be validly implemented provided that the Provincial Government has established that Change Orders or Extra Work Orders are within the general scope of the Project as bid and awarded, and are due to

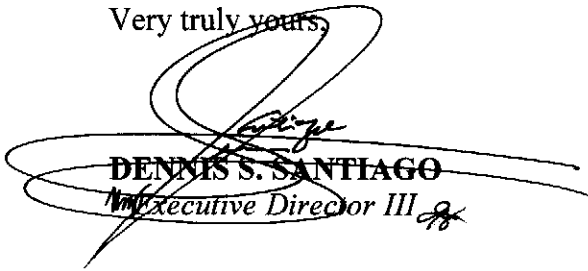
⁵ G.R. No. 174567 dated 12 March 2009.

the change of plans, design, or alignment to suit actual field conditions resulting in disparity between the preconstruction plans used for purposes of bidding and the “as staked plans” or the construction drawings prepared after the joint survey by the contractor and the government after award of contract.

2. The total cumulative amount of positive or additive Variation Orders should not exceed ten percent (10%) of the total contract price, and the scope of work should not be reduced so as to accommodate a positive Variation Order.
3. Mobilization fee cannot be granted if the contractor has already mobilized its equipment and has commenced with the required works under the contract, advance payment can no longer be provided as doing so shall negate the very purpose of granting such privilege to the contractor.
4. The Provincial Governor may enter into contract if the *Sangguniang Panlalawigan* has given a clear and categorical prior authorization for the former to enter into contract as required under Sections 22(c) and 465(b)(1)(vi) of RA 7160.
5. The authority to determine whether the two (2) components of the Project may be made into two (2) separate contracts is the prerogative and discretion of the procuring entity.

We hope our advice 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 you have other concerns, please do not hesitate to contact us.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director III