



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

NPM No. 63-2012

18 May 2012

MR. JUNIO M. RAGRAGIO

General Manager

PHILIPPINE NATIONAL RAILWAYS (PNR)

PNR Executive Building, Mayhaligue Street,
Tondo, Manila

Re: Amendment to Order

Dear Mr. Rragragio:

We respond to your letters dated 15 and 26 March 2012 requesting for clarification on the application of amendment to order under Republic Act (RA) 9184 and its Implementing Rules and Regulations (IRR) in relation to the transport of fifty (50) units of donated rolling stock from East Japan Railway Company (EJRC).

As represented, PNR conducted a public bidding for the said service. The Invitation to Bid indicated that the transport shall commence from the depot of EJRC to the designated port of origin in Japan, to the designated port of destination in Manila, and to the PNR tracks in Tayuman Yard, Manila. Prior to the shipping of the rolling stocks, Rhenus Prolog Logistics, Inc. (Rhenus) informed PNR that brake pads on the first and last coaches of each train set must first be installed to ensure safety during the transport from Japan to the Philippines, which was not among the expected incidental services to be performed by the former, being primarily a transport and logistics firm. Nonetheless, PNR agreed to the installation requirement to facilitate the immediate transport and comply with the Deed of Donation timetable, with Rhenus initially shouldering the cost for the same. In addition, PNR was later on informed by EJRC that the port of origin was changed from Kawasaki Port to Niigata Port for three (3) of the trainsets to be shipped. Consequently, Rhenus seeks reimbursement from PNR for the costs it incurred for the installation of the brake pads and the change in the designated port of origin.

For your guidance, an amendment to order is allowed under Annex "D" of the IRR (Contract Implementation Guidelines for the Procurement of Goods, Supplies and Materials), and may be issued only in the following instances:

1. Emergency cases or during fortuitous events requiring necessary adjustments within the general scope of the contract in order to fully meet the requirements of the project involving any of the following:

- a. Drawing, design or specifications, if the goods to be furnished are to be specifically manufactured for the Government in accordance therewith;
 - b. Method of shipment or packing; or
 - c. Place of delivery.¹
2. Where there are additional items needed and necessary for the protection of the goods, which were not included in the original contract.²

Thus, in order for an amendment to order to be valid, the procuring entity must establish that the conditions required in any of the two aforementioned situations exist.

In applying the first instance, an “emergency” is defined as a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action.³ As discussed in a previous opinion, emergency cases refer to those situations when time is of the essence or the procurement is an exigency, which requires immediate action on the part of the procuring entity in order to prevent damage or loss of life or property.⁴ On the other hand, the term “fortuitous” means a happening, or produced by chance, or accidental.⁵ Fortuitous event or *causa fortuito* has also been defined as exempting a person from responsibility necessitates that (1) the event must be independent of the human will; (2) the occurrence must render it impossible for the debtor to fulfill the obligation in a normal manner; and (3) the obligor must be free of participation in, or aggravation of, the injury to the creditor. The event must have been impossible to foresee, or if it could be foreseen, must have been impossible to avoid. There must be an entire exclusion of human agency from the cause of the injury or loss.⁶

Under Annex “D” of the IRR, the occurrence of an emergency case or fortuitous event should necessitate the adjustment to the original contract in order to fully meet the requirements of the project involving the (a) drawing, design or specifications of the goods; (b) the method of shipment or packing; or (c) the place of delivery. Thus, it must be further established that the emergency case or fortuitous event led to the need for an amendment.

In applying the second instance, an amendment to order may be issued when items excluded in the original contract are added to ensure that the goods to be delivered are protected from possible damage or unnecessary exposure. Section 1.3 of Annex “D” of the IRR provides that the payments for the additional items should be based on the unit prices in the original contract for items or goods similar to those in the original contract. If the contract does not contain any rate applicable to the additional items, then suitable prices shall mutually be agreed upon between the parties.

Based on the foregoing, an amendment to order may be issued if the circumstances involved in the procurement project are covered by any of the two instances mentioned in Annex “D” of the IRR. The change in the port of origin from Kawasaki Port to Niigata Port may warrant an amendment should PNR prove that there was an emergency or fortuitous event resulting to the need for modification of the place of delivery, *i.e.*, point of origin or point of destination or both, for the three (3) trainsets. On the other hand, the installation of the brake pads may be considered under the second instance of Annex “D” of the IRR if it

¹ Contract Implementation Guidelines for the Procurement of Goods, Supplies, and Materials, Section 1.2.

² *Ibid.*, Section 1.3.

³ Random House Webster’s Unabridged Dictionary, Second Edition, 2001, p. 636.

⁴ NPM No. 021-2004 dated 26 February 2004.

⁵ Random House Webster’s Unabridged Dictionary, Second Edition, 2001, p. 754.

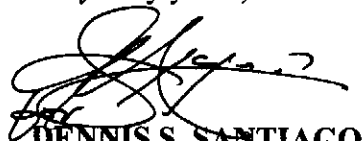
⁶ Ruben E. Agpalo, *Agpalo’s Legal Words and Phrases*, 1997 Edition, p. 102 citing *Vasquez v. CA*, 138 SCRA 553 (1985).

will be established that it is necessary for the protection of the fifty (50) units of donated rolling stock and such installation was not part of the terms of the original contract.

Lastly, we wish to remind you that Annex "D" of the IRR further provides that an amendment to order is valid only on items up to the point where the cumulative increase in the contract cost which has not been duly fully approved does not exceed five percent (5%) of the original contract cost, and the amendment has to be immediately prepared and submitted for approval to the HOPE or his duly authorized representative. However, for amendment to order involving a cumulative amount exceeding five percent (5%) but not more than ten percent (10%) of the original contract cost, no work should be started unless the same has been approved by the HOPE or his duly authorized representative. Thus, PNR should verify if the increase falls within the allowable range of at most ten percent (10%) and if the conditions for the issuance of the amendment to order have been complied with.

We hope our advice provided sufficient guidance on the matter. This opinion is based on the information presented, and may not be applicable to 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 III

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