

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

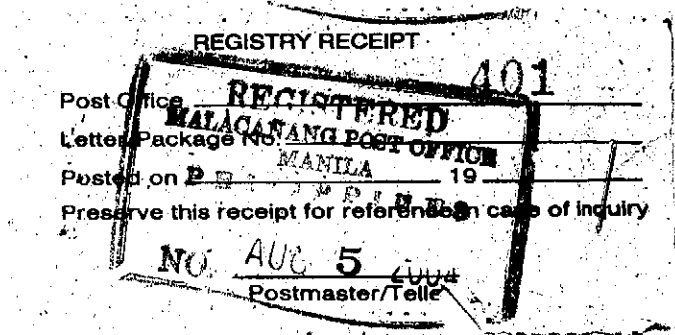
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NPM No. 106-2004

August 3, 2004

MR. JUAN CARLOS J. GUADARRAMA

Vice President for Logistics
National Power Corporation
Cor. Quezon Avenue & Agham Road,
Diliman, Quezon City, 1100



Re : Request for Clarification on Section 42.4 of the Implementing Rules and Regulations Part A of Republic Act 9184

Dear Mr. Guadarrama:

This refers to your letter dated July 21, 2004, requesting clarification on the application of Section 42.4 of the Implementing Rules and Regulations Part A ("IRR-A") of Republic Act 9184 ("R.A. 9184") with respect to the practice of the National Power Corporation ("NPC") in granting upward adjustment of the price in the event that the coal delivered by the winning bidder produces a higher heating value than what was originally guaranteed.

As represented in the said letter, due to the inherent characteristics of coal and the impossibility of getting exact and the same heating value for every batch of coal mined, it is the international practice to include provisions in coal supply and delivery contracts that in the event the delivered coal produces a higher heating value than what was guaranteed by the supplier during the bidding, an upward adjustment in the price shall be granted. However, in case the coal produces a lower heating value than what was guaranteed, the supplier will be accorded a corresponding penalty of downward adjustment of its original price.

Under the IRR-A of R.A. 9184, specifically Section 42.4 thereof, "no incentive bonus, in whatever form or for whatever purpose, shall be allowed." It is with regard to this provision that NPC is now requesting clarification on the propriety of the contract provision on downward or upward adjustment in the price of coal included in the NPC contract for coal supply and delivery. The issue for resolution is as follows:

Whether or not the grant of upward adjustment in the price of coal in case it produces a heating value higher than what was guaranteed is a form of incentive bonus.

Incentive Bonus as Contemplated Under the IRR-A of R.A. 9184

The incentive bonus contemplated under the IRR-A of R.A. 9184 is an extra consideration given by the procuring entity to a bidder, during evaluation of bids, which submitted specifications or provided works more than what was required at no cost to the procuring entity. The IRR-A of R.A. 9184 prohibits the grant of any special consideration or bonus to a bidder for submitting higher specifications, offering extra work or earlier delivery period, or providing extra items. Bids shall be evaluated in equal footing, and no premium shall be given by the procuring entity to a bidder who offers more than what was required.

In the procurement of coal, the bidders guarantee a certain amount of heating value/heat content and other quality parameters of coal to be delivered. Based on these guaranteed parameters, the bidders submit its price quotation for the amount of coal to be delivered. The bids are then evaluated based on the submitted price for the quality parameters guaranteed using a standard formula.

In this regard, we are of the opinion that the above-mentioned upward price adjustment mechanism is not an incentive bonus that is prohibited under Section 42.4 of the IRR-A of R.A. 9184. However, it is noteworthy that this mechanism does not characterize a fixed priced contract mandated under Section 61.1 of the IRR-A of R.A. 9184. Section 61.1 of the IRR-A specifically provides as follows:

For the given scope of work in the contract as awarded, **all bid prices shall be considered as fixed prices, and therefore not subject to price escalation during contract implementation**, except under extraordinary circumstances and upon prior approval of the GPPB. All contracts shall be denominated and payable in Philippine currency, and this shall be stated in the bidding documents: Provided, however, That should the procuring entity receive bids denominated in foreign currency, the same shall be converted to Philippine currency based on the exchange rate prevailing on the day of the bid opening. (Emphasis supplied)

In view of all the foregoing, although the upward price adjustment mechanism adopted by the NPC does not take the form of an incentive bonus, it is our view that such mechanism violates the requirement on fixed price contracts as provided in the above-quoted provision.

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,


JOSE MARTIN C. SYQUIA
Executive Director