

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office
Mezzanine 125, Mabini Hall, Malacañang, Manila
Telefax Nos. (02) 735-4962; (02) 736-5758

NPM No. 119-2004

August 27, 2004

MS. SYLVIA D. CLEMENTE

Deputy Executive Director
Pasig River Rehabilitation Commission
2nd Floor MWSS Engineering Building,
Katipunan Road, Balara, Quezon City

Re : Price Escalation, Variation Orders and Adjustment of the Approved Budget for the Contract

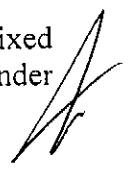
Dear Deputy Executive Director Clemente:

This refers to your letter dated August 17, 2004, which we received on August 18, 2004, requesting clarification on the application of Republic Act 9184 (R.A. 9184) and its Implementing Rules and Regulations Part A (IRR-A) on several concerns involving the School Building Project of the Pasig River Rehabilitation Commission (PRRC). The relevant issues are as follows:

1. Whether or not the thirty percent (30%) increase in the prices of steel and other structural steel products justify the grant of price escalation;
2. Whether or not the provisions of the IRR-A of R.A. 9184 on variation orders apply to a contract the invitation to bid for which was published after the approval of R.A. 9184 but before the approval of its IRR-A; and
3. Whether or not the procuring entity may initiate a review of the Approved Budget for the Contract (ABC) and adjust the same to be responsive to the current market prices.

Grant of Contract Price Escalation

Section 61 of R.A. 9184 explicitly provides that 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 Government Procurement Policy Board (GPPB).

In order to ensure that the task mandated by Section 61 of R.A. 9184 shall be undertaken competently, objectively and expeditiously by the GPPB and the National Economic and Development Authority (NEDA), the GPPB, during its 6th meeting held on October 20, 2003, tasked the GPPB-Technical Support Office (GPPB-TSO) and NEDA to draft the guidelines that will govern requests for contract price escalation for the procurement of goods and infrastructure projects. Accordingly, it is imperative that requests for contract price escalation be held in abeyance until the effectivity of said guidelines.

This being the case, the propriety of granting a contract price escalation to any contractor or supplier which depends on the Guidelines for Contract Price Escalation will necessarily be determined only after its effectivity. In this connection, we wish to inform you that during the 4th GPPB meeting held on June 10, 2004, the members of the GPPB unanimously approved the issuance of the Guidelines for Contract Price Escalation.

Applicable Law for Implementation of Variation Orders

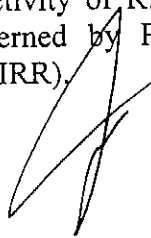
The passage of R.A. 9184 and its IRR-A lead to the repeal or amendment of all procurement laws, rules and regulations and such other laws, presidential decrees, or issuances, executive orders, letters of instruction, administrative orders, proclamations, charters, rules or regulations and/or parts thereof contrary to or inconsistent therewith.

However, repeal or amendment of existing laws and regulations on procurement and government contracts by R.A. 9184 has no retroactive effect in view of the transitory clause of provided under Section 77 of its IRR-A, to wit:

In all procurement activities **where the advertisement or invitation for bids was issued prior to the effectivity of the Act**, the provisions of E.O. 40 and its IRR, P.D. 1594 and its IRR, R.A. 7160 and its IRR, or other applicable laws, as the case may be, shall govern.

In cases **where the advertisements or invitations for bids were issued after the effectivity of the Act but before the effectivity of this IRR-A**, procuring entities may continue adopting the procurement procedures, rules and regulations provided in E.O. 40 and its IRR, P.D. 1594 and its IRR, R.A. 7160 and its IRR, or other applicable laws, as the case may be. (Emphasis supplied)

Accordingly, notwithstanding the passage of R.A. 9184 and its IRR-A prior procurement laws, rules and regulations still govern the procurement and implementation of certain government contracts, if its invitation for bids were issued or advertised prior to the effectivity of R.A. 9184 or its IRR-A. Hence, prior to the effectivity of R.A. 9184 and its IRR-A, the implementation of infrastructure projects shall be governed by Presidential Decree 1594 (P.D. 1594) and its Implementing Rules and Regulations (IRR).



Review and Adjustment of the ABC

Although there appears to be no provision under R.A. 9184 and its IRR-A that prohibits a procuring entity from initiating a review of the responsiveness of its ABC for a particular procurement to the current market prices, it is nonetheless prohibited from adjusting the same accordingly from the time the invitation to bid for the procurement project has been issued or advertised until after there has been a second failure of bidding.

In the event that the ABC failed to reflect the current market prices and results in a failure of bidding for the first time, Section 35.2 of the IRR-A allows modification of the terms, conditions and specifications in the first bidding documents, but expressly provides that the ABC be maintained. Section 35.2 of the IRR-A specifically provides as follows:

The BAC shall modify the terms, conditions and specifications in the first bidding documents, when necessary, to change the scope of work or to adjust the procuring entity's cost estimates or specifications. However, the ABC shall be maintained. All bidders who have initially responded to the Invitation to Apply for Eligibility and to Bid and have been declared eligible in the first bidding shall be allowed to submit new bids. The BAC shall observe the same process and set the new periods according to the same rules followed during the first bidding. (Emphasis supplied)

In case a second failure of bidding occurs, the procuring entity has three options to go about its procurement project, namely the following: (i) conduct a re-bidding with re-advertisement and/or posting under the same ABC, as provided in Section 35.1 of the IRR-A; (ii) enter into a negotiated procurement, as provided in Section 53 of R.A. 9184 and its IRR-A; or (iii) re-align the budget of the procuring entity to accommodate the necessary increase in the ABC of the procurement project and bid out the same under the adjusted ABC.

Based on the foregoing, it is only after occurrence of a second failure of bidding that a procuring entity may adjust its ABC for the particular procurement project. Accordingly, no procuring entity can categorically adjust its ABC regardless of a finding proving that the current ABC does not reflect the current market prices.

Conclusion

In view of all the foregoing, we arrive at the following conclusions:

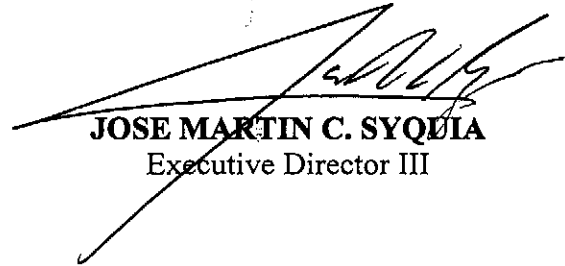
1. The grant of a contract price escalation in favor of the contractor for the school building project of PRRC will be determined only after the effectivity of the Guidelines for Contract Price Escalation;
2. Considering the facts and representations, we are of the opinion that PRRC may apply the provisions of P.D. 1594 and its IRR for the implementation of variation orders necessary for the completion of its school building project; and
3. Although PRRC may initiate a review of its ABC, it cannot make any adjustment thereto until after there have been two (2) failures of bidding, in which case it may

re-align its budget to accommodate the increase in the ABC for a particular procurement project.

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 III

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August 18, 2004

MS. SYLVIA D. CLEMENTE
Deputy Executive Director
Pasig River Rehabilitation Commission
2nd Floor MWSS Engineering Building,
Katipunan Road, Balara, Quezon City

Dear Ms. Clemente:

This refers to your letter dated August 17, 2004, which we received through facsimile on August 18, 2004, addressed to Executive Director Jose Martin C. Syquia, requesting for clarification on the application of Republic Act 9184 and its Implementing Rules and Regulations Part A on several procurements of your agency.

We wish to inform you that we shall respond to your concerns either through phone or in writing at the earliest possible opportunity, or raise the same to the Government Procurement Policy Board for appropriate resolution should referral thereto becomes necessary.

Very truly yours,


ATTY. SALVADOR C. MALANA III
Procurement Management Officer V

REGISTRY RECEIPT
REGISTERED
MALACANANG POST OFFICE
Post Office: MANILA 955
Letter/Package No. 13-LETT-P-1178
Posted on: _____ 19____
Preserve this receipt for reference in case of inquiry
Postmaster/Teller