

**NPM No. 122-2015**

27 November 2015

**ENGR. JOSEPH ALLAN C. DILAY**  
*General Manager*  
**PHILIPPINE NATIONAL RAILWAYS**  
PNR Executive Building, Mayhaligue Street,  
Tondo, Manila

**Re: Replacement of Personnel**

Dear Engr. Dilay

This refers to your letter dated 8 December 2015, which we received on even date, requesting clarification on Clause 39.5 of the General Conditions of the Contract (GCC) in the Philippine Bidding Documents (PBD) for the Procurement of Consulting Services.

It is your understanding that the phrase “of equivalent or better qualifications” refers to the minimum requirements set or provided in the original Terms of Reference for the project and not to the qualifications of the original Key Personnel submitted by the bidder. It is in this wise that you seek the correct interpretation of Clause 39.5 of the GCC in the PBD for Consulting Services. In relation thereto, you are also inquiring on whether the procuring entity can request replacement of personnel or positions to suit its needs as long as the qualification complies with the minimum requirements set or provided in the original Terms of Reference for the project.

Clause 39.5 of the GCC in the PBD for Consulting Services prohibits changes in the Key Personnel, except for justifiable reasons beyond the control of the Consultant, as indicated in the Special Conditions of the Contract (SCC), and only upon prior approval of the procuring entity. The associated SCC clause provides that the Consultant may change its Key Personnel only for reasons of death, serious illness, incapacity of an individual consultant, or until after fifty percent (50%) of the Personnel’s man-months have been served. Please be reminded that if the Consultant introduces changes in Key Personnel for reasons other than those mentioned in the SCC, the Consultant shall be liable for damages as described in the SCC.

As provided in Clause 39.5 of the GCC in the PBD for Consulting Services, if it becomes justifiable and necessary to replace any of the Personnel, the Consultant shall provide as a replacement a person of equivalent or better qualifications. As can be gleaned from the foregoing, the replacement must be a person of equivalent or better qualifications *vis-a-vis* the consultant sought to be replaced. Since the Consultant was selected on the basis of, among other things, an evaluation of the quality of proposed key professional staffs, more particularly their specific competence, experience, and qualifications, including their education and training, it is our considered view that the phrase “of equivalent or better qualifications” refers to the qualifications of the original key personnel or individual consultant sought to be replaced.

As regards the query whether the procuring entity can, during the implementation of the contract, request replacement of personnel or positions to suit its needs as long as the qualification complies with the minimum requirements set in the original Terms of Reference for the project, Clause 39.7 of the GCC provides the conditions under which the PE can request the replacement of personnel, thus:

If the Procuring Entity finds that any of the Personnel has committed serious misconduct or has been charged with having committed a criminal action as defined in the Applicable Law, or has reasonable cause to be dissatisfied with the performance of any of the Personnel, then the Consultant shall, at the Procuring Entity's written request specifying the grounds therefore, forthwith provide as a replacement a person with qualifications and experience acceptable to the Procuring Entity.

From the foregoing, before the PE can request the replacement of personnel during contract implementation, there must be a finding that any of the Personnel has committed serious misconduct or has been criminally charged, or the PE has reasonable cause to be dissatisfied with the Personnel's performance.

In sum, in case of changes in Key Personnel pursuant to Clause 39.5 of the GCC, the phrase "of equivalent or better qualifications" refers to the qualifications of the original key personnel or individual consultant sought to be replaced. Additionally, the procuring entity may request the replacement of personnel pursuant to Clause 39.7 of the GCC and the Consultant shall provide as a replacement a person with qualifications and experience acceptable to the Procuring Entity.

We hope that this opinion issued by the GPPB-TSO 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 there be other concerns, please do not hesitate to contact us.

Very truly yours,

  
**DENNIS S. SANTIAGO**  
*Executive Director V*

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