

GOVERNMENT PROCUREMENT POLICY BOARD

Technical Support Office

Unit 2506 Raffles Corporate Center, Emerald Avenue, Ortigas Center, Pasig City
Telefax Nos. (02) 900-6741 to 44

NPM No. 126-2004

September 28, 2004

MR. MEDARIO SAMUEL T. RIVERA
Vice President – Marketing II
Information Professionals, Inc.
5/F Family Clinic Bldg., 1474 Maria Clara St.,
Sampaloc, Manila

Re : Withholding of at Least Ten Percent (10%) of the Contract Amount for Final Payments to Consultants

Dear Mr. Rivera:

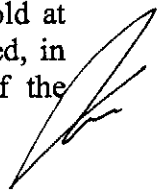
This refers to your letter dated September 7, 2004, which we received through facsimile on even date, requesting clarification and confirmation on the statement given by Procurement Watch, Inc. (PWI) that the ten percent (10%) retention money on progress payments for consultants is no longer required for consulting services under Republic Act 9184 (R.A. 9184) and its Implementing Rules and Regulations Part A (IRR-A).

The sole substantive issue for resolution is as follows:

Whether or not procuring entities may withhold at least ten percent (10%) of the contract amount for final payment to consultants for consulting services procured under R.A. 9184 and its IRR-A.

As represented, this query is being raised in relation to your company's preparation and review of the contract with the Securities and Exchange Commission (SEC) for the development, supply, delivery, installation, configuration, and testing of an Integrated Computer Application System for Compliance and Monitoring Enforcement, more commonly known as the SEC-iReport Project.

Based on the communications between your company and PWI, we have observed that the discussion on this subject matter centers on the obligation of the procuring entity to withhold at least ten percent (10%) of the contract amount for the final payment until after it has issued, in favor of the consultant, a certificate of completion indicating satisfactory completion of the



consultancy services. In this regard, we shall hereinafter discuss the applicability of this provision with respect to the consultancy services contract for the SEC-iReport Project.

Withholding of at Least Ten Percent (10%) of the Consultant's Final Payment

Prior to the enactment of R.A. 9184 and the issuance of its IRR-A, the applicable rules and regulations for procurement of consulting services were Executive Order 40, Series of 2001 (E.O. 40) and its Implementing Rules and Regulations (IRR), while the IRR for the Procurement of Consulting Service for Government Projects (hereinafter the "IRR for Consulting Service") promulgated by the National Economic and Development Authority (NEDA) pursuant to Section 3 of Executive Order 164, Series of 1987 (E.O. 164) governs the implementation of contracts for consulting services.

Under the IRR for Consulting Service, procuring entities are required to ensure that the final payment shall not be less than ten percent (10%) of the contract amount, and withhold the same until after a certificate of satisfactory completion has been issued therefor or subject to the issuance by the consultant of a surety bond or letter of credit to cover such amount. Section 8.3 of the said IRR for Consulting Service provides as follows:

To guarantee the faithful performance of the Consultant under contract, the final payment shall be withheld until after a certificate of completion indicating satisfactory completion of the consultancy services shall have been issued by the concerned government agency. **The final payment should not be less than 10% of the total contract amount but may be released if substituted by a surety bond of the same amount, callable on demand, or a letter of credit from an accredited insurance or financial institution.**¹ The bond should only be held within one year.

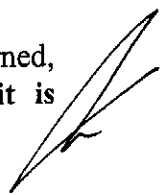
Based on the afore-quoted provision, the minimum amount of ten percent (10%) required to be withheld serves to guarantee that the consultant will not renege on the complete performance of his obligations under the consulting services contract. In this light, it is well to emphasize that this concern was addressed in R.A. 9184 and its IRR-A by requiring consultants with the Highest Rated and Responsive Bid to post a performance security upon the signing of the contract. Section 39.1 of the IRR-A of R.A. 9184 specifically provides, to wit:

To guarantee the faithful performance by the winning bidder of its obligations under the contract prepared in accordance with the bidding documents, it shall post a Performance Security upon the signing of the contract.² The Performance Security may be in any of the following forms:

x x x x

In addition, Section 39.2 of the IRR-A of R.A. 9184 states as follows:

The Performance Security shall be posted in favor of the procuring entity concerned, and **shall be forfeited in favor of the procuring entity in the event it is**



¹ Emphasis supplied.

² Emphasis supplied.

established that the winning bidder is in default in any of its obligations under the contract.³

In view of the afore-mentioned provisions of the IRR-A of R.A. 9184, the requirement to retain at least ten percent (10%) of the contract amount for the final payment under Section 8.3 of the IRR for Consulting Service was no longer required in the new procurement rules and regulations. However, it should be noted that although R.A. 9184 and its IRR-A did not require the retention of at least ten percent (10%) of the contract amount, neither did it prohibit procuring entities from imposing such requirement for its consulting services contracts.

Considering that the subject matter of your request involves contract implementation, the provisions of the Civil Code of the Philippines on Contracts apply. The Civil Code of the Philippines provides that the contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy.⁴ In this regard, whenever determined appropriate by the procuring entity, additional conditions on the implementation of its contracts may be imposed, which shall bind the contracting parties when accepted and agreed upon by both parties.

Based on the foregoing considerations, we support the view elucidated by PWI that withholding at least ten percent (10%) of the contract amount for the final payment is no longer required under R.A. 9184 and its IRR-A. However, considering that the said law does not prohibit procuring entities from imposing such requirement, and considering further that the Civil Code of the Philippines allows parties to freely stipulate on the terms and conditions of their contract, we are of the opinion that SEC may validly require that the final payment, which should not be less than ten percent (10%) of the total contract amount, be withheld until after a certificate of completion indicating satisfactory completion of the consultancy services shall have been issued by it, or unless the same amount is substituted by a surety bond, callable on demand, or a letter of credit from an accredited insurance or financial institution.

Please bear in mind that this opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not be necessarily 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

/dlsn/npm/ipi.retentionmoney/09.04

³ Emphasis supplied.

⁴ Article 1306, Chapter I, Title II, Book IV, Civil Code of the Philippines.

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

Unit 2506 Raffles Corporate Center, Emerald Avenue, Ortigas Center, Pasig City
Telefax Nos. (02) 900-6741 to 44

*Request
for written
reply*

September 13, 2004

MR. MEDARIO SAMUEL T. RIVERA
Vice President – Marketing II
Information Professionals, Inc.
5/F Family Clinic Bldg., 1474 Maria Clara St.,
Sampaloc, Manila

Dear Mr. Rivera:

This refers to your letter dated September 7, 2004, which we received through facsimile on even date, addressed to Executive Director Jose Martin C. Syquia, requesting for clarification on Republic Act 9184 and its Implementing Rules and Regulations Part A, specifically whether ten percent (10%) retention money on progress payments to the consultants is no longer required for consulting services.

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