REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
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NPM No. 018-2004

February 20, 2004

LT. COL. RICARDO C. BANAYAT
Air Logistics and Support Command
Philippine Air Force Procurement Center
Colonel Jesus Villamor Air Base,
Pasay City

Re: **Recovery of Liquidated Damages, termination of contract and imposition of sanctions.**

Dear Col. Banayat:

This pertains to your letter dated January 9, 2004, which made reference to your letter of September 19, 2003, requesting for advice and clarification on the following issues:

1) Whether or not the Philippine Air Force Procurement Center ("PAFPC") may unilaterally terminate contracts it has entered into with suppliers for CYs 2001 and 2002 whose amounts of liquidated damages already exceeded 15% of the total contract prices; and

2) Whether or not the procuring entity is legally justified in requiring the erring supplier to pay the total amount of accumulated liquidated damages and impose the appropriate sanctions aside from terminating the contract.

Applicable Procurement Law on Claims for Liquidated Damages and Termination of Contracts

Although Executive Order No. 40, series of 2001 ("E.O. 40)", the executive promulgation utilized by the PAFPC in the procurement of goods and services for the Calendar Years 2001 and 2002, repealed Executive Order No. 262, series of 2000 ("E.O. 262") and its Implementing Rules and Regulations ("IRR"), the provisions of the latter executive promulgation and its IRR pertaining to "contract implementation" were not repealed as E.O. 40 applies only from pre-procurement conference until the award of contract. Section 1 of E.O. 40, provides:

> Scope and Application. This Executive Order shall apply to the procurement of: a) goods, supplies, materials and related services; b) civil works; and c) consulting services, by all National Government agencies, including State Universities and Colleges (SUCs), Government-Owned or -Controlled Corporations (GOCCs) and Government Financial Institutions (GFIs, hereby referred to as "Agencies". **This Executive Order shall cover the procurement process from the pre-procurement conference up to award of contract.** (Emphasis supplied)

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Applying the above-cited provision, there is no doubt that the contract implementation aspect of the PAFPC goods and services procurement for CYs 2001 and 2002 is clearly governed by E.O. 262 and its IRR, as the "contract implementation" provisions thereof were not repealed by E.O. 40. Accordingly, the provisions on contract implementation of E.O. 262 and its IRR shall govern the imposition and recovery of liquidated damages on contracts entered into by PAFPC with accredited suppliers for CYs 2001 and 2002. Section 5.10.1 provides:

> When the supplier fails to satisfactorily deliver goods under the contract within the specified delivery schedule, inclusive of duly granted time extensions, if any, the supplier shall be liable for damages for the delay and shall pay the Government for liquidated damages, not by way of penalty, an amount equal to one-tenth (1/10) of one percent (1%) of the cost of the delayed goods scheduled for delivery for every day of delay until such goods are finally delivered and accepted by the Government.

On the other hand, with respect to contract termination, Section 5.10.2 of the IRR of E.O. 262 provides:

> The Government need not prove that it has incurred actual damages to be entitled to liquidated damages. Such amount shall be deducted from any money due or which may become due to the supplier, collect the same from any securities or warranties posted by the supplier whichever is convenient to the Government. **In no case shall the total sum of liquidated damages exceed fifteen percent (15%) of the total price, in which event the concerned agency shall automatically terminate the contract and impose appropriate sanctions over and above the liquidated damages to be paid.** (Emphasis supplied)

As can be logically deduced from Section 5.10.2 of the IRR of E.O. 262, PAFPC has legal basis to terminate the contracts it has entered into with suppliers where the total liquidated damages exceeded fifteen percent (15%) of the amount of the contract price. Since the aspect of termination in the immediately cited provision is couched in mandatory and in no uncertain terms, it is clear that the PAFPC is allowed to terminate its contracts on the ground that the total sum of liquidated damages for each contract exceeded fifteen percent (15%) of the contract price.

Recovery of Liquidated Damages and Imposition of Sanction

Liquidated damages, as a form of indemnification under the Civil Code, may be recovered in case of breach by a party of any of the stipulation, agreement or covenant in the contract. The same acceptation is applied under E.O. 262 and its IRR, such that when the supplier fails to deliver the goods or the services required, he will be held liable for liquidated damages in an amount equal to one-tenth (1/10) of one percent (1%) of the cost of the delayed goods scheduled for delivery for every day of delay until such goods are finally delivered and accepted by the Government.

It must be stressed, however, that Section 5.10.1 of the IRR of E.O. 262 is silent as to whether partial or full recovery of liquidated damages should be made by PAFPC. The same is also true with respect to Section 5.10.2. Be that as it may, it can be inferred that PAFPC has the option to claim full or partial recovery of liquidated damages from the erring supplier. Simply put, recovery of liquidated damages, whether partial or full, is the prerogative of PAFPC.

Additionally, due to the termination of the contract by reason of its default, the PAFPC may likewise hold the supplier administratively liable and suspend it from participating in any of its public bidding for one (1) year for the first (1^{st}) offense or two (2) years for the second (2^{nd}) offense. Section 44.1 of the IRR of E.O. 40 specifically provides:

> The head of the agency shall impose on bidders or prospective bidders, the administrative penalties of suspension from participating in any public bidding of the agency for one (1) year for the first offense and two (2) years for the second offense, as well as disqualification from further participating in the public bidding currently being undertaken by the agency concerned, where applicable, for the following acts or violations, without prejudice to the imposition of criminal and civil sanctions as provided by laws, rules and regulation:
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> 1. xxx xxx xxx
>
> 6. Termination of the contract due to the default of the bidder;
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> xxx xxx xxx

Moreover, the imposition of administrative sanction(s) is without prejudice to the filing of criminal or civil charges against the defaulting supplier as may be supported by available evidence.

With the foregoing elucidations, we trust that our opinion has provided PAFPC with the needed information relevant to the recovery of liquidated damages, termination of contract and imposition of sanction(s) against its defaulting supplier.

Please note that 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.

Very truly yours,

JOSE MARTIN C. SYQUIA
Executive Director