

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. 092-2004

July 2, 2004

ATTY. LUIS MANUEL L. VIRTUCIO

Director, Legal Service Department
OIC, Office of the Assistant Secretary for Legal Affairs
Department of Transportation and Communications
The Columbia Tower, Brgy. Wack-Wack,
Mandaluyong City

Re : Variation Orders and Supplemental Agreements in Light of the Republic Act 9184 and its Implementing Rules and Regulations Part A

Dear Director Virtucio:

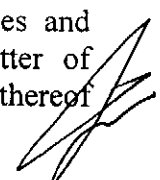
This refers to your letter dated June 14, 2004, which we received on June 15, 2004 requesting clarification on the following issues:

1. Whether or not the provisions of Republic Act 9184 ("R.A. 9184") and its Implementing Rules and Regulations Part A ("IRR-A") on Variation Orders apply to contracts perfected during the effectivity of Presidential Decree 1594 ("P.D. 1594") and its Implementing Rules and Regulations ("IRR"); and
2. Whether or not Supplemental Agreements are still allowed considering that the basic elements of a Supplemental Agreement is reproduced in Section 53(d) of the IRR-A.

These issues are being raised in connection with several existing contracts of the Department of Transportation and Communications ("DOTC") perfected during the effectivity of P.D. 1594 and its IRR, which DOTC now intends to subject to Variation Orders/Supplemental Agreements.

Applicability of P.D. 1594 and its IRR

In light of the passage of R.A. 9184 and its IRR-A, all procurement laws, rules and regulations and such other law, presidential decree, or issuance, executive order, letter of instruction, administrative order, proclamation, charter, rule or regulation and/or parts thereof



contrary to or inconsistent with the provisions of the said laws, are deemed repealed or amended accordingly.

However, it should be noted that the 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 clause¹ 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.

Based on the foregoing, it is apparent that 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 the advertisement or invitation for bids were issued prior to the effectivity of R.A. 9184 or its IRR-A.

In this regard, we are of the opinion that DOTC may apply the provisions of P.D. 1594 and its IRR for contracts perfected during its effectivity since this implies the fact that the advertisements or invitation for bids therefor has been issued prior to the effectivity of R.A. 9184 and its IRR-A.

Supplemental Agreements Not Recognized Under R.A. 9184 and its IRR-A

Under P.D. 1594 and its IRR, there are three recognized forms of Variation Order, namely, Change Order, Extra Work Order, and Supplemental Agreement. Supplemental Agreement is a form of Variation Order a procuring entity enters into for all Change Orders and Extra Work Orders if the aggregate amount exceeds twenty five percent (25%) of the escalated original contract price. Section CI 1.6 of the IRR of P.D. 1594 specifically states as follows:

A separate Supplemental Agreement may be entered into for all Change Orders and Extra Work Orders if the aggregate amount exceeds 25% of the escalated original contract price. All Change Orders/Extra Work Orders beyond 100% of the escalated original contract cost shall be subject to public bidding except where the works involved are inseparable from the original scope of the project in which case negotiation with the incumbent contractor may be allowed, subject to approval by the appropriate authorities. (Emphasis supplied)

However, under the IRR-A of R.A. 9184, Supplemental Agreement is no longer recognized as a form of Variation Order. The only forms of Variation Orders recognized under Annex "E" of

¹ Section 77, IRR-A of R.A. 9184

the IRR-A of R.A. 9184 are Change Order and Extra Work Order. Section 1.1 of Annex "E" specifically provides, to wit:

Variation Orders may be issued by the procuring entity to cover any increase/decrease in quantities, including the introduction of new work items that are not included in the original contract or reclassification of work items that are either due to change of plans, design or alignment to suit actual field conditions resulting in disparity between the preconstruction plans used for purposes of bidding and the "as staked plans" or construction drawings prepared after a joint survey by the contractor and the Government after award of the contract, provided that the cumulative amount of the Variation Order does not exceed ten percent (10%) of the original project cost. The addition/deletion of works should be within the general scope of the project as bid and awarded. **A Variation Order may either be in the form of a change order or extra work order.** (Emphasis supplied)

It is worthy to mention that Section 1.4 of Annex "E" of the IRR-A provides that "[a]ny cumulative Variation Order beyond ten percent (10%) shall be subject of another contract to be bid out if the works are separable from the original contract." It is further provided therein that although the head of the procuring entity may authorize a Variation Order beyond ten percent (10%) but not more than twenty percent (20%) in exceptional cases where it is urgently necessary to complete the original scope of work, subject to the guidelines to be issued by the Government Procurement Policy Board ("GPPB"), appropriate sanctions shall be imposed on the designer, consultant or official responsible for the original detailed engineering design which failed to consider the Variation Order beyond ten percent (10%).

Even assuming *arguendo* that the basic elements of a Supplemental Agreement were reproduced in Section 53(d) of the IRR-A of R.A. 9184, such reproduction does not imply recognition by the IRR-A of Supplemental Agreement as a form of Variation Order. Section 53(d) of the IRR-A should be strictly interpreted to apply only in the circumstance provided therein, specifically when the contract is adjacent or contiguous to an on-going infrastructure project; but it cannot be interpreted in the same light as a Supplemental Agreement recognized under P.D. 1594 and its IRR which may be executed for Change Orders or Extra Work Orders.

Based on the foregoing, it is clear that Supplemental Agreement as a form of Variation Order is not recognized under the IRR-A of R.A. 9184 regardless of the aggregate or cumulative amount of any Variation Order.

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

