

NPM No. 016-2018

7 May 2018

MR. FRANCIS G. LAVILLA

President

ENDURE MEDICAL, INC.

17 A Belvedere Tower, San Miguel Avenue
Ortigas Complex, Pasig City

Re: Imposition and Computation of Liquidated Damages -

Dear Mr. Lavilla:

This refers to your letter inquiring whether in the computation of liquidated damages, the cost of the unperformed portion for every day of delay should be computed per line item awarded or based on the entire purchase order.

As represented, the Procuring Entity (PE) expressly allowed partial bids indicated in the Invitation to Bid for its procurement of drugs, medicines, and medical supplies. The PE conducted line item bidding, whereby each item had a specific Approved Budget for the Contract (ABC), and each item was evaluated and recommended for award of contract separately. The PE, for economy, grouped all the items awarded to the same bidder in one Purchase Order (PO). In case of delay of delivery, the PE imposes liquidated damages based on the entire PO, even if some of the awarded line items were already delivered. Hence, this inquiry.

Section 68 of Republic Act (RA) No. 9184 provides that “[a]ll contracts executed in accordance with this Act shall contain a provision on liquidated damages which shall be payable in case of breach thereof.” On the other hand, the 2016 revised Implementing Rules and Regulations (IRR) of RA 9184 states that “[f]or the procurement of Goods, Infrastructure Projects and Consulting Services, the amount of the liquidated damages shall be at least equal to one-tenth of one percent (0.001) of the cost of the unperformed portion for every day of delay.”

A guidepost in the imposition of liquidated damages is likewise found in Section 3.1 of the Implementation Guidelines for the Procurement of Goods, Supplies and Materials or Annex “D” of the 2016 IRR of RA 9184, thus:

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 PE 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 procuring entity concerned. (*Emphasis ours*)

Based on the cited provisions of the procurement law and its associated rules, liquidated damages shall be imposed against the supplier who fails to satisfactorily deliver the goods within the specified delivery schedule in an amount equivalent to one-tenth (1/10) of one percent (1%) of the cost of the unperformed portion for every day of delay

It is worthy to stress that procurement by item/lot, is recognized and supported under RA 9184 and its 2016 IRR, as well as its associated issuances, and may be adopted by PEs by specifying the details of each item/lot in the bidding documents.¹ The Fifth Edition (5th Ed.) of the Philippine Bidding Documents (PBD) for the Procurement of Goods, particularly Clause 1.2 of the Instructions to Bidders (ITB) and the corresponding Bid Data Sheet (BDS) provision, requires PEs to provide the name, identification, and number of lots specific to the bidding. The BDS provision in relation to ITB Clause 28.3(a) of the PBDs for Goods (5th Ed.) provides three options PEs may choose from in grouping and evaluating lots, to wit:

... (i) *each item to be evaluated and compared with other bids separately and recommended for contract award separately*; (ii) all items to be grouped together to form one complete lot that will be awarded to one bidder to form one complete contract; and (iii) similar items, to be grouped together to form several lots that shall be evaluated and awarded as separate contracts.² (*Emphasis ours*)


Based on the representations provided in the request, the PE opted that each item be evaluated and compared with other bids separately and recommended for contract award separately.

Accordingly, it is our considered view that for purposes of imposing liquidated damages, the delay shall be based on the schedule of delivery for each item, such that failure to deliver the goods on time, per delivery schedule, shall warrant the imposition of **one-tenth (1/10) of one percent (1%)** of the cost of the “unperformed portion”³ for every day of delay, until such goods are finally delivered and accepted by the procuring entity. Elsewise put, when delay sets in, liquidated damages is imposed only on the cost or amount that corresponds to the delayed item or items scheduled for delivery.

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.
(sgd.)


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~~DENNIS S. SANTIAGO~~
Executive Director 

¹ Non-Policy Matter Opinion (NPM) No. 139-2016, dated 29 December 2016.

² NPM No. 43-2014 dated 10 October 2014.

³ Unperformed portion refers to the goods that were not delivered on time based on the delivery schedule.