

**NPM No. 028-2017**

15 December 2017

**MR. TEODORO C. ROBLES**

*Chairman*

**METRO ILOILO WATER DISTRICT (MIWD)**

Bonifacio Drive, Iloilo City

**Re: Termination of Contracts**

Dear Chairman Robles:

This refers to the Honorable Chairman's letter inquiring whether the Board of Directors has the discretion to reconsider the termination of a contract, and thereafter proceed with its implementation.

Per representations of the Honorable Chairman, MIWD procured the supply and delivery of water and awarded the contract to Mactan Rock Inc. (MRI). MRI allegedly failed to comply with its obligations under the contract from 24 October 2015 until January 2017, for this reason, the contract between MIWD and MRI was terminated. MRI filed a Motion for Reconsideration on the termination of contract. MIWD Board of Directors is considering the infrastructure of MRI for the supply and delivery of water that is already in place. Hence, this request.

**Breach of Contract; Effect -**

Relevant to the Honorable Chairman's inquiry, the applicable provision under the revised Implementing Rules and Regulations (IRR)<sup>1</sup> of Republic Act No. 9184 is found in Section 68, thus:

**Section 68. Liquidated Damages**

All contracts executed in accordance with this Act (RA No. 9184) and its IRR shall contain a provision on liquidated damages which shall be payable by the contractor in case of breach thereof. For 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. **Once the cumulative amount of liquidated damages reaches ten percent (10%) of the amount of the contract, the procuring entity *shall* rescind the contract without prejudice to other courses of action and remedies open to it.** (Emphasis supplied)

<sup>1</sup> 2009 revised Implementing Rules and Regulations

The Contract Implementation Guidelines for the Procurement of Goods, Supplies and Materials echoes the above quoted provision, with detailed rules and procedures on how liquidated damages may be imposed, to wit:

### 3. Liquidated Damages

3.1. 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 procuring entity 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 everyday of delay until such goods are finally delivered and accepted by the procuring entity concerned.

3.2. The procuring entity 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, or collected from any securities or warranties posted by the supplier, whichever is convenient to the procuring entity concerned. **In no case shall the total sum of liquidated damages exceed ten percent (10%) of the total contract price, in which event the procuring entity concerned shall automatically rescind the contract and impose appropriate sanctions over and above the liquidated damages to be paid.** (Emphasis supplied)

#### **Liquidated Damages; Rescission -**

The provision of the Guidelines is forthright in stating that if the total sum of liquidated damages arising from the breach of the supplier exceeds ten percent (10%) of the total contract price, the Procuring Entity shall automatically rescind or terminate the contract. The use of the word “shall” makes the termination or rescission of the contract mandatory. The word “shall” means ought to, must, obligation used to express a command or exhortation used in laws, regulations or directives to express what is mandatory<sup>2</sup>.

It is settled that where the law speaks in clear and categorical language, there is no room for interpretation. There is only room for application. Where the language of a statute is clear and unambiguous, the law is applied according to its express terms, and interpretation should be resorted to only where a literal interpretation would be either impossible or absurd or would lead to an injustice<sup>3</sup>. The rules are clear, if the liquidated damages, arising from the breach of the supplier, exceed ten percent (10%) of the total contract price, the contract must be terminated or rescinded.

#### **Head of the Procuring Entity; Decision Making -**

Decisions of the Head of the Procuring Entity pertaining to the termination of contracts and reversal thereof are not within the powers and jurisdiction of the Government Procurement Policy Board (GPPB) and its Technical Support Office (TSO). The GPPB and its TSO renders policy and non-policy matter opinions, respectively, on issues purely relating

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<sup>2</sup> NPM No. 37-2012 dated 19 April 2012, *citing* Baranda vs. Gustilo, 165 SCRA 757 (1988).

<sup>3</sup> Barcellano vs. Baas G.R No. 165287 September 14, 2011

to the interpretation and application of procurement laws, rules and regulations. It has no jurisdiction to rule over actual controversies as regards Procuring Entities and suppliers since it has no judicial, quasi-judicial or investigatory powers under the law.

Questions on the propriety and wisdom of a decision are best left to the procuring entity. The GPPB and its TSO adhere to the position that apart from courts having actual jurisdiction over the subject matter of a case, it cannot, nor any other government agency, authority, or official, encroach upon or interfere with the exercise of the functions and decisions of the Head of the Procuring Entity, as well as the Bids and Awards Committee, since these duties and responsibilities fall solely within the ambit of their authority and discretion as sanctioned by law.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is issued on the basis of particular facts and 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.)

*Executive Director V* 