NPM No. 072-2016

15 November 2016

[redacted]

Re: Delay in Delivery of Goods

Dear Madam/Sir:

This refers to your electronic mail (e-mail) inquiring on whether it is allowed to rescind the contract and forfeit the performance security if the liquidated damages is less than ten percent (10%) of the contract price. If not, you also inquired for other remedies that may be pursued under the circumstances.

We understand that the supplier delivered 38% of the total contract price of goods, and no other delivery to the procuring entity has been made thereafter. Meanwhile, the procuring entity has not made any payment while the computation of liquidated damages show that it is less than ten (10%) of the contract price. Thus, this request for opinion.

Please be informed that aside from rescinding the contract as a consequence of the liquidated damages reaching at least 10% of the contract price, the procuring entity may terminate its procurement contract under the grounds provided in the Guidelines for Termination of Contracts[1] (Guidelines for brevity).

Pursuant to the Guidelines, contracts for the procurement of goods, infrastructure projects, and consulting services may be terminated by the Procuring Entity (PE) on the following grounds: (1) default of the supplier, contractor, or consultant; (2) convenience; (3) insolvency of the supplier, contractor, or consultant; or (4) unlawful acts of the supplier, contractor, or consultant. Since the procuring entity is in the best position to determine the propriety of rescinding or terminating the contract based on the grounds provided in the Guidelines and Section 68 of RA 9184, it has the full responsibility and accountability over such decision.

For the Procurement of Goods, the Procuring Entity is allowed to **terminate the contract in case of default** by the Supplier. Thus, the PE shall terminate a contract for default following the procedures for termination of contracts when the Supplier fails to perform any other obligation under the Contract which is provided in Part III.A.1(c) of the Guidelines and General Conditions of Contract (GCC) Clause 23.1(c) of the Philippine Bidding Documents (PBDs) for the Procurement of Goods.

[1] Issued through GPPB Resolution 018-2004, dated 22 December 2004, and published in the Official Gazette on 16 May 2005.

Moreover, pursuant to Section 69(6) of RA 9184, in addition to Article XXI on Penal Clause and Article XXII on Civil Liability, the Head of the Procuring Entity (HOPE), subject to the authority delegated to the BAC, if any, shall impose on suppliers, contractors or consultants the administrative penalty of suspension for one (1) year for the first offense, and suspension of two (2) years for the second offense from participating in the public bidding process, **for termination of contract due to the default of the bidder**. Thus, Item 4.2(d) of the Uniform Guidelines for Blacklisting[2] (Blacklisting Guidelines for brevity) provide for the blacklisting of the Supplier for the procurement of goods following the termination of the contract due to **unsatisfactory progress in the delivery of the goods by the manufacturer, supplier or distributor arising from his fault or negligence and/or unsatisfactory or inferior quality of goods, as may be provided in the contract.** In addition to the penalty of suspension, the performance security posted by the contractor shall also be forfeited.

In sum, in case of delay in the delivery of goods, the PE may opt to terminate the contract and blacklist the supplier with forfeiture of performance security when warranted by the circumstances, provided the procedures provided in the Guidelines are properly observed.

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.

(sgd.)

DENNIS S. SANTIAGO
Executive Director V

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[2] Issued through GPPB Resolution No. 09-2004, dated 20 August 2004, and published in the Official Gazette on 30 November 2004.