

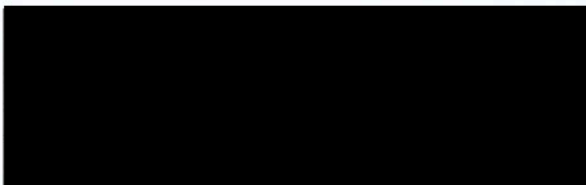


Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 09-2015

7 April 2015



Re: Technical Specifications/Amendment to Order

Dear 

This refers to your letter requesting for opinion as to the applicability of Amendment to Order on BFP's contract for the Supply and Delivery of 244 Units 1000-Gallon Capacity and 225 Units 500-Gallon Capacity Fire Trucks.

As represented, the concern stemmed from the recommendation of the Technical Team, which monitored the prototype production of the firetruck to upgrade the 500-Gallon Capacity Firetruck to 750-Gallon Capacity Firetruck considering that the Horse Power offered by the bidder can handle such change in volume and capacity. Although it was noted that other conditions of the contract such as warranty and after sales service, among others, will not be affected, the proposed amendment entails adjustments in the original specifications and dimensions as indicated in the Bidding Documents, thus:

	Original Dimension in the Technical Specifications	Proposed Dimensional Adjustment due to Change from 500-750 Gallon Capacity
Width	<i>not to exceed 2200mm</i>	<i>2400mm</i>
Height	<i>not to exceed 2700mm</i>	<i>3210mm</i>
Length	<i>not to exceed 7400mm</i>	<i>7400mm</i>

On the other hand, you presented the following advantages in the proposed change of capacity:

1. Higher water tank capacity will result to a longer discharge capacity of the firetruck, resulting in an increase in the firefighting capability;
2. Higher engine output extending the lifespan of the engine, as offered by the President of Hubei Jiangnan Special Automobile Company, Ltd.;
3. Greater gross vehicular weight rating capacity; and
4. No extra cost to the government.

Considering the stated possible advantages *vis-à-vis* apprehensions on the changes in the original dimensions of the firetruck, BFP is inquiring on whether to proceed with the amendment or not. Hence, this request for opinion.

Amendment to Order

The Contract Implementation Guidelines for the Procurement of Goods, Supplies and Materials¹ (Guidelines for brevity), sets forth the conditions where amendment to order may be issued, thus:

1. In *emergency cases or during fortuitous events* requiring necessary adjustments within the general scope of the contract in any one or more of the following is required in order to fully meet the requirements of the project:
 - a. drawings, design or specifications, if the goods to be furnished are to be specifically manufactured for the Government in accordance therewith;
 - b. method of shipment or packing; or
 - c. place of delivery.
2. Where there are additional items needed and *necessary for the protection of the goods*, which were not included in the original contract. (Emphasis ours)

It is mandatory on the part of the PE to show presence of any of the foregoing conditions to warrant any proposed amendment to order. Accordingly, except in emergency cases or fortuitous event, and in cases where necessary for the protection of the goods, it is our considered view that the provisions of the Guidelines pertinent to amendment to order is not applicable. The stringent conditions on the use of amendment to order under the Guidelines is designed to safeguard the public from unlawful schemes where the technical specifications initially set out as basis for bidding will later be modified during contract implementation without sufficient legal basis.

Compliance with Technical Specifications

We wish to clarify that “[i]n the preparation of technical specifications, procuring entities are presumed to have carefully considered the necessity and underlying reason for the procurement of the intended goods. Consequently, “[t]he specifications and other terms in the Bidding Documents shall reflect the minimum requirements or specifications required to meet the needs of the procuring entity in clear and unambiguous terms.”² As such, a bidder complying with the minimum technical specifications, whose price proposal is determined to be the lowest, must perforce be awarded the contract.”³

However, we wish to emphasize that any change or modification in the technical specifications, in order to be valid and binding, should be done thru the issuance of a supplemental/bid bulletin before the deadline for submission and opening of bids. Otherwise, any change in the technical specifications after the issuance of Notice of Award amounts to modification of bidding documents that is not sanctioned under RA 9184 and its IRR⁴.

¹ Annex “D” of the IRR of RA 9184.

² Section 17.2, IRR of RA 9184.

³ NPM No. 094-2012, dated 3 August 2012.

⁴ NPM No. 90-2013, dated 25 November 2013.

RMJ

In the case of *Agan, Jr. v. PIATCO*⁵, the Supreme Court declared null and void for being contrary to public policy the 1997 Concession Agreement on the ground that the amendments introduced thereto had resulted in substantial variance between the conditions under which the bids were invited and the contract executed after the award thereof. The High Court declared:

“An essential element of a publicly bid contract is that all bidders must be on equal footing. Not simply in terms of application of the procedural rules and regulations imposed by the relevant government agency, but more importantly, on the contract bid upon. *Each bidder must be able to bid on the same thing.*” (Emphasis supplied)

In another case pertinent to the amendment of the provisions of procurement contracts, the Supreme Court, in the consolidated case of *Capalla v. COMELEC*,⁶ held that:

“[A] winning bidder is not precluded from modifying or amending certain provisions of the contract bid upon. However, such *changes must not constitute substantial or material amendments that would alter the basic parameters of the contract and would constitute a denial to the other bidders of the opportunity to bid on the same terms. The determination of whether or not a modification or amendment of a contract bid out constitutes a substantial amendment rests on whether the contract, when taken as a whole, would contain substantially different terms and conditions that would have the effect of altering the technical and/or financial proposals previously submitted by the other bidders.* The modifications in the contract executed between the government and the winning bidder must be such as to render the executed contract to be an entirely different contract from the one bid upon.” (Emphasis and underscoring supplied)

In the concurring opinion of the Honorable Supreme Court Associate Justice Lucas P. Bersamin in the *Capalla* case, it was stated that only those material amendments to competitively bid contracts are prohibited. Considered to be of importance by the courts in determining whether an amendment is embraced in the context of materiality which tend to be subversive of the purpose of competitive bidding are as follows:

- (1) the legitimacy of the reasons for the change;
- (2) whether the reasons for the change were unforeseen at the time the contract was made;
- (3) the timing of the change;
- (4) whether the contract contains clauses authorizing modifications; and
- (5) the extent of the change, relative to the original contract⁷.

Thus, in an earlier opinion⁸, we noted that it is incumbent upon the PE to evaluate whether a change in the specifications of goods will constitute material amendment of the contract that will defeat the purpose of competitive bidding.

⁵ 450 Phil. 744 (2003).

⁶ *Archbishop Fernando R. Capalla, et al. v. The Hon. Commission on Elections Solidarity for Sovereignty, etc., et al. v. Commission on Elections/Teofisto T. Guingona, et al. v. Commission on Elections, et al./Tanggulang Demokrasya, Inc., et al. v. Commission on Elections, et al.*, G.R. Nos. 201112, 201121, 201127 and 201413, dated 13 June 2012.

⁷ *Supra* on note 5. Concurring opinion of Justice Bersamin citing *Kenai Lumber Company, Inc. v. Le Resche*, 646 P.2d 215, 220 (1982 Alas).

⁸ NPM No. 107-2014, dated 5 November 2014.

In this case, BFP pointed out that the original dimensions in the technical specifications *should not exceed specific measurements*, which the proposed dimensional adjustments seek to change, thus:

	Original Dimension in the Technical Specifications	Proposed Dimensional Adjustment due to Change from 500-750 Gallon Capacity
Width	<i>not to exceed 2200mm</i>	2400mm
Height	<i>not to exceed 2700mm</i>	3210mm
Length	<i>not to exceed 7400mm</i>	7400mm

Consequently, there is modification in the identified technical specifications as originally bid out if there is a change in the fire truck specifications from 500 to 750 Gallon Capacity.

As represented, the supposed upgrading of the 500 to 750-Gallon Capacity Firetruck will entail adjustments to the original specifications that were indicated in the bidding documents, which served as basis of bidders in submitting their technical and financial proposals, and these proposed adjustments in the dimension, size, measure, capacity, operation, etc., may entail additional cost to government in the long run in terms of maintenance, service, parts, repair, operation, utility and consumables, not to mention actual use, access, mobility and functionality of the firetrucks, the capacity of which was increased from 500 gallons to 750 gallons. Notwithstanding the supposed identified advantages of the offered upgrading of Firetruck, these adjustments, if effected after the contract award, may constitute denial to the other bidders of the opportunity to bid on the same terms.

In *Mata v. San Diego*⁹, the Supreme Court had the occasion to rule on the matter and held that “[m]odification of government contracts, after the same had been awarded after a public bidding, is not allowed because such modification serves to nullify the effect of public bidding and whatever advantages the Government had secured thereby and may also result in manifest injustice to other bidders”.

In this regard, we are of the opinion that an amendment to order in a Contract for the Procurement of Goods may be issued only upon the occurrence of the conditions set forth in the Guidelines, and any procurement contract shall in no case be amended if it will constitute denial to the other bidders of the opportunity to bid on the same terms.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this is being 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.)

MELISSA A. SANTIAGO-YAN
Deputy Executive Director IV/OIC

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⁹ G.R. No. L-30447, dated 21 March 1975.