

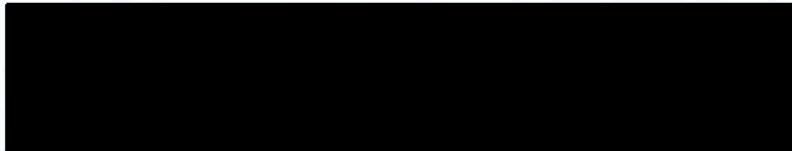


Republic of the Philippines
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE



NPM No. 18-2015

7 October 2015



Re: Price Adjustment/Price Escalation

Dear :

This refers to the Honorable Secretary's letter requesting opinion relative to the application of DPWH's contractor for price adjustment due to the increase in the prices of construction materials.

It is represented that the C-2 (Gov. Forbes St.)/R-7 (España St.) Interchange Project (Project) was bid out on 15 November 2011 and the Notice to Proceed (NTP) was issued on 7 March 2012 in favor of Foundation Specialists Inc. (FSI). However, the implementation of the Project was suspended due to the following factors:

1. It took more than (3) years to secure the tree cutting/earthballing permit with the Department of Environment and Natural Resources (DENR);
2. The Project plan had to be revised from 3rd level to 2nd level in view of the proposal of the Department of Transportation and Communications (DOTC) to implement the Bus Rapid Transit (BRT) System, instead of MRT 9 at 2nd level along España St.; and,
3. DPWH had to address the concern of the University of Santo Tomas (UST) to adjust the western terminus of the Project from Dapitan St./Gov. Forbes St. intersection to between Maria Clara St. and Aragon St., in order to preclude negative impact on the ingress/egress to the University.

Considering that over three (3) years from the procurement of the Project to the resumption of construction work have already lapsed, FSI is applying for price adjustment due to the movement in the prices of construction materials. It is in this context that the DPWH is seeking legal basis on the possibility of heeding the request of its contractor.

Price Adjustment/Price Escalation

As a rule, all bid prices shall be considered as fixed prices, and therefore not subject to price adjustment and escalation during contract implementation¹. However, by way of

¹ Section 61.1, IRR of RA 9184.

exception, price adjustment or escalation may be allowed under extraordinary circumstances and upon prior approval of the Government Procurement Policy Board (GPPB), or when a Treaty or International or Executive Agreement expressly allows it pursuant to Section 4 of the IRR of RA 9184.

For instance, Section 61.2 of the IRR of RA 9184 provides that in cases where the cost of the awarded contract is affected by any applicable new laws, ordinances, regulations, or other acts of the Government of the Philippines (GOP), promulgated after the date of bid opening, a contract price adjustment shall be made or appropriate relief shall be applied on a no loss-no gain basis.

Price Escalation, Recommendation of NEDA and Approval of GPPB

On the other hand, in case of an increase in the prices of materials during project implementation, under Section 61.3 of the IRR of RA 9184, a price escalation may be allowed on the basis of the existence of "extraordinary circumstances" as determined by the National Economic and Development Authority (NEDA) and upon prior approval of the GPPB. However, we wish to emphasize that the burden of proving the occurrence of "extraordinary circumstances" that will allow for price escalation rests with the requesting procuring entity. Additionally, NEDA shall only respond to such request after receiving the proof and the necessary documentation provided by the procuring entity.

Section 4 of the Revised Guidelines on Contract Price Escalation provides for the circumstances that are considered "extraordinary"².

Summary

In view of the foregoing, price adjustment or price escalation may be allowed in any of the following cases:

² 4.1 Article 1174, as it pertains to Ordinary Fortuitous Events or those events which ordinarily happen or which could be reasonably foreseen but are inevitable, such as, but not limited to the following:

- a. Typhoons;
- b. Thunderstorms;
- c. Flooding of lowly areas; and
- d. Vehicular accidents;

Provided that the following requisites are present:

- (i) The cause of the extraordinary circumstance must be independent of the will of the parties;
- (ii) The event must be either unforeseeable or unavoidable;
- (iii) The event must be such as to render it difficult but not impossible for the supplier or contractor to fulfill his obligation in a normal manner or within the contemplation of the parties;
- (iv) The supplier or contractor must be free from any participation in or aggravation of the injury to the procuring entity; and
- (v) The allowance for price escalation should an ordinary fortuitous event occur is stipulated by the parties or the nature of the obligation requires the assumption of risk.

4.2 Article 1250, as it pertains to Extraordinary Inflation or Deflation, as defined in Section 3.3 hereof.

4.3 Article 1680, as it enumerates Extraordinary Fortuitous Events or those events which do not usually happen, such as, but not limited to the following:

- a. Fire;
- b. War;
- c. Pestilence;
- d. Unusual flood;
- e. Locusts; and
- f. Earthquake;

Provided that the circumstances before, during and after the event shall be taken into consideration.

1. When a Treaty or International or Executive Agreement expressly allows it pursuant to Section 4 of the IRR of RA 9184;
2. Where the cost of the awarded contract is affected by any applicable new laws, ordinances, regulations, or other acts of the GOP, promulgated after the date of bid opening; and,
3. Existence of "extraordinary circumstances" as determined by NEDA and upon prior approval of the GPPB in accordance with the Revised Guidelines on Price Escalation.

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 

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