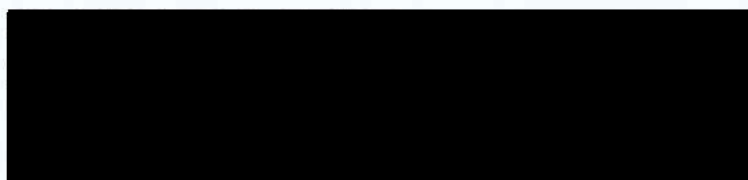


NPM No. 34-2015

8 October 2015



Re: Amendment to Order

Dear

This refers to your letter seeking our opinion on whether a change in the contract price during contract implementation is allowed under the procurement law and its associated rules.

As represented, DTI-Caraga conducted a re-bidding for the procurement of Supply and Delivery of Decorating Machine under the Shared Service Facilities (SSF) project of the DTI. The contract was awarded to Suki Trading Corporation wherein two (2) sets of equipment were already delivered to two separate cooperators. However, with respect to the third cooperator, CLACOFARMCO, it has deferred the acceptance of the equipment despite compliance by the supplier with the technical specifications of the goods under the contract. CLACOFARMCO requested for a change of the diesel engine from surplus to a brand new one. The supplier is willing to accede to the demand provided that the price of a brand new engine in the amount of PhP 60,000.00 will be added to the contract price. It is in this context that our opinion is being requested.

Under the Contract Implementation Guidelines for the Procurement of Goods, Supplies and Materials¹ (Guidelines), an amendment to order, which may result to adjustment in contract price, may be issued by the procuring entity subject to the conditions set forth below:

1. Emergency cases or during fortuitous events requiring necessary adjustments within the general scope of the contract in order to fully meet the requirements of the project involving any of the following:
 - a. Drawing, 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.²

¹ Annex "D" of the IRR of RA 9184.

² *Ibid*, Section 1.3.

Thus, in order for an amendment to order to be valid, the procuring entity must establish that the conditions required in any of the above-cited situations exist.

For proper guidance in the first situation, an "emergency" is defined as a situation requiring immediate attention and remedial action. It involves injury, loss of life, damage to the property, or catastrophic interference with the normal activities.³ On the other hand, fortuitous events by definition are extraordinary events not foreseeable or avoidable. It is therefore, not enough that the event should not have been foreseen or anticipated, as is commonly believed but it must be one impossible to foresee or to avoid. The mere difficulty to foresee the happening is not impossibility to foresee the same.⁴

The occurrence of an emergency case or fortuitous event should necessitate the adjustment of the original contract in order to fully meet the requirements of the project involving the (a) drawing, design or specifications of the goods; (b) the method of shipment or packing; or (c) the place of delivery. Accordingly, it must be established that the emergency case or fortuitous event prompted the need for an amendment. With respect to the second situation, an amendment to order may be issued when items excluded in the original contract are added to ensure that the goods to be delivered are protected from possible damage or unnecessary exposure.

In either case, we wish to stress that an amendment to order is valid only on items up to the point where the cumulative increase in the contract cost which has not been duly fully approved does not exceed five percent (5%) of the original contract cost. Such amendment has to be immediately prepared and submitted for approval to the head of procuring entity (HOPE) or his duly authorized representative. However, for amendment to order involving a cumulative amount exceeding five percent (5%) but not more than ten percent (10%) of the original contract cost, no work should be started unless the same has been approved by the HOPE or his duly authorized representative.⁵

All told, the proposed change in contract price may be allowed through the issuance of an amendment to order, subject to the conditions and threshold requirements under the Guidelines.

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

vsj

³ Black's Law Dictionary 2nd Ed.

⁴ *Sicam and Agencia de R.C. Sicam, Inc. vs. Jorge and Jorge*, G.R. No. 159617, August 8, 2007.

⁵ Section 1.4 of the Contract Implementation Guidelines for the Procurement of Goods, Supplies and Materials.