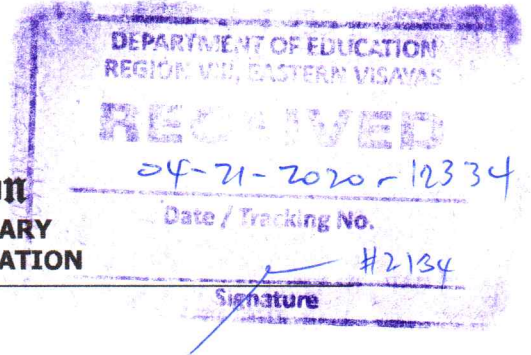




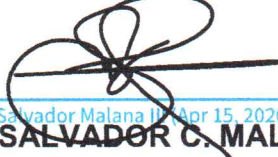
Republic of Philippines
Department of Education
OFFICE OF THE ASSISTANT SECRETARY
FOR PROCUREMENT AND ADMINISTRATION



MEMORANDUM

OASPA 0420-204

FOR: Undersecretaries
Assistant Secretaries
Bureau and Service Directors
Minister, Basic, Higher and Technical Education, BARMM
Regional Directors
Schools Division Superintendents
Public Elementary and Secondary School Heads
All Others Concerned

FROM: 
Salvador Malana III (Apr 15, 2020)
ATTY. SALVADOR C. MALANA III
Assistant Secretary
Procurement and Administration

SUBJECT: **ADVISORY/GUIDANCE ON THE ISSUANCE OF NOTICE OF CONTRACT SUSPENSION OR NOTICE OF CONTRACT TERMINATION OF PROCUREMENT CONTRACTS IN THE LIGHT OF THE EMERGENCY SITUATION BROUGHT ABOUT BY THE ENHANCED COMMUNITY QUARANTINE**

DATE: 15 April 2020

Background

The threat of the coronavirus disease 2019 (COVID-19) pandemic prompted the government to initiate drastic measures in order to prevent its spread in the country. On 09 March 2020, President Rodrigo Duterte signed Proclamation No. 922 declaring a State of Public Health Emergency throughout the Philippines due to this said public health threat. On 12 March 2020, the President ordered community quarantine in the entire National Capital Region as the national alert response was raised to Code Red Sub-Level 2. By 16 March 2020, the general community quarantine was raised to Enhanced

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Community Quarantine (ECQ) covering the entire Luzon, initially for a period of 30 days. The President signed Proclamation 929 placing the Philippines under a State of Calamity for a period of six (6) months.

Notice is taken of the repercussions of the COVID-19 pandemic that are felt more strongly every passing day. Despite the unprecedented steps and cumulative efforts undertaken by governments, businesses and individuals, here and abroad, to address the problem and its complications, the virus continues to rampage across the globe, causing loss of life and hitting businesses, among which are the manufacturing, supply and logistics sectors. The quick turn of events hampered government services and operations, the Department of Education not being excluded, and, possibly, including those industries to which DepEd suppliers and contractors belong.

The imposition of the ECQ has restricted the movement of people and goods, and prohibited the congregation of people. It has also resulted in the suspension of work both in the government and private sectors and to a significant extent hampered the delivery of services. In view of this situation, it is imperative to consider adjustments in the implementation of existing procurement contracts, particularly on delivery or work schedules, to avoid an unfair and confusing scenario where conditions prove to be more onerous than that originally contemplated by the parties, for reasons beyond their will and control.

It is for these reasons that end-users and/or implementing units may, subject to the conditions and guidelines provided hereunder, be justified to issue: (i) *Notices of Contract Delivery Time Suspension*, to temporarily put on hold, in whole or in part, the deliveries and/or works under existing procurement contracts; or (ii) *Notice of Contract Termination*, in whole or in part, to rescind contracts which were rendered by existing circumstances as economically, financially, or technically impractical and/or unnecessary.

Legal Basis

Clause 2.1 of Annex "D" of the 2016 Revised Implementing Rules and Regulations of R.A. 9184, provides:

2.1 The procuring entity may suspend the work wholly or partly by written order for a certain period of time, as it deems necessary due to force majeure or any fortuitous events as defined in the contract. The supplier shall take all reasonable steps to minimize the costs allocable to the work covered by such order during work stoppage.

Clause 9.1 of Annex "E" of the 2016 Revised Implementing Rules and Regulations of R.A. 9184, likewise provides:

9.1. The procuring entity shall have the authority to suspend the work wholly or partly by written order for such period as may be deemed necessary, due to force majeure or any fortuitous events or for failure on the part of the contractor to correct bad conditions which are unsafe for workers or for the general public, to carry out valid orders given by the procuring entity or to perform any provisions of the contract, or due to adjustment of plans to suit field conditions as found necessary during construction. The contractor shall immediately comply with such order to suspend the work wholly or partly.

The Manual of Procedure for the Procurement of Consulting Services states that:

The Procuring Entity may, by written notice of suspension to the consultant, suspend all payments to the consultant if the consultant fails to perform any of its obligations due to its own fault or due to force majeure or other circumstances beyond the control of either party. xxx

Clause III (B) of Annex "I" of 2016 Revised Implementing Rules and Regulations of R.A. 9184, on the Guidelines on Termination of Contracts, as amended, states:

B. Termination for Convenience.

The Procuring Entity may terminate the Contract, in whole or in part, at any time for its convenience. The Head of the Procuring Entity may terminate a contract for the convenience of the Government if he has determined the existence of conditions that make Project Implementation economically, financially or technically impractical and/or unnecessary, such as, but not limited to, fortuitous event(s) or changes in law and national government policies.

Article 1174 of the New Civil Code provides that:

Except in cases specified by the law, or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk, no person shall be responsible

for those events which, could not be foreseen, or which, though foreseen were inevitable.

In *NAPOCOR vs. Philipp Brothers Oceanic, Inc.* G.R. No. 126204, November 20, 2001, the Supreme Court, citing renowned civilist Prof. Arturo Tolentino, defined force majeure, as follows:

“An event which takes place by accident and could not have been foreseen. x x x. Fortuitous events may be produced by two general causes: (1) by Nature, such as earthquakes, storms, floods, epidemics, fires, etc., and (2) by the act of man, such as an armed invasion, attack by bandits, governmental prohibitions, robbery, etc.”

The above-cited definition is incorporated in *Appendix 15 of the 2016 Revised Implementing Rules and Regulations of R.A. 9184.*

Discussion/Justification

The government’s decision to place many parts of the country under ECQ and the President’s declaration of a state of calamity because of the COVID-19 pandemic very well puts the situation within the definition of force majeure. The above-cited factual and legal considerations allow the end-user or implementing units to: (1) Suspend contract delivery time or work; or (2) to Terminate the contract, whichever is appropriate under the circumstances

Advisory/Guidance on Contract Delivery Time Suspension and Contract Termination

1. Contract Delivery Time/Work Suspension.

- a. **Sound Discretion.** End-users or implementing units are advised to evaluate the status of the implementation of the contracts and to determine the necessity and the extent of the contract delivery time/work suspension. For this purpose, the exercise of sound discretion is advised and assessment should be made on a per-contract basis.

- b. **Form.** Notices of Contract Delivery Time/Work Suspension shall be in writing, with the option to use electronic means of correspondence, and end-user or implementing unit should ensure that the supplier's or contractor's acknowledgment and conformity is likewise documented.
- c. **Effectivity.** The effectivity of the suspension may be allowed to retroact beginning March 12, 2020 to coincide with the declaration of the community quarantine, or at a time when the effects of the pandemic and/or the government imposed quarantine are showed to have already impeded contract delivery or work.
- d. **Duration.** The suspension shall continue from effectivity until further notice by the end-user or implementing unit, based on the duration of the government-imposed quarantine or on other circumstances as would directly affect contract implementation.
- e. **Monitoring and Documentation.** Prior to the issuance of the notice of suspension, the end-users or implementing units are advised to document the current status of the contract implementation as well as the contract performance of the supplier or contractor, particularly paying attention to quantity and amount of deliveries, extent of work/service accomplishment, number of days of delay or slippage, and the amount of imposable liquidated damages. A consolidated report should be submitted to the Head of the Procuring Entity, to his or her authorized representative or an appropriate unit or official handling the management of contracts.
- f. **Contract adjustments upon resumption.** The end-users or implementing units are advised to communicate, through proper documentation, to the supplier or contractor the fact of resumption of the running of the contract delivery time or work period, indicating the adjustments in the delivery or works schedule, or other terms and conditions as may be necessary and legally permissible.

2. Contract Termination

- a. **Sound Discretion.** End-users or implementing units are advised to evaluate the status of the implementation of the contracts and to determine the necessity and the extent of the contract termination. For this purpose, the exercise of sound discretion is advised and assessment should be made on a per-contract basis, taking into account primarily the financial and practical benefit of the decision to the Department.

- b. **Form and Procedure.** The procedures and documentary requirements for contract termination shall be in accordance with Clause IV of Annex "I" of the Revised Implementing Rules and Regulations of RA 9184 or the Guidelines on Contract Termination.

For your reference and guidance.