

MEMORANDUM

FOR : WAYNE C. BELIZAR
Director IV, Financial Management Service

**FROM : ASSISTANT SECRETARY FOR GASSG AND
CONCURRENT OFFICER-IN-CHARGE, LEGAL
SERVICE**

**SUBJECT : LEGAL OPINION ON THE REFUND OF LIQUIDATED
DAMAGES TO KAREN INTERNATIONAL
INCORPORATED**

DATE : 27 AUGUST 2024

This pertains to your Memorandum¹ requesting the Legal Service (LS) for legal opinion on the refund of liquidated damages to Karen International Inc., (Supplier) under Disbursement Voucher No. 24-04-05311, relating to the procurement of "Angels in Red Vests (ARV) Launch Kits", in the amount of Four Thousand Three Hundred Sixty-Six and Eighty Centavos (Php 4,366.80).

Specifically, your query is whether the series of communications between our Department's selected offices justify a refund of the liquidated damages.

Background

The DSWD procured the services of herein supplier under Purchase Order (PO) No. 2024-01-0060 dated 02 February 2024, for the "Supply and Delivery of Items intended for the Angels in Red Vests Merchandise for the DSWD employees from the DSWD Central Office". Thereafter, the Agency Operations Service (AOS) issued a Memorandum dated 08 February 2024 upon the Secretary's directive to put on hold the procurement of the Angels in Red Vest (AVR) launch kits, which included the subject ARV Logo patch. The PO stated that 50% of the items are expected to be delivered on or before 05 February 2024 for the first batch, and on or before 12 February 2024 for the remaining items. Thereafter, the PO was only issued to and received by the Supplier on 20 February 2024.

In a Memorandum dated 21 February 2024, Director Clarissa Lara A. Duran of the Agency Operations Service (AOS) expressly communicated with Atty. Erickson Luz, former Head of the Bids and Awards Committee (BAC) Secretariat, that the abovementioned launch kits, after being temporarily postponed, may now be procured. Additionally, in view of the earlier postponement, Dir. Duran requested for an extension of the "Proofing Stage" and "Delivery Dates", from 12 February 2024- to 9 March 2024 (1st batch or 50% of the items) and 16 March 2024 (2nd batch or the remaining 50% of the items).

Subsequently, Dir. Duran sent another Memorandum dated 22 February 2024 to Atty. Luz, pertaining to a separate request for adjustment of a delivery date of some

¹ Annex "A" – Memorandum from FMS dated 26 June 2024

ARV merchandise, which was initially scheduled on 28 February 2024, claiming that there were purchase orders that needed to be funded and were still the subject of review in compliance with budgeting and accounting rules and regulations.

The above requests of Dir. Duran were not communicated to the Head of the Procuring Entity (HoPE).

Thereafter, the ARV launch kits have been completely delivered by the Supplier on 08 March 2024. On 25 April 2024, the AOS requested to waive the penalty against the Supplier as the products were delivered ahead of the extended date. On 26 April 2024, the request of AOS was approved by the Authorized Representative of the HoPE-Assistant Secretary Ulysses Hermogenes C. Aguilar who waived the Liquidated Damages in the amount of Php 4,366.80.

On 10 May 2024, Director Wayne C. Belizar of the Financial Management Service (FMS) issued a Memorandum to Dir. Duran and Atty Karina Antonette Agudo of the Administrative Service (AS) seeking clarification on the refund of liquidated damages to the Supplier, based on the following observations:

1. The request for extension should have been approved by the HOPE prior to the expiration or deadline of the contract. However, the Purchase Order was already accepted by the supplier before any request for extension was made;
2. The waiving of liquidated damages should have been executed before the processing of payment, yet it appears that the waiver was approved after the Disbursement Voucher was processed;
3. The conforme of the AOS appears to conflict with the subsequent waiving of the penalty, indicating a lack of alignment within the procurement process.

On 10 June 2024, Dir. Duran sent a Memorandum to Atty. Agudo clarifying that its Memoranda dated 21 and 22 February 2024 were intended for the “**amendment to the schedule of delivery date**” and not to “**request for an extension of delivery date**”, and that such amendment is for the purpose of alignment with the procurement requirements. Subsequently, through a Memorandum dated 20 June 2024, Atty. Agudo had communicated to the FMS its acceptance on the changes to the schedule of deliveries during implementation provided that the same be signed by the Director or Head of Office from the End-User.

Further, Atty. Agudo requested for the facilitation of the payment of the remaining Php 4,366.80 that was deducted as liquidated damages from the amounts due to the Supplier.

Thus, on 26 June 2024, Dir. Belizar sought for the legal opinion from the LS on the justification for the refund of the liquidated damages to this service provider.

On 05 August 2024, a Focal Group Discussion was held at the Legal Service Conference Room, attended by representatives from the AS, LS, FMS, BAC Secretariat, and Contract Management Division (CMD).

Comment

This level opines that the refund of the amount of Php 4,366.80 under Disbursement Voucher No. 24-04-05311 is justified.

Section 68 of the Implementing Rules and Regulations (IRR) of Republic Act (R.A.) No. 9184, or the “Government Procurement Reform Act (GPRA)” provides that:

"For the procurement of Goods, the amount of liquidated damages shall be at least equal to one-tenth of one percent (0.001) of the cost of the unperformed portion for every day of delay".

As ruled in the case of *SSS v. Moonwalk Development & Housing Corp.*², "A penalty is demandable in case of non-performance or late performance of the main obligation. In order that the penalty may arise there must be a breach of the obligation either by total or partial non-fulfillment or there is non-fulfillment in point of time which is called mora or delay.

As per our records, PO No. 2024-01-0060 provides that: *"In case of failure to make full the delivery within the specified above, the amount of Liquidated Damages shall be at least equal to one-tenth of one percent (0.001) of the cost of the unperformed portion for every day of delay. xxx"*

Said PO No. 2024-01-0060 likewise mandates under the Proofing Stage that upon receipt of the approved PO, the awarded service provider shall submit a sample for each item three to seven (3-7) days.

However, it was only on 20 February 2024 when the Supplier signed the PO. Thus, even if we apply the minimum day provided for under the Proofing Stage, it will still render the Delivery Dates moot.

Furthermore, there is no delay incurred since the items were delivered on 09 March 2024, that is within the new delivery dates set forth in Dir. Duran's request, which is 09 March 2024 for Batch 1, and 16 March 2024 for Batch 2. Hence, no delay was incurred.

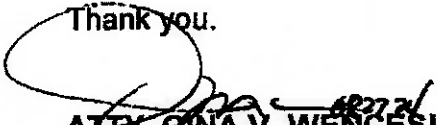
Conclusion

In the absence of delay, the imposition of penalty in the form of Liquidated Damages against the Supplier has no basis. Thus, this level opines that the processing of FMS of the refund of the amount of liquidated damages previously charged against the supplier is just and reasonable.

Further, to prevent any forms of miscommunications or any other similar setbacks in the future, we recommend that the End-User, AS-PMD-CMS, and FMS should ensure proper coordination and consultation on all government procurement transactions pursuant to R.A. No. 9184 and its IRR.

Lastly, kindly fill out the attached Customer Feedback Form and return the same to the Legal Service.

Thank you.


ATTY. GINA V. WENCESLAO

MCMUG/AG/10065


² G.R. No. 73345, April 7, 1993