NPM No. 120-2017

29 December 2017

MR. PAULO SHERWIN P. DUMAN
Supply Officer III
SOCIAL HOUSING FINANCE CORPORATION
8737 BDO Plaza, Paseo de Roxas,
Makati City

Re: Retention Fees; Warranty Security -

Dear Mr. Duman:

This refers to your electronic mail (e-mail) requesting for clarification on whether the Retention Fee, as contemplated in Annex "E" of the *Contract Implementation Guidelines for the Procurement of Infrastructure Projects*, is superseded by the Warranty Security provided under Section 62.2.3.3 of the IRR of RA 9184.

We wish to stress that in the procurement of Infrastructure Projects, retention money, as provided in Annex "E" of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184[1], the Government Procurement Reform Act, is imposed prior to the final acceptance of the works by the procuring entity, while the posting of warranty security, in accordance with Section 62.2.3.3 of the 2016 IRR, is made upon final acceptance of the project.

Retention Money –

Retention money as contemplated in Annex "E" of the 2016 IRR of RA 9184 refers to the ten percent (10%) value of money allowed to be deducted from the progress payments by the Procuring Entity[2]. The total value of the amounts retained shall be due for release upon final acceptance of the works. The contractor may, however, request the substitution of the retention money for each progress billing with irrevocable standby letters of credit from a commercial bank, bank guarantees or surety bonds callable on demand, of amounts equivalent to the retention money substituted for and acceptable to Government, provided that the project is on schedule and is satisfactorily undertaken. Otherwise, the ten percent (10%) retention shall be made. Said irrevocable standby letters of credit, bank guarantees and/or surety bonds, to be posted in favor of the Government shall be valid for a duration to be determined by the concerned implementing office/agency or procuring entity and will

[1] Contract Implementation Guidelines for the procurement of Infrastructure Projects
[2] Item 6.1 of Annex "E" or the Contract Implementation Guidelines for the Procurement of Infrastructure Projects

answer for the purpose for which the ten percent (10%) retention is intended, i.e., to cover uncorrected discovered defects and third party liabilities.[3]

Warranty Security -

Under Section 62.2.3.3 of the 2016 revised IRR, warranty security is imposed upon the winning contractor to guarantee that the contractor shall perform its responsibilities prescribed in Section 62.2.3.1(a)[4]. Specifically, the Warranty Security will cover "Structural Defects", *i.e.* major faults/flaws/deficiencies in one or more key structural elements of the project which may lead to structural failure of the completed elements or structure, or "Structural Failures", *i.e.* where one or more key structural elements in an infrastructure facility fails or collapses, thereby rendering the facility or part thereof incapable of withstanding the design loads, and/or endangering the safety of the users or the general public.[5]

Further, the warranty under the referenced provision commences from the final acceptance of the project with a duration of either fifteen (15), five (5) or two (2) years, depending on the type of structure[6]. The warranty security, however, shall remain effective for one (1) year from the date of issuance of the Certificate of Final Acceptance by the PE, and returned only after the lapse of the said period.[7]

Summary -

The *"final acceptance of the works by the procuring entity"* which marks the period when the retention money may be released, also marks the commencement of the warranty period contemplated in Section 62.2.3 of the 2016 revised IRR of RA 9184.

It is important to note, however, that retention money is intended to cover *"uncorrected discovered defects and third party liabilities"* prior to the issuance of the final acceptance while warranty security intends to cover *"structural defects and failures"* after the issuance of the procuring entity of the final acceptance and will be valid for a certain period, depending on the type of structure. Thus, the warranty security does not supersede the retention money, as the two serve different purposes.

We hope 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 you have further questions, please do not hesitate to contact us.

Very truly yours,

DENNIS S. SANTIAGO
Executive Director V

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[3] Item 6.2 of Annex "E" or the Contract Implementation Guidelines for the Procurement of Infrastructure Projects

[4] Section 62.2.3.1(a) Contractor – Where Structural Deects/Failure arise due to faults attributable to improper construction, use of inferior quality/substandard materials, and any violation of the contract plans and specifications, the contractor shall be held liable.

[5] Section 62.2.3.1 of the 2016 revised IRR of RA 9184

[6] Section 62.2.3.2 of the 2016 revised IRR of RA 9184.

[7] Section 62.2.3.4 of the 2016 revised IRR of RA 9184.