



Department of Budget and Management
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE

NPM No. 35-2013

27 March 2013

MR. BELSHAZAR C. RUIZ
Chairman, Bids and Awards Committee (BAC)
MUNICIPALITY OF HILONGOS
Province of Leyte

Re: Performance Security and Blacklisting

Dear Mr. Ruiz:

We respond to your letter dated 7 January 2013, seeking our opinion on whether the payment of Performance Security through a personal check is one of the grounds to blacklist a winning bidder based on Section 4.1.5¹ of the Uniform Guidelines for Blacklisting of Manufacturers, Suppliers, Distributors, Contractors and Consultants (Guidelines)².

As represented, RJIR Enterprises (RJIR) participated and won in the public bidding conducted by the Local Government Unit (LGU) of Hilongos. The Notice of Award and Notice to Proceed were issued to RJIR with the contract signed on 30 January 2012. Thereafter, RJIR posted its Performance Security on 3 February 2012 in the form of a personal check³, which was honored on 26 March 2012 when deposited to the LGU of Hilongos depository bank. After delivering all the items stipulated in the contract, RJIR was issued the Certificate of Acceptance, and was eventually paid by the LGU of Hilongos. Subsequently, Mr. Edwin Anadon⁴ filed a formal complaint for blacklisting against RJIR citing Section 4.1.5 of the Guidelines. You now seek our legal opinion on the propriety of blacklisting RJIR after the contract has been completed, and eight (8) months after the occurrence of the alleged irregularity in the issuance of a personal check as Performance Security.

Section 3.3 of the Guidelines defines blacklisting as an administrative penalty disqualifying a person or an entity from participating in any government procurement for a given period. The primary purpose of the Guidelines is to penalize erring manufacturers, suppliers, distributors, contractors and consultants (*"contractors" for brevity*) for offenses or violations committed during competitive bidding and contract implementation stage, in accordance with Section 69.4⁵ of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184. Blacklisting is imposed to discourage dubious contractors from participating in government procurement activities that may place the government in a disadvantageous position.

¹ Refusal or failure to post the required performance security within the prescribed time.

² GPPB Resolution No. 09-2004 dated 20 August 2004.

³ China Bank Check No. 126641.

⁴ A duly authorized observer of the BAC-LGU Hilongos who is a member of the Association of Differently Able Persons and a representative of the Local Project Monitoring Committee.

⁵ The procedures for the suspension or blacklisting of suppliers, contractors, or consultants for GOP projects shall be undertaken in accordance with the guidelines issued by the GPPB.

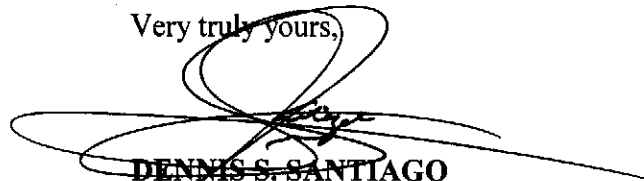
During the competitive bidding stage, Section 4.1.5 of the Guidelines provides that the refusal or failure of a contractor to post the required Performance Security within the prescribed period is one of the grounds for blacklisting. The aforesaid provision thus considers two situations - (1) Refusal to post the required Performance Security, or (2) Failure to post the required Performance Security. Failure to post denotes the inability to post the Performance Security in the required form and in accordance with the corresponding percentages indicated in Section 39.2⁶ of the IRR of RA 9184. Hence, the submission by RJIR of a Performance Security in the form of a personal check after the signing of the contract could be considered as a failure to post the required Performance Security.

Likewise, we note that the BAC of Hilongos did not observe the proper procurement procedure as Section 37.1.4(b) of the IRR of RA 9184 expressly provides that the posting of Performance Security in accordance with Section 39 of the IRR must be complied with prior to the award of contract.

Article 5 of the Civil Code of the Philippines provides that acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity. RA 9184, having been enacted for the advancement of public welfare, undoubtedly contains mandatory provisions. Thus, the omission to follow such rules renders the proceeding to which it relates illegal and void, or the violation of which makes the decision therein rendered invalid.⁷

We hope that our advice provided sufficient guidance on the matter. Please note that this opinion is being rendered on the basis of the facts and particular situation presented, and may not be applicable given a different set of facts and circumstances. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director III

//LSD3 *[initials]*

⁶ The performance security shall be in an amount equal to a percentage of the total contract price in accordance with the following schedule:

Form of Performance Security	Amount of Performance Security (Equal to Percentage of the Total Contract Price)
a) Cash or cashier's/manager's check issued by a Universal or Commercial Bank.	Goods and Consulting Services – Five percent (5%)
b) Bank draft/guarantee or irrevocable letter of credit issued by a Universal or Commercial Bank: Provided, however, that it shall be confirmed or authenticated by a Universal or Commercial Bank, if issued by a foreign bank.	Infrastructure Projects – Ten percent (10%)
c) Surety bond callable upon demand issued by a surety or insurance company duly certified by the Insurance Commission as authorized to issue such security	Thirty percent (30%)
d) Any combination of the foregoing.	Proportionate to share of form with respect to total amount of security.

For biddings conducted by LGUs, the prospective bidder may also submit performance securities in the form of cashier's/manager's check, bank draft/guarantee, or irrevocable letter of credit from other banks certified by the BSP as authorized to issue such financial instrument.

⁷ NPM No. 170-2012 dated 28 December 2012 and NPM No. 026-2005 dated 25 April 2005.