



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

**NPM No. 98-2013**

20 December 2013

**ATTY. ANITA LOURDES C. ORIEL**  
*Chairperson, Bids and Awards Committee*  
**PHILIPPINE HEALTH INSURANCE CORPORATION**  
**(PHILHEALTH) REGIONAL OFFICE VIII**  
PhilHealth Bldg. 2, 167 P. Burgos St., Tacloban City

**Re: Forfeiture of Performance Security**

Dear Atty. Oriel:

This is in response to your letter dated 10 September 2013, addressed to Director Imelda C. Laceras of the Department of Budget and Management (DBM) Regional Office VIII, seeking clarification on whether the performance security posted by the winning bidder, on the basis of a Notice of Award (NOA) issued in its favor, should be forfeited in the event that it is found that another procuring entity has previously issued a Blacklisting Order against the same bidder.

It is represented that Philippine Health Insurance Corporation Region VIII (PhilHealth) issued a Notice of Award (NOA) last 18 July 2013 to HLYC Trading, which thereafter posted a performance security. However, PhilHealth is unaware that the Office of the Ombudsman issued a blacklisting order against HLYC Trading effective 14 June 2013 in relation to a procurement project of the former. It is in this context that PhilHealth sought the guidance of the DBM Regional Office VIII on the abovementioned issue, which the latter endorsed to this office for opinion.

For your guidance, Section 7 of the Uniform Guidelines for Blacklisting of Manufacturers, Supplies, Distributors, Contractors and Consultants (Guidelines) states that before the issuance of a Blacklisting Order, the erring contractor may participate in the procurement of any government project except in the agency where it is suspended. But if the Blacklisting Order is issued prior to the date of the NOA, the blacklisted entity shall not be qualified for the award, and such project or contract shall be awarded to another bidder pursuant to Republic Act (RA) No. 9184 and its revised Implementing Rules and Regulations (IRR). Since the Blacklisting Order of the Office of the Ombudsman was issued prior to the NOA from the PhilHealth, HLYC Trading is deemed disqualified from entering into a contract with PhilHealth, and the NOA issued in its favor is deemed to have no force and effect.

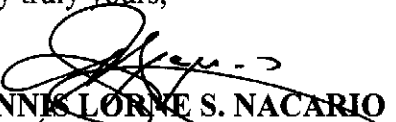
We wish to clarify that under Section 39.1 of the IRR of RA 9184, the posting of performance security is required in order to guarantee the winning bidder's faithful performance of its obligations under the contract. Accordingly, Section 39.3 of the same IRR provides that the performance security shall be forfeited in the event it is established that the winning bidder is in default of any of its obligations under the contract. Hence, the posting of a performance security and its forfeiture depend on a validly awarded contract.

Considering that the NOA issued by PhilHealth has no force and effect, HLYC Trading has no obligation to post a performance security in favor of the procuring entity because there is no contract performance to guarantee in the first place. In such case, rather than forfeiting the performance security, the same may be deemed to have been mistakenly posted, and should thus be returned to HLYC Trading in accordance with the principle of *solutio indebiti* under Article 2154 of the Civil Code of the Philippines.

Based on the foregoing, we are of the opinion that the performance security posted by HLYC Trading on the basis of the NOA issued in its favor by PhilHealth cannot be forfeited, but should instead be returned in accordance with the principle of *solutio indebiti* under Article 2154 of the Civil Code of the Philippines. In order to ensure that contracts are awarded validly, we wish to remind PhilHealth to conduct due diligence in ascertaining the qualifications and good standing of its bidders during post-qualification.

We hope that this opinion issued by the GPPB-TSO 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 LORNE S. NACARIO**  
*Officer-In-Charge*

*Copy Furnished:*

**MS. IMELDA C. LACERAS**

*Director IV*

**DEPARTMENT OF BUDGET AND MANAGEMENT (DBM)**

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