



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

NPM No. 117-2012

17 September 2012

HON. ARNEL PACIANO D. CASANOVA, ESQ.

President and Chief Executive Officer

BASES CONVERSION AND DEVELOPMENT AUTHORITY (BCDA)

2F Bonifacio Technology Center,
31st St., Crescent Park West,
Bonifacio Global City, Taguig City

Re: Posting of Warranty Security under Section 62 of Republic Act (RA) 9184

Dear Atty. Casanova:

We respond to your letter dated 30 July 2012 seeking our advice on which version of the Implementing Rules and Regulations (IRR) of RA 9184 shall be applied to R.D. Policarpio and Company, Inc. (RDPCI) in posting the warranty security for a project that commenced in the year 2006.

As represented, BCDA entered into a Memorandum of Agreement (MOA) on 1 December 2005 with the local government unit of Concepcion, Tarlac, for the Construction of Overpasses in the area including the provinces of Bataan and Pampanga. The winning bidder, RDPCI, was issued the Notice to Proceed on 11 December 2006, and the project commenced on 28 December 2006 with completion date originally set on 7 October 2007, which was subsequently extended to 20 November 2008. On 10 June 2009, BCDA issued a Certificate of Completion and Preliminary Acceptance to RDPCI. On 26 June 2009, RDPCI requested for the release of the retention money, and in lieu thereof, submitted an irrevocable standby Letter of Credit (LC) expiring on 18 June 2010 to guarantee the contractor's warranty obligation during the defects liability period. On 5 May and 1 June 2010, BCDA called the attention of RDPCI of the impending expiration of the irrevocable LC and required its renewal.

On 8 June 2010, RDPCI informed BCDA in writing that it cannot renew the irrevocable LC and instead requested the issuance of the Certificate of Final Acceptance on the ground that the one (1) year warranty period already lapsed. RDPCI made another request on 31 March 2012 after repairing the defects that were noted during the defects liability period. BCDA refuses to issue a Certificate of Final Acceptance, citing the second paragraph of Section 62.2¹ of IRR Part A (IRR-A) of RA 9184, which requires RDPCI to post the

¹ The warranty security shall be stated in Philippine Pesos, shall remain effective during the applicable warranty period provided in Section 62.2.2 hereof, and shall be returned only after the lapse of the said warranty period. The warranty shall be full for the first year, and renewable every year thereafter, subject to depreciation after the first year, on a straight line basis. (underline ours)

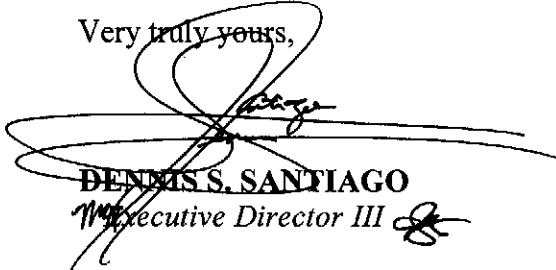
corresponding warranty security. However, BCDA noted that Section 62.2.3.4² of the revised IRR amended this relevant provision of the IRR-A. It is within this context that BCDA inquires as to which version of the IRR shall be applicable to RDPCI in posting the warranty security considering that the project was bid out in 2006 pursuant to the provisions of IRR-A while the project was completed in 2008 under the revised IRR.

As we have discussed in a previous opinion³, the revised IRR took effect on 2 September 2009, thus, its provisions shall apply to all procurement activities where the Invitations to Bid were posted on or after this date.⁴ This reflects the basic tenet that "Laws shall have no retroactive effect, unless the contrary is provided".⁵ This rule has been underscored in the case of *Lepanto Consolidated v. WMC Resources*⁶, wherein the Supreme Court held that, "in order that a law may have retroactive effect it is necessary that an express provision to this effect be made in the law, otherwise nothing should be understood which is not embodied in the law". It should be emphasized that nothing in the revised IRR provides for its retroactive application. On the contrary, Section 77 thereof recognizes the application of prior laws, rules and regulations for procurement projects advertised or posted prior to the effectivity of the revised IRR.

Based on the foregoing, considering that the IRR of RA 9184 does not provide for retroactive application, we are of the view that Section 62.2.3.4 of the revised IRR should be applied prospectively to BCDA's infrastructure contracts. Hence, infrastructure projects implemented using IRR-A, but completed under the revised IRR, shall continue to require the renewal of warranty security based on Section 62.2 of the IRR-A, on the assumption that the Invitation to Bid were posted before 2 September 2009.

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 circumstances presented, and may not be applicable to 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

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² The warranty security shall be denominated in Philippine Pesos, remain effective for one (1) year from the date of issuance of the Certificate of Final Acceptance by the procuring entity, and returned only after the lapse of the said one (1) year period

³ NPM No. 49-2012 dated 30 April 2012.

⁴ NPM No. 19-2010 dated 15 June 2010.

⁵ Section 4 of the Civil Code of the Philippines.

⁶ G.R. No. 162331 dated 20 November 2006.