

NPM No. 13-2006

17 July 2006

MS. BINGLE H.B. GUTIERREZ
Executive Director
PASIG RIVER REHABILITATION COMMISSION
2/F Engineering Building, MWSS Compound
Katipunan Road, Balara
Quezon City, Philippines

**Re : Government Policy on Fraudulent/Forged Bank Guarantees
(Performance Security and Warranty for Defect Liability)**

Dear Exec. Dir. Gutierrez:

In letter dated 6 June 2006, the Pasig River Rehabilitation Commission (PRRC) referred to the Government Procurement Policy Board – Technical Support Office (GPPB-TSO) several procurement issues encountered during the bidding of its projects. The referral was a product of initial discussions made between representatives of PRRC and GPPB-TSO last 5 June 2006.

As represented, PRRC successfully bid out the construction of several loading docks along Pasig River under the Asian Development Bank (ADB) Assisted Pasig River Environmental Management and Rehabilitation Sector Development Program (PAREMAR). However, during contract implementation, it was discovered that the performance security submitted by the winning bidder was fraudulent. Moreover, a fraudulent warranty security was likewise posted by the same winning bidder for another completed project.

In sum, the query being posited by PRRC is what would be the proper course of action that may be taken by PRRC against the erring awardee.

At the outset, it bears stressing that the Implementing Rules and Regulations Part A (IRR-A) of Republic Act No. 9184 (R.A. 9184) may only apply to fully domestically-funded procurement activities. Pending the issuance of rules governing the procurement of foreign-funded procurement activities, national government

agencies must observe the procurement guidelines prescribed in the loan or grant agreement between the Government of the Philippines (GOP) and the International Financing Institution (IFI). In case, however, that the IFI guidelines are silent, the provisions of IRR-A shall be given supplementary effect.

Consequently, PRRC is advised to first refer to the guidelines prescribed in the agreement between GOP and ADB. In the event, however, that the chosen guidelines are silent or both parties agreed to be governed by R.A. 9184 and its IRR, set forth below are the remedies available to PRRC based on the circumstances relayed to this office.

1. *Project Implementation*

During implementation stage, whether the project is half completed or substantially finished, and the contractor was found to have submitted a fraudulent performance security, the procuring entity has the following legal remedies under R.A. 9184 and its IRR:

- a. Terminate the contract for drawing up or using forged documents. (GPPB Resolution No 18-2004 approving the Guidelines on Termination of Contracts); and
- b. Initiate blacklisting proceeding against the contractor under any of the following grounds: (i) failure to fully and faithfully comply with its contractual obligation without valid cause; or (ii) failure to comply with the written lawful instruction of the procuring entity or its representative(s) pursuant to the implementation of the contract. (GPPB Resolution No 9-2004 approving the Uniform Guidelines for Blacklisting).

2. *Project Completion*

After a project has been completed and the contractor was found to have submitted a fraudulent warranty security, the procuring entity shall have the same legal options described above if it has not fully paid the contractor. However, if the procuring entity has fully paid up or complied with its contractual commitments, then it may only initiate blacklisting proceeding against the contractor since there is no more contract to terminate.

3. *Contract Termination*

In the event that the procuring entity exercised the first option and terminated the contract, it continues to be legally bound to pay the cost of completed works pursuant to the principle of *quantum meruit*. Following Section 3, number 45 of the General Conditions of the Contract under the Philippine Bidding Documents (PBD's), the procuring entity should determine and pay the value of the work done and the materials ordered less advance payments made up to the date of the contract


termination and less the percentage to apply to the value of the work not completed, as indicated in the Special Conditions of the Contract. However, should total amount due the procuring entity exceed any payment due the contract awardee, the difference shall be considered as debt payable to the procuring entity.

Further, the procuring entity is not legally precluded from demanding from the defaulting contractor the replacement of the fraudulent warranty security in order to minimize the national government's risk exposure to potential defects, damage, and destruction of the contract work.

Finally, please be advised that a bidder cannot be prohibited from participating in other public bidding unless found administratively suspended or blacklisted by the procuring entity in accordance with the rules and procedures for blacklisting.

We hope that we have sufficiently addressed your concerns.

Very truly yours,

for: 
RUBY U. ALVAREZ