

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office

Unit 2506 Raffles Corporate Center, Emerald Avenue, Ortigas Center, Pasig City
Telefax Nos. (02) 900-6741 to 44

NPM No. 142-2004

November 5, 2004

HON. ALEXANDER A. PADILLA
Undersecretary, Department of Health
Chairman, Bids and Awards Committee
1/F Bldg. 6, San Lazaro Compound,
Sta. Cruz, 1003 Manila

Re : Use of Performance Security Posted for a Current Contract for Another Contract

Dear Undersecretary Padilla:

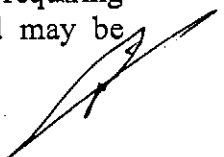
This refers to your letter dated September 30, 2004, which we received on October 4, 2004, requesting clarification whether or not it is allowed under Republic Act 9184 (R.A. 9184) and its Implementing Rules and Regulations Part A (IRR-A) for a procuring entity to retain the performance security posted for an ongoing contract for purposes of a new and similar contract.

This is being raised in connection with the procurement of Janitorial Services for the Department of Health (DOH) Central Office for CY 2004-2005 where your agency's current service provider was declared as the winning bidder. The current service provider requested that, instead of posting another performance security for the new janitorial services contract, DOH retain the existing performance security for the current contract and allow the service provider to pay the incremental difference to make up for the shortfall in amount. The sole substantive issue therefore is as follows:

Whether or not a performance security posted for an ongoing contract may be used by the service provider for compliance with a new and similar contract.

Use of a Performance Security for a Current Contract for Purposes of Another Similar Contract

Although Section 39 of the IRR-A of R.A. 9184 provides the details on performance security, there is nothing that expressly prohibits or allows the use of a subsisting performance security for another contract. For this reason, it is necessary to consider the purpose for requiring the posting a performance security in order to determine whether the issue at hand may be answered in the affirmative.



Section 39 of R.A. 9184 provides that performance security serves as a measure of guarantee for the faithful performance of and compliance by the winning bidder of its obligations under the contract. Section 39 of R.A. 9184 specifically provides as follows:

Prior to the signing of the contract, the winning bidder, shall, as a measure of **guarantee for the faithful performance of and compliance with his obligations under the contract** prepared in accordance with the Bidding Documents, be required to post a performance security in such form and amount as specified in the Bidding Documents.¹

In order to fully serve its purpose, the IRR-A provides that the performance security be at least co-terminus with the final completion of the contract² such that it may be released by the procuring entity only after the issuance of the Certificate of Acceptance in case of goods and consulting services, or the Certificate of Completion in case of infrastructure projects.³

It is clear from the foregoing discussion that the purpose for requiring the posting of a performance security prior to the signing of the contract is to guarantee that the winning bidder will not renege on its contractual obligations and to protect the procuring entity's interests in the completion of the project. It is therefore imperative that performance security be posted prior to the signing of a contract and released only after the contract is completed as certified by the procuring entity.

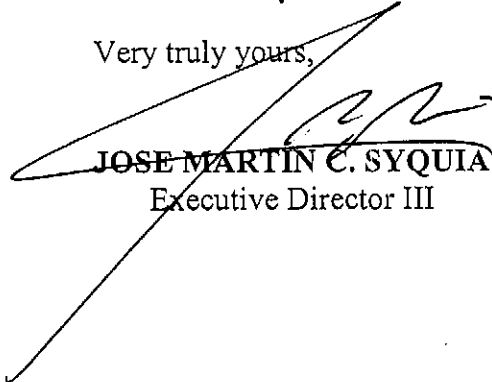
In this regard, if the contract for which the performance security is posted is still ongoing, the service provider for that contract cannot make use of the said performance security for purposes of compliance in a new contract regardless of the fact that the incremental difference will be paid to cover any shortfall in amount. A performance security, being contract specific, may be retained by the procuring entity and used for purposes of compliance with a subsequent contract only after the contract for which it was posted has been completed as certified by the procuring entity.

In view of the foregoing, we are of the opinion that the suggestion for the DOH to retain the performance security posted for the current janitorial services contract and allow the current service provider to pay any incremental difference to cover the shortfall in amount is not in accordance with the principles of R.A. 9184 with respect to performance security. The suggested practice may only be applicable if the DOH has officially accepted that the contract for janitorial services for which the performance security was posted has been completed.

This opinion is being rendered on the basis of the facts and particular circumstances as represented. It may not be necessarily applicable upon a different set of facts and circumstances.

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director III

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¹ Emphasis supplied.
² Section 39.3(b), IRR-A, R.A. 9184.
³ Section 39.4, IRR-A, R.A. 9184.

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October 14, 2004

HON. ALEXANDER A. PADILLA
Undersecretary
Department of Health
Chairperson
Central Office Bids and Awards Committee
1/F Bldg 6, San Lazaro Compound,
Sta. Cruz, Manila

Dear Undersecretary Padilla:

This refers to your letter dated September 30, 2004, which we received on October 4, 2004, addressed to the undersigned, requesting for clarification on Republic Act 9184 and its Implementing Rules and Regulations Part A, specifically whether or not your agency may retain the performance security posted last year for the current contract and allow the payment of the incremental difference to make up for the shortfall in amount.

We wish to inform you that we shall respond to your concerns either through phone or in writing at the earliest possible opportunity, or raise the same to the Government Procurement Policy Board for appropriate resolution should referral thereto becomes necessary.

Very truly yours,


JOSE MARTIN C. SYQUIA
Executive Director III