NPM No. 151-2012

13 December 2012

MR. HOWARD M. DE VILLA
Sales Manager
ADLIB INTERNATIONAL SALES (AIS)
GM Building, 240 EDSA, Mandaluyong City

Re: Surety Bond Callable on Demand

Dear Mr. de Villa:

We respond to your letters dated 3 September 2012 and 5 October 2012 seeking clarification on the requirement that a Surety Bond should be callable on demand under Section 27.2 of the revised Implementing Rules and Regulations (IRR) of Republic Act (RA) 9184, otherwise known as the Government Procurement Reform Act.

As represented, AIS is of the position that the surety bond required under Section 27.2 of the IRR of RA 9184 should explicitly specify the phrase "callable on demand" and the absence of said phrase shall be a ground for disqualification of a bidder during bid opening. It is AIS' contention that the bidder filing a request for reconsideration has the burden of proving its allegations in support of such request. AIS likewise asserts that supporting documents not submitted during bid opening should not be considered by the Bids and Awards Committee (BAC) in deciding the request for reconsideration as these already constitute enhancement of the bid. AIS further maintains that the BAC could not seek confirmation of the facts and issues raised in the request for reconsideration from any other source as verification of submitted documents can only be done during post-qualification.

Nature of a Surety Contract

Article 2047[1] of the Civil Code of the Philippines provides that a surety binds itself solidarily with the principal debtor in the performance of the subject obligation. In *Visayan Surety and Insurance Corporation v. Court of Appeals* the Supreme Court defined a surety contract as "[a]n agreement where a party, called the surety, guarantees the performance by another party, called the principal or obligor, of an obligation or undertaking in favor of a third person called the obligee. Specifically, suretyship is a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default or miscarriage of another, known as the principal."[2]

[1] By guaranty a person, called the guarantor, binds himself to the creditor to fulfill the obligation of the principal debtor in case the latter should fail to do so. If a person binds himself solidarily with the principal debtor, the provisions of Section 4, Chapter 3, Title I of this Book shall be observed. In such case, the contract is called a suretyship.
[2] G.R. No. 127261, September 7, 2001.

Necessity of Demand in a Surety Contract to Establish Delay

The surety has primary liability over the obligation of the obligor. However, this liability does not come into fore until and unless a demand is made, judicially or extra-judicially, by the obligee from the obligor and the latter fails or refuses to perform. It is only after failure or refusal of the obligor to perform or to honor his obligation, after demand was duly made, will enforcement of rights under the surety contract (surety bond) is triggered as delay or default has already set in at this point. The case of *Philippine Charter Insurance Corporation v. Central Colleges of the Philippines*[3] is well in point, where the concept of delay or default was considered to trigger the effects of a surety contract, thus:

> The civil law concept of delay or default commences from the time the obligee demands, judicially or extrajudicially, the fulfillment of the obligation from the obligor. In legal parlance, demand is the assertion of a legal or procedural right. … It is the obligor's culpable delay, not merely the time element, which gives the obligee the right to seek the performance of the obligation.

In referring to "surety bond callable upon demand" under Section 27.2 of the IRR of RA 9184, the phrase "callable upon demand" reflects the initiatory step that has to be performed by the obligee to make a claim against the surety contract, *i.e.,* demand must first be made by the obligee from the obligor to perform his obligation before the surety contract facility is triggered. It is essential that before the Procuring Entity (PE), as the obligee, can call on the Surety Bond submitted by the bidder, a claim or demand must be made by the PE to the obligor to perform his obligations per Section 37.1.4[4] of the IRR of RA 9184. The liability of the surety arises the moment the PE (obligee) demands from the bidder (obligor) and the latter does not perform his obligation. Hence, upon notice of obligor's default, the surety's liability is attached. Although the phrase "Callable Upon Demand" appearing on the face of the Surety Bond is preferred, there is no requirement that the exact/same phrase should appear on the face of the Surety Bond, as this phrase simply provides the caveat to the obligee, obligor and the surety that the surety contract facility may be called only upon a proper demand – "callable upon demand" – to establish default, and to trigger the liability under the surety contract.

Accordingly, the phrase "CALLABLE UPON DEMAND" need not be specifically written, or emphasized in bold letters across, or diagonally on the face of the Surety Bond, it is sufficient that the import or totality of the stipulations, covenants, provisions, and agreements written on the instrument makes the Surety Bond callable upon demand. This application is consistent with the principle enunciated by the Supreme Court that, "the rule is

[3] G.R. Nos. 170631-33, 22 February 2012.

[4] Section 37.1.4. Notwithstanding the issuance of the Notice of Award, award of contract shall be subject to the following conditions:

a) Submission of the following documents within the prescribed period:
   i) Valid JVA, if applicable, within ten (10) calendar days from receipt by the bidder of the notice from the BAC that the bidder has the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid, as the case may be; or
   ii) In the case of infrastructure projects, valid PCAB license and registration for the type and cost of the contract to be bid for foreign bidders, within thirty (30) calendar days from receipt by the bidder of the notice from the BAC that the bidder has the Lowest Calculated Responsive Bid, when the Treaty or International or Executive Agreement expressly allows submission of the PCAB license and registration for the type and cost of the contract to be as a precondition to the Notice of Award;

b) Posting of performance security in accordance with Section 39 of this IRR;
c) Signing of the contract as provided in Section 37.2 of this IRR; and
d) Approval by higher authority, if required, as provided in Section 37.3 of this IRR.

that it is not the title of the contract, but its express terms or stipulations that determine the kind of contract entered into by the parties."[5]

Modification of Bids and Verification Prior to Post-Qualification

Anent your other queries, Section 30.1 of the IRR of RA 9184 instructs the BAC to check the submitted documents of each bidder against a checklist of required documents to ascertain if they are all present using a non-discretionary "pass/fail" criterion. The absence of the document required shall be cause for the disqualification of the bidder. Section 26.1 of the IRR, on the other hand, prohibits bidders from modifying their bid, through the submission of new or additional documents after the deadline for submission, receipt and opening of bids, to support its eligibility or qualification as this constitutes an improvement of bids; and is violative of the rule that bids must be submitted complete on the date, time and place for the submission of bids.

During post-qualification, the BAC should verify, validate and ascertain all statements made and documents submitted by the bidder with the Lowest Calculated/Highest Rated Bid, using non-discretionary criterion provided in the Bidding Documents.[6] Initial verification of the documentary submissions may, however, be allowed as an exercise of due diligence by the BAC. This is borne by the rule that in the performance of its functions, duties, and obligations, the BAC shall perform such other related functions as may be necessary, particularly in the eligibility screening, evaluation of bids, and post-qualification.[7] After all, the BAC shall be responsible for ensuring that the PE abides by the standards set forth by the Act and the IRR.[8]

Please note that this act of verification is separate and distinct from the verification, validation and ascertainment, which the BAC is mandated to perform during post-qualification. The decision to exercise its verification function to enhance the efficiency of the procurement process is a matter of wisdom and prerogative on the part of the BAC. As explained by the Supreme Court in *National Power Corporation v. Pinatubo Commercial*, the discretion to accept or reject bids and awards contracts is of such wide latitude, courts will not interfere, unless it is apparent that it is exercised arbitrarily, or used as a shield to a fraudulent award. The exercise of that discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation. This task can best be discharged by the concerned government agencies, not by the courts.[9]

Based on the foregoing, we are of the opinion that it is sufficient that the Surety Bond is "callable upon demand" based on the stipulations, agreements and covenants in the surety contract; and although ideal or preferred, it is not a requirement that the Surety Bond should expressly contain the phrase "callable on demand". However, demand must be made by the obligee to the obligor, to perform its obligation, before delay or default is recognized; and demand to the surety is likewise necessary to make a claim against the Surety Bond. Additionally, during the pendency of the request for reconsideration, the movant-bidder is barred from submitting new or additional documents as this action constitutes modification, enhancement or improvement of the bids. Finally, the BAC may review the qualifications of

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[5] David v. Misamis Occidental II Electric Cooperative, G.R. No. 194785, July 11, 2012.
[6] Section 34.3 of the IRR of RA 9184.
[7] Section 12.1 of the IRR of RA 9184.
[8] Section 12.2 of the IRR of RA 9184.
[9] G.R. No. 176006, March 26, 2010.

the bidder at any stage of the procurement process as it may perform such other related functions as may be necessary, particularly in the eligibility screening, evaluation of bids, and post-qualification.

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

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