

REPUBLIC OF THE PHILIPPINES
GOVERNMENT PROCUREMENT POLICY BOARD
Technical Support Office
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NPM No. 019-2004

February 26, 2004

ATTY. NOEL Z. DE LEON
General Counsel
National Transmission Corporation

Re : Performance Security

Dear Atty. De Leon:

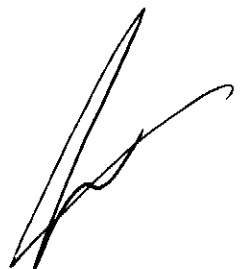
This refers to your letter dated January 23, 2004, requesting for clarification on Section 39 of the Implementing Rules and Regulations Part A ("IRR-A") of Republic Act 9184 ("R.A. 9184") from which we have determined the following issues:

1. Whether or not a procuring entity may require that performance securities come exclusively from the Government Service Insurance System ("GSIS"); and
2. Whether or not a procuring entity may impose standards or requirements in order to ascertain if the insurance/surety company issuing the performance security is "reputable."

Performance Security Exclusively Issued by GSIS

Section 39.1 of IRR-A of R.A. 9184 requires the posting of a performance security upon signing of the contract in order "to guarantee the faithful performance by the winning bidder of its obligations under the contract prepared in accordance with the bidding documents." It also provides for the forms by which a performance security may be issued, as follows:

To guarantee the faithful performance by the winning bidder of its obligations under the contract prepared in accordance with the bidding documents, it shall post a Performance Security upon the signing of the contract. The Performance Security may be in any of the following forms:



- a) Cash, certified check, cashier's/manager's check, bank draft/guarantee confirmed by a reputable local bank or in the case of a foreign winning bidder, bonded by a foreign bank;
- b) Irrevocable letter of credit issued by a reputable commercial bank or in the case of an irrevocable letter of credit issued by a foreign bank, the same shall be confirmed or authenticated by a reputable local bank;
- c) Surety bond callable upon demand issued by any reputable surety or insurance company;
- d) A combination of the foregoing; or
- e) A foreign government guarantee as provided in an executive, bilateral or multilateral agreement, as may be required by the head of the procuring entity concerned.

Since the performance security serves to the advantage of the procuring entity, IRR-A of R.A. 9184 under Section 39.3 thereof affords procuring entities discretion to choose the type of performance security to be posted in its favor. Section 39.3 specifically provides, to wit:

In the execution of the Performance Security, the following conditions shall be complied with:

- a) It shall be **executed in the form prescribed by the procuring entity concerned in the Instruction to Bidders**;
- b) It shall at least be co-terminus with the final completion of the contract; and
- c) For the procurement of infrastructure projects, the following provisions shall form part of the Performance Security: "The right to institute action on the penal bond pursuant to Act No. 3688 of any individual firm, partnership, corporation and association supplying the contractor with labor and materials for the prosecution of the work is hereby acknowledged and confirmed." (Emphasis supplied)

It should be noted that procuring entities have the discretion to require a particular form of performance security but such discretion does not extend to the authority to require where a performance security may be secured because to allow otherwise would defeat the principle of competitiveness espoused under R.A. 9184 and its IRR-A. The preference of a bidder on the insurance/surety company which shall provide it with its performance security should not serve as a hindrance in its eligibility as a bidder.

In this regard, we are of the opinion that your agency can prescribe only the type of performance security to be posted by the winning bidder, but not from where it should be applied from, advantage to other government agencies notwithstanding.

Imposition of Standards or Additional Requirements

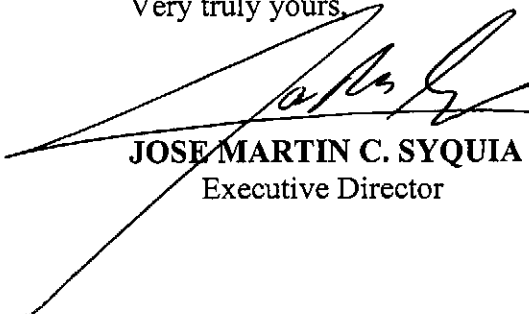
During the meeting of the GPPB and the Joint Congressional Oversight Committee (“JCOC”) on the draft IRR-A of R.A. 9184, held on July 11, 2003, it was unanimously agreed upon that the phrase “duly accredited by the Insurance Commission” under Section 39.1(c) of IRR-A be deleted in order not to discriminate bonds issued by GSIS. Moreover, in order to emphasize the character of the insurance/surety company from which the performance security will be applied from, the term “reputable” was inserted in the provision.

Considering that the “reputable” character of an insurance/surety company is a requirement that is subjective in nature, and considering further that the IRR-A did not provide guidelines for its proper determination, it may be inferred that it was the intention of the Legislature to vest procuring entities with the discretion to impose standards or additional requirements, e.g., certificate of accreditation from IC, in ensuring the “reputable” character of the insurance/surety company issuing the performance security.

Accordingly, it is our opinion that your agency may prescribe standards or additional requirements to properly ensure the “reputable” character of an insurance/surety company issuing a performance security provided that it shall be so stated in the bidding documents.

We trust that this clarifies matters.

Very truly yours,



JOSE MARTIN C. SYQUIA
Executive Director