

NPM No. 124-2017

29 December 2017

DIRECTOR MICHAEL D. PABALINAS
Bids and Awards Committee (BAC) Vice Chairman
**GOVERNANCE COMMISSION FOR GOVERNMENT OWNED OR
CONTROLLED CORPORATIONS (GCG)**
3/F Citibank Tower, 8741 Paseo de Roxas,
Makati City

Re: Form of Bid Security and Performance Security -

Dear Dir. Pabalinas:

This refers to your letter inquiring whether the GCG may limit the prospective bidders to the submission of the following:

- (a) a Bid Securing Declaration (BSD) or bank draft/guarantee or irrevocable letter of credit issued by a Universal or Commercial Bank as its preferred form of *Bid Security*; and
- (b) a bank draft guarantee or irrevocable letter of credit issued by a Universal or Commercial Bank or a surety bond callable upon demand issued by a surety or insurance company duly certified by the Insurance Commission as its preferred form of *Performance Security*.

As represented, the GCG received Audit Observation Memorandum (AOM) No. 01-2015 issued by the Commission on Audit (COA) recommending to the management to deposit the balance of its three (3) Land Bank of the Philippines (LBP) Current Accounts to the National Treasury as required under Executive Order (EO) No. 338 and Budget Circular (BC) No. 2004-5A. One of the three LBP Current Accounts pertains to the BAC Account (LCCA No. 3432-1006-25) of the GCG to which the Performance Securities posted by winning bidders are deposited. In response and in the interest of facilitating the immediate return of these forms of security, the GCG manifested to the COA its intention to require the winning bidders to submit bank guarantees to ensure performance instead of surety bonds, cash and/or other forms of Performance Security.

At the outset, please note that Sec. 27.2 and 39.2 of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, the Government Procurement Reform Act, which took effect last 28 October 2016, now provide that:

Sec. 27.2. The bidder shall submit a Bid Securing Declaration, or any form of Bid Security, in an amount not less than the required percentage of the ABC in accordance with the following schedule:

Form of Bid Security	Amount of Bid Security (Not less than the required percentage of the ABC)
a) Cash or cashier's/manager's check issued by a Universal or Commercial Bank. For biddings conducted by LGUs, the cashier's/manager's check may be issued by other banks certified by the BSP as authorized to issue such financial instrument. ^(a)	Two percent (2%)
b) Bank draft/guarantee or irrevocable letter of credit issued by a Universal or Commercial Bank: <i>Provided, however,</i> That it shall be confirmed or authenticated by a Universal or Commercial Bank, if issued by a foreign bank. For biddings conducted by LGUs, bank draft/guarantee, or irrevocable letter of credit may be issued by other banks certified by the BSP as authorized to issue such financial instrument. ^(a)	
c) Surety bond callable upon demand issued by a surety or insurance company duly certified by the Insurance Commission as authorized to issue such security.	Five percent (5%)

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Section 39.2 The performance security shall be in an amount not less than the required percentage of the total contract price in accordance with the following schedule:

Form of Performance Security	Amount of Performance Security (Not less than the required percentage of the Total Contract Price)
a) Cash or cashier's/manager's check issued by a Universal or Commercial Bank. For biddings conducted by LGUs, the cashier's/manager's check may be issued by other banks certified by the BSP as authorized to issue such financial instrument. ^(a)	Goods and Consulting Services – Five percent (5%)
b) Bank draft/guarantee or irrevocable letter of credit issued by a Universal or Commercial Bank: <i>Provided, however,</i> That it shall be confirmed or authenticated by a Universal or Commercial Bank, if issued by a foreign bank.	Infrastructure Projects – Ten percent (10%)



<p>For biddings conducted by LGUs, bank draft/guarantee, or irrevocable letter of credit may be issued by other banks certified by the BSP as authorized to issue such financial instrument. (a)</p>	
<p>c) Surety bond callable upon demand issued by a surety or insurance company duly certified by the Insurance Commission as authorized to issue such security.</p>	<p>Thirty percent (30%)</p>

In view thereof, under the 2016 revised IRR, the option to choose which one (1) form of bid security and performance security to submit solely belongs to the bidders, such that the PE can no longer limit the acceptable forms of bid security, as well as that of performance security, in its Bidding Documents as provided under GPPB Resolution No. 25-2013¹ and clarified in GPPB Circular No. 01-2014².

We wish to note that the intention of the rule is to encourage greater participation in competitive bidding by granting the bidders the right to choose any of the prescribed forms of bid security and performance security. In any case, the acceptable forms provided under the 2016 IRR of RA 9184 were deliberated and considered as adequate to ensure that the procuring entities would not be left without remedy in the event that the bidder withdraws its bid or refuses to enter into contract with the procuring entity upon award; or when the winning bidder defaults in the performance of its obligations under the contract.

Accordingly, under the present state of the rules, the GCG cannot limit the forms of bid security and performance security to only two (2) GCG preferred forms. Ultimately, it is the bidder that has the discretion and choice as to what form of bid or performance security it shall post, and a departure therefrom would be a violation of the existing procurement rules and regulations.

We hope that this opinion issued by the GPPB-TSO provided sufficient guidance on the matter. Note that this opinion is being issued on the basis of facts and particular situations presented, and may not be applicable given a different set of facts and circumstances. Should there be other concerns, please do not hesitate to contact us.

(sgd.)

Executive Director *V. M. M.*

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¹ Dated 30 August 2013.

² Dated 23 May 2014.