



Republic of the Philippines  
**GOVERNMENT PROCUREMENT POLICY BOARD**  
**TECHNICAL SUPPORT OFFICE**



**NPM No. 127-2017**

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**HON. BINGLE B. GUTTIEREZ**

*Executive Director*

**DEPARTMENT OF BUDGET AND MANAGEMENT-  
PROCUREMENT SERVICE**

RR Road, Cristobal Street, Paco, manila, Philippines 1007

**Re: Bank Guarantee as Bid Security -**

Dear ED Gutierrez:

This refers to your request for guidance on whether a bank guarantee that contains only four (4) conditions under which the bid security may be forfeited by the procuring entity, may be accepted.

As represented, the DBM-PS is presently conducting the bidding process in the procurement of non-common use supplies and equipment, where the bidder submitted a bank guarantee as its bid security. During the post-qualification stage, it was found that the bank guarantee contained only four (4) conditions under which the bid security may be forfeited by the procuring entity, *to wit*:

THE CONDITIONS of this obligation are:

- (1) If the bidder:
  - (a) Withdraws his bid during the period of bid validity specified in the Form of Bid, or
  - (b) Does not accept the correction of arithmetical errors of his bid price in accordance with the Instruction to Bidders, or
- (2) If the bidder having been notified of the acceptance of his bid by the Entity during the period of bid validity:
  - (a) Fails or refuses to execute the Form of Agreement in accordance with the Instructions to Bidders, if required, or
  - (b) Fails or refuses to furnish the Performance Security in accordance with the Instruction to Bidders.

However, the Bidding Documents, as published and purchased by the bidders, specified fourteen (14) conditions, the happening of which will give rise to the right of the Procuring Entity (PE) to forfeit the bid security. The BAC opines that failure to include all 14 conditions limits the responsibility of the bidder to the PE, because if the bidder is found to have committed acts that are not covered by the conditions of the bid security, the same

cannot be enforced and payment cannot be demanded by the PE from the bank. The pertinent portion of the bank guarantee provides that:

We undertake to pay the above amount upon receipt of the first written demand, without the Entity having to substantiate its demand, provided that in their demand, the entity will note that the amount claimed by them is due to them owing to the occurrence of one or both of the two conditions, specifying the occurrence of one or both of the conditions, specifying the occurred condition or conditions.

According to the BAC, it is considered an insufficient submission and thus a valid basis for post-disqualification. A dissenting opinion, however, argues that the other twelve (12) conditions not included in the bank guarantee have been complied with by the bidder per the result of the post-qualification process. Hence, considering that there is no standard format for bank guarantee provided in the Bidding Documents, the issue being raised is whether there is a ground to disqualify the bidder. Hence, this query.

At the outset, it is noteworthy to emphasize that the Government Procurement Policy Board (GPPB) and its Technical Support Office (GPPB-TSO) only render policy and non-policy opinions, respectively, on issues pertaining to the interpretation and application of our procurement laws, rules and regulations. It has no jurisdiction to rule over actual controversies with regard to the conduct of the bidding since it has no quasi-judicial functions or investigatory powers under the law. Moreover, we adhere to the position that apart from the courts having competent jurisdiction over the subject matter of a case, we cannot, nor any other government agency, authority, or official, encroach upon or interfere with the exercise of the functions of the Bids and Awards Committee (BAC), since these duties and responsibilities fall solely within the ambit of its authority and discretion as sanctioned by law.

### **Bid Security –**

A bid security is an undertaking on the part of the bidder in the form and amount prescribed and acceptable by, and made payable to, the Procuring Entity (PE) that in case the prospective bidder is awarded the contract, such successful bidder warrants to enter into contract, within the prescribed period from receipt of the Notice of Award (NOA), with the PE and furnish the corresponding performance security. It serves as a mechanism of the bidder to bind itself in good faith to make good its offer to the PE.

Section 28 of the 2016 revised Implementing Rules and Regulations (IRR) of Republic Act (RA) No. 9184, the Government Procurement Reform Act, provides that: “bids and bid securities shall be valid for a reasonable period as determined by the Head of the Procuring Entity (HoPE) concerned, which shall be indicated in the Bidding Documents, but in no case shall the period exceed one hundred twenty (120) calendar days from the date of opening of bids.” The validity of bids is the period within which the BAC conducts its preliminary examination of bids, bid evaluation, post-qualification process, recommends award of contract, and for the HoPE to approve the recommendation, issue the NOA and sign the contract. Hence, it is important that the PE must be able to forfeit the bid security within the period of validity of the bid and the bid security.



It must be noted that Clause 18.5 of the Instructions to Bidders (ITB) of the standardized Philippine Bidding Documents for Goods, provides for instances as to when the bid security may be forfeited, *thus*:

18.5 The bid security may be forfeited:

(a) if a Bidder:

- (i) withdraws its bid during the period of bid validity specified in **ITB** Clause 17;
- (ii) does not accept the correction of errors pursuant to **ITB** Clause 28.3(b);
- (iii) has a finding against the veracity of any of the documents submitted as stated in **ITB** Clause 29.2;
- (iv) submission of eligibility requirements containing false information or falsified documents;
- (v) submission of bids that contain false information or falsified documents, or the concealment of such information in the bids in order to influence the outcome of eligibility screening or any other stage of the public bidding;
- (vi) allowing the use of one's name, or using the name of another for purposes of public bidding;
- (vii) withdrawal of a bid, or refusal to accept an award, or enter into contract with the Government without justifiable cause, after the Bidder had been adjudged as having submitted the LCRB;
- (viii) refusal or failure to post the required performance security within the prescribed time;
- (ix) refusal to clarify or validate in writing its bid during post-qualification within a period of seven (7) calendar days from receipt of the request for clarification;
- (x) any documented attempt by a Bidder to unduly influence the outcome of the bidding in his favor;
- (xi) failure of the potential joint venture partners to enter into the joint venture after the bid is declared successful; or
- (xii) all other acts that tend to defeat the purpose of the competitive bidding, such as habitually withdrawing from bidding, submitting late Bids or patently insufficient bid, for at least three (3) times within a year, except for valid reasons.

(b) if the successful Bidder:

- (i) fails to sign the contract in accordance with **ITB** Clause 32; or

- (ii) fails to furnish performance security in accordance with ITB Clause 33.


Thus, the bid security shall include all these conditions under which circumstances the bid security may be forfeited.

As regards the argument that the other conditions need not be included in the bank guarantee since they have been complied with by the bidder as a result of the post-qualification process, it must be noted that the bid security is submitted at the outset, or during the preliminary examination of bids. Most of the conditions provided for under Clause 18.5 may arise even prior to the post-qualification stage. Thus, all of these conditions must be necessarily incorporated in the bank guarantee (bid security) upon submission of the bid, and such promises and covenants by the bidder as reflected in the bank guarantee should already exist during the opening and preliminary examination of bids, as an assurance to the PE that the bid security may be forfeited if any of the grounds is present at any stage of the bidding process from preliminary examination of bids until the contract is awarded.

In view of the foregoing, the bid security, particularly the bank guarantee in this case, shall include all the conditions provided for under Clause 18.5 of the Instructions to Bidders of the Philippine Bidding Documents for Goods, under which the bid security may be called upon.

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

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Executive Director *V. [initials]*