

**DSWD OPINION NO. 50 S. 2024**

DRN: LS-L-LO-24-05-90646-C

**MEMORANDUM**

**FOR : ATTY. KARINA ANTONETTE A. AGUDO**  
Director IV, Administrative Service

**FROM : THE ASSISTANT SECRETARY**  
General Administration and Support Services Group and  
concurrent officer-in-charge, Legal Service

**SUBJECT : CLARIFICATION ON THE POSTING OF PERFORMANCE  
SECURITY UNDER NEGOTIATED PROCUREMENT-  
AGENCY TO AGENCY**

**DATE : 18 JUNE 2024**

This pertains to your MEMORANDUM requesting for clarification on whether a Performance Security (PS) is required to be posted by the Service Provider under the Negotiated Procurement Agency-to-Agency with the National Printing Office given that it is not included in the summary of the alternative methods of procurement necessitating the posting of performance security under Section 54.5 of Republic Act (R.A) No. 9184.

In your Memorandum, you have cited Part IV (M) on Bid, Performance and Warranty Securities of Annex H of the Revised Implementing Rules and (RIRR) of R.A. No. 9184 entitled CONSOLIDATED GUIDELINES FOR THE ALTERNATIVE METHODS OF PROCUREMENT, which reads, thus:

*M. Bid, Performance and Warranty Securities. Bid security may be dispensed with. However, performance and/or warranty securities are required for the following alternative methods of procurement, in accordance with Sections 39 and 62 of the IRR as summarized below:*

<b>Alternative Method of Procurement</b>	<b>Performance Security</b>	<b>Warranty Security</b>
Direct Contracting	x	✓
Repeat Order	x	✓
Two Failed Biddings	✓	✓
Emergency Cases	Procuring Entity may require PS depending on the nature of the procurement project. However, for Infrastructure	Procuring Entity may require WS depending on the nature of the procurement project. In no case shall WS be required in the

	Projects. PS is required	procurement of Consulting Services.
Take-over of Contracts	✓	✓
Adjacent/Contiguous	✓	For Infrastructure Projects, WS is required.
Small Value Procurement	Procuring Entity may require PS depending on the nature of the procurement project. However, for Infrastructure Projects, PS is required.	Procuring Entity may require WS depending on the nature of the procurement project. In no case shall WS be required in the procurement of Consulting Services.
Direct Retail Purchase of POL, Airline Tickets, and Online Subscriptions (n)	x	WS is required if the terms and conditions or similar agreements do not provide corrective actions to be undertaken by the supplier or service provider on any noted defects in the procured item, as determined by the procuring entity.

Based on the above Guidelines, there was no mention of an Agency-to-Agency mode of procurement. Hence, you concluded that a performance security is not required in an Agency-to-Agency procurement.

The Government Procurement Reform Act (GPRA) states:

*Section 39. To guarantee the faithful performance by the winning bidder of its obligations under the contract in accordance with the Bidding Documents, it shall post a performance security prior to the signing of the contract.*

That is, the law mandates the posting of a PS by the winning bidder prior to the signing of the contract. However, the GPRA is *silent* on the necessity of posting of a PS when what is involved is the alternative methods of procurement such as the Negotiated Procurement for Agency-to-Agency<sup>\*</sup>. Corollary, the same provision can be found under Section 39.1, paragraph 1 of the Revised IRR of the GPRA. In fact, Part IV (M) of Annex H of the RIRR identified specific alternative methods of procurement that will require performance securities.

<sup>\*</sup> 53.5 Agency-to-Agency. Procurement of Goods, Infrastructure Projects and Consulting Services from another agency of the GoP, such as the DBM-PS, which is tasked with a centralized procurement of Common-Use Supplies for the GoP in accordance with Letters of Instruction No. 755 and E.O. 359, s. 1989.

Jurisprudence dictates that *where a statute, by its terms, is expressly limited to certain matters, it may not, by interpretation or construction, be extended to others*<sup>2</sup>. That is, following the doctrine of *expressio unius est exclusio alterius*<sup>3</sup>, the requirement of a PS is **neither prohibited nor allowed**.

Relatedly, under the old Implementing Rules and Regulations, GPPB issued Resolution No. 20-2012<sup>4</sup> which exempts among others, Agency-to-Agency modality in requiring PS from winning bidders, thus:

"1. AMEND Section 54.5 of the Revised IRR of R.A. 9184 to read as follows:

Performance and warranty securities, as prescribed in Section 39 and 62 of this IRR, shall be submitted for contracts acquired through alternative methods of procurement, **except for Shopping under Section 52 and Negotiated Procurement under Sections 53.2 (emergency cases), 53.5 (Agency-to-Agency), 53.9 (small value procurement), 53.10 (lease of real estate property), 53.12 (Community Participation), and 53.13 (UN agencies).**" (Emphasis supplied)

That is consistent with Section 54 of the updated RIRR of GPRA which no longer provides for any PS requirement under Agency-to-Agency alternative mode of procurement.

The wisdom behind the passage of GPPB Resolution No. 20-2012 is the need to exempt Agency-to-Agency and community participation modalities from the posting of Performance and Warranty Securities.

Essentially, under the Agency-to-Agency modality, the servicing agency tasked to perform the work, must have the legal mandate to deliver the goods and services or undertake the infrastructure projects or consulting services required by the procuring entity, and thus, there is an assurance that the servicing agency can execute and perform the contract in accordance with the agreed requirements.

Applying the aforesaid guidance from GPPB, the Agency-to-Agency mode of procurement by the DSWD with NPO is not different.

The engagement of the DSWD with the NPO is advantageous to the Department because NPO, a government agency with a mandate to deliver services for the government which are required to be procured, meets all the conditions for an Agency-to-Agency procurement because *[i]* the DSWD has justified that entering into an Agency-to-Agency procurement with NPO, another government agency, is more efficient and economical for the government, *[ii]* the NPO has the mandate and absorptive capacity to undertake the publication in the Official Gazette of various DSWD Memorandum Circulars, and *[iii]* the NPO owns or has access to the necessary tools and equipment for the project. Hence, since the procurement

<sup>2</sup> Development Bank of the Philippines vs. Commission on Audit (G.R. No. 221706, March 13, 2018)

<sup>3</sup> *Ibid.*

<sup>4</sup> Resolution amending Section 54.5 of the Implementing Rules and Regulations of Republic Act No. 9184.

process was done in accordance with the basic tenets of the law, the procuring entity shall not in any manner add a requirement other than what is provided by law pursuant to the principles of Government Procurement that the heads of the procuring entities are responsible for establishing and maintaining a transparent, effective, and efficient procurement system in their respective agencies. The responsibilities of each official involved in the procurement process must be clear and legally identifiable.

In view of the foregoing, this level concurs with the Administrative Service that the posting of a performance security is not required in an Agency-to-Agency procurement transaction. However, the Procuring Entity is not precluded to require PS from the winning bidder, at the discretion of the former.

For consideration.

Lastly, kindly fill-out the attached Customer Feedback Form and return the same to the Legal Service.

Thank you.

  
ATTY. GINA V. WENCESLAO

MCMUG/MMSBP/LCA/10065