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## How contractors can protect against performance guarantee bonds

THE RISK OF CALLING FOR PERFORMANCE GUARANTEE BONDS, ARE GREATLY ENHANCED DURING RECESSIONARY MARKETS. ANDREW GIBSON CONSIDERS THE AVAILABLE OPTIONS

**During the peak of** last year's construction boom, the provision of a Performance Guarantee Bond (PGB) by a contractor was practically second nature, and was to some extent regarded as being merely an administrative prerequisite to securing the all important contract in question.

But with the local construction market now having taken a turn for the worse, the inevitable calling of PGBs is still raining in. The vast majority of such calls are of course genuine, and are often the result of contractors struggling to cope with the narrow schedule of works they were once only too eager to commit to. But a darker picture also exists whereby some developers now intent on seizing whatever remaining liquidity is within reach are calling upon such PGBs disingenuously.

Unfortunately, if a disingenuous call has already been made, there is very little an aggrieved contractor can do. After all, the very essence of a PGB is that it is an undertaking by the issuing bank to pay the captioned amount upon the first demand of the intended beneficiary. Therefore, should the bank fail to comply with its undertaking in this regard, or otherwise seek to delay the inevitable, it could easily land itself in some very unwelcome hot water.

But if the contractor has clear reason to believe that a disingenuous call is about to be made, there are a few steps that it should consider taking to safeguard its position.

The first is to contact the issuing bank in question. The contractor has no leverage over the bank in the sense that it is unable to prevent it from releasing the funds. But that is not to say that it cannot write to the bank to formally notify it of the possible demand and request the bank to notify it in the event that such a demand is made.

The contractor can then use this information to carry out the next important step,

which is to submit an application to court for a block to be placed upon any calling of the PGB. It is however crucial to recognise that the first step is by no means conditional upon the filing of an application in this regard; indeed it would be reckless to rely upon a tipping off from the bank not only because it may refuse or simply forget to notify the contractor, but more importantly it may by that time be too late to carry out any preventative action.

In essence, if a contractor considers that a disingenuous call is imminent, it should proceed immediately with the filing of the court application. This will necessitate the preparation of a Statement of Claim setting out a brief summary of the factual background and the remedy sought. Payment of the Court fee in the sum of [US \$4083] AED15,000 will also be required, which is recoverable in the event that the application is successful.

Finally, it is worth mentioning that not all developers insist upon the provision of a PGB. Some favour the handing over of straight forward cheques, whether in the form of a singular lump sum or a multitude equivalent to the total amount (usually 10% of the contract price).

While this may appear at first glance to be a less cumbersome and confrontational arrangement, the risks associated with the same are far greater to both parties. From the developer's perspective, the obvious risk is that the cheques bounce resulting in non-payment, whereas the risk of the issuing bank being unable to honour payment is significantly less. From the contractor's perspective, the power it retains to unilaterally withdraw the cheques in the event of a dispute may seem attractive, although clearly such action would then expose itself to both civil and criminal proceedings carrying serious consequences indeed.



**“IF A CONTRACTOR CONSIDERS THAT A DISINGENUOUS CALL IS IMMINENT, IT SHOULD PROCEED IMMEDIATELY WITH THE FILING OF THE COURT APPLICATION”**

**Andrew Gibson** is a dispute resolution lawyer specialising in construction, engineering and real estate matters. Prior to joining the DIFC office of Bin Shabib & Associates (BSA) as an Associate in May 2008, Andrew worked in the Property Litigation Department of Michelmores in England where he also qualified as a Solicitor of the Supreme Court of England and Wales.

*The opinions expressed in this column are of the author and not of the publisher.*