



Department of Budget and Management
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE

NPM No. 39-2013

22 April 2013

MR. NICANOR L. CUENCA

Vice President and Authorized Managing Officer

N & N CONSTRUCTION CORPORATION

75 Ecoville Townhomes, Metropolitan Avenue,

Brgy. Sta. Cruz, Makati City

Re: Surety Bond as a Protest Fee

Dear Mr. Cuenca:

We write in response to your letter dated 26 November 2012, suggesting that a Surety Bond be considered as acceptable form of non-refundable protest fee. As mentioned in your letter, the requirement of non-refundable cash protest fee is costly and futile when: (1) a competitive bid tender is low; (2) there is no uniformity in implementing the procurement system; and (3) bid invitations, vague documents, and abnormal bid processes are subject to a wide array of interpretations, where the decision of the Bids and Awards Committee (BAC) always prevails. In addition, you argue that the cost of bidding documents and the provision of an administrative cost in the program should be sufficient to include the costs of protests.

Payment of Protest Fee

On the argument that protest fee is futile when a competitive bid tender is low, please note that the protest fee is akin to an appeal fee, payment of which within the prescribed period is both mandatory and jurisdictional. In effect, it is a condition *sine qua non* for the appeal to be perfected.¹ Moreover, it must be stressed that the remedy of protest to the head of the procuring entity partakes the nature of a privilege. Thus, it is required that those seeking to avail of such privilege must strictly comply with all the mandatory requirements; otherwise, the protest cannot be given due course. It is worthy to mention that in the case of *LRA v. Lanting Security and Watchmen Agency*², no less than the Supreme Court recognized the protest fee requirement as a condition precedent for a protest to be valid under Section 55 of the procurement law and its associated rules.

Rationalized Protest Fee

We wish to inform you that the rules on Protest, particularly Section 55.3 of the IRR, which requires that the verified position paper should be accompanied by a non-refundable

¹ Samuel Julian v. Development Bank of the Philippines, G.R. No. 174193, 7 December 2011.

² G.R. No. 181735, 20 July 2010.

protest fee, has been recently amended by the Government Procurement Policy Board (GPPB) through GPPB Resolution No. 05-2012³ to rationalize the amount of such fees, thus:

ABC Range	Protest Fee
50 Million Pesos and below	.75% of the ABC
More than 50 Million Pesos to 100 Million Pesos	PhP 500,000.00
More than 100 Million Pesos to 500 Million Pesos	.5% of the ABC
More than 500 Million Pesos to 1 Billion Pesos	PhP 2,500,000.00
More than 1 Billion Pesos to 2 Billion Pesos	.25% of the ABC
More than 2 Billion Pesos to 5 Billion Pesos	PhP 5,000,000.00
More than 5 Billion Pesos	.1% of the ABC

The rationalization of the protest fee amount is perceived to strike a balance between the institution and filing of valid protests, and the deterrence of filing vexatious and frivolous ones.

Protest is Not Futile

It must be emphasized that under Section 3(c) of Republic Act No. (RA) 9184 and its revised Implementing Rules and Regulations (IRR), procurement by the Government of the Philippines shall be governed by the principle of streamlined procurement process that will uniformly apply to all government procurement.⁴ Thus, procuring entities are mandated to comply with the policies and procedures established in RA 9184, its IRR, and associated guidelines in the conduct of its procurement activities. Accordingly, the Protest Mechanism in Section 55 of RA 9184 and its IRR is established for the purpose of effecting opportunity for bidders to seek redress of their grievance brought about by the failure of procuring entities to comply with RA 9184 and its IRR.

On the other hand, in pointing out that the cost of bidding documents and the provision of an administrative cost should be sufficient to include costs of protests, please note that Section 17.4 of the IRR of RA 9184 provides that the purpose of requiring bidders to purchase the bidding documents is to recover the cost of its preparation and development. Evidently, the cost of the bidding documents neither contemplate nor include the costs that an adjudication of protest entails.

Surety Bond as Protest Fee

On the request to consider surety bond as an acceptable form of protest fee, we wish to point out that a surety bond is a contractual arrangement between the surety, the principal and the obligee whereby the surety agrees to protect the obligee if the principal defaults in performing the principal's contractual obligations.⁵ In other words, it provides financial security to the obligee by assuring that in case of default by the principal, the obligee can obtain indemnification from the surety. Incidentally, this is not the rationale and purpose for which the protest mechanism and fee are required under the Law and rules; the purposes being to deter filing of frivolous complaints and answer for the costs of the action. *g*

³ Issued on 30 March 2012, and published in The Daily Tribune on 20 August 2012.

⁴ Section 3(c) of RA 9184 and its IRR.

⁵ Black, Henry Campbell. Black's Law Dictionary. 6th Edition, West Publishing Co., 1990, p. 181.

The application of an appeal fee and a surety bond is best exemplified in the instance of an appeal to the National Labor Relations Commission whereby both the payment of an appeal fee and the posting of a surety bond are required for the perfection of an appeal. The purpose of the appeal fee is for the NLRC to acquire jurisdiction, while the surety bond is necessary to ensure that the award will be eventually paid should the appeal fail.

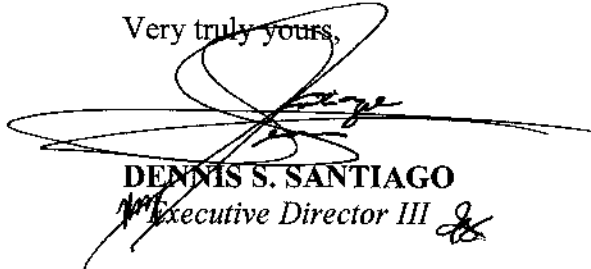
In *DBM-PS v. Kolonwel Trading*⁶, the Supreme Court had the occasion to recognize the elements of a valid protest under Section 55, thus:

1. The protest must be in writing, in the form of a verified position paper;
2. The protest must be submitted to the head of the procuring entity; and
3. The payment of a non-refundable protest fee.

In view of the foregoing, the posting of a surety bond as a form of non-refundable protest fee should not be countenanced.

We hope our advice 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 you have other concerns, please do not hesitate to contact us.

Very truly yours,



DENNIS S. SANTIAGO
Executive Director III

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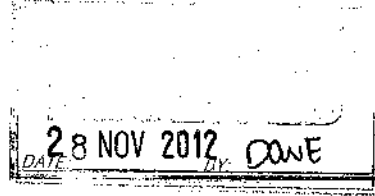
⁶ G.R. No. 175608, 8 June 2007.



NCC CONSTRUCTION CORPORATION

26th November, 2012

ATTY. DENNIS S. SANTIAGO
Executive Director III
Government Procurement Policy Board
Unit 2506, Raffles Corporate Center,
F. Ortigas Jr. Rd., Ortigas Center,
Pasig City



Subject: REQUEST FOR CLARIFICATION OF RULE VIII, SECTIONS 23.1 AND 23.4.2

Dear Atty. Santiago,

We refer to a bidding for a DPWH project where our bid was rejected by the District for not submitting the required class A documents in spite of our Contractors Registration Certificate (CRC) issued from DPWH's civil works registry. They claim that section 23.1 refers to the District's autonomy and that our company is not registered with them and have not been issued a certificate of registry by them.

The Central Procurement Office has been mandated by the Department to issue a CRC as a license to bid for DPWH projects meantime that PhilGEPs is not yet geared for electronic procurement undertaking. Class A documents are maintained and updated in CPO's CRW, available by intranet, for contractor's eligibility findings for access by procuring offices. We have referred this problem to the DPWH authorities.

We wish to raise problems with Rule XVIII, Protest Mechanism; specifically the non-refundable cash protest fee. This provision is costly and futile when a competitive bid tendered is low, when there is no uniformity in implementing the procurement system, as above cited, and when bid invitations, vague documents and abnormal bid processes (particularly the omission of the pre-bid conference, absence of bid bulletins, and excessive equipment and key personnel requirements) are subject to a wide array of interpretations, where almost always the BAC prevails.

May we suggest that a Surety Bond be acceptable in lieu of a non-refundable cash protest fee. We believe that the cost of bidding documents and the provision of an administrative cost in the program should be sufficient to include the cost of protests; lest this fee imposed be construed as a deterrent for legitimate protests.

Thank you and we remain

Very truly yours,

NICANOR L. CUENCA
Vice-President and Authorized Managing Officer