

**NPM No. 138-2015**

27 November 2015

**MR. JOSE A. CAPISTRANO, JR.**

*President and CEO*

**PITC PHARMA, INC. (PPI)**

2/F National Development Company (NDC) Building  
116 Tordesillas St. Salcedo Village, Makati City

**Re: Return of Protest Fee**

Dear Mr. Capistrano:

This refers to your letter requesting for our opinion on the validity of disqualifying a bidder for non-compliance with the specified technical specifications, and whether the Procuring Entity may return the protest fee paid by the bidder when the procurement is cancelled.

It is represented that PPI conducted the procurement of 3,161 units of Ice-Lined Vaccine Refrigerator for the Department of Health (DOH). One of the bidders was disqualified due to non-compliance with the required technical specifications of "50-hour hold-over time" and "market history". The request for reconsideration having been denied, the bidder filed a protest with the Head of the Procuring Entity (HOPE). But before the protest was resolved, the DOH cancelled the procurement and its agreement with PPI for the latter's inability to deliver the required goods on time. It is in this context that our opinion is being sought as to whether PPI is obliged and/or mandated to return the protest fee paid by the bidder.

Section 55 of Republic Act (RA) No. 9184 clearly provides that decisions of the BAC may be protested by filing a verified position paper and paying a **non-refundable protest fee**. The amount of the protest fee and the periods during which the protests may be filed and resolved shall be specified in the Implementing Rules and Regulations (IRR) of RA 9184. Thus, Section 55 of R.A. No. 9184 sets three requirements that must be met by a party desiring to protest the decision of the Bids and Awards Committee (BAC), these are: (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.<sup>1</sup>

The nature of the protest fee as non-refundable was imposed by the procurement law itself. Basic is the rule in government financial transactions and operations that "no money shall be paid out of any public treasury or depository except in pursuance of an appropriation law or other specific statutory authority."<sup>2</sup> Moreover, "trust funds shall not be paid out of any public treasury or depository except in fulfillment of the purpose for which the trust was created

<sup>1</sup> Land Registration Authority v. Lanting Security and Watchman Agency, G.R. No. 181735, 20 July 2010.

<sup>2</sup> Section 4(1) of Presidential Decree No. 1445 or the "Government Auditing Code of the Philippines."

or funds received, and upon authorization of the legislative body, or head of any other agency of the government having control thereof, and subject to pertinent budget law, rules and regulations.”<sup>3</sup> Thus, after payment of the non-refundable protest fee by a bidder protesting a decision of the BAC, the procuring entity cannot, without valid appropriations or statutory authority therefor, return such money to the bidder. This is likewise in consonance with the rule that “all laws and regulations applicable to financial transactions shall be faithfully adhered to.”<sup>4</sup>

All told, the nature of the protest fee determined by the law itself as non-refundable, and the fundamental principles in disbursement of public funds, limits the authority of PPI to effect the return of the protest fee paid for by the bidder, notwithstanding the intervening events that led to the cancellation of the bidding process.

We hope that 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 there be other concerns, please do not hesitate to contact us.

Very truly yours,

  
DENNIS S. SANTIAGO  
*Executive Director V*

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<sup>3</sup> Section 84(2), *Ibid.*

<sup>4</sup> Section 4(7), *Id.*

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