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3 December 2007

HON. FRANCISCO S. BRAVO

Acting Executive Director

PASIG RIVER REHABILITATION COMMISSION

5/F DENR Bldg., Visayas Ave.

Diliman, Quezon City

Re : Protest Fee for Foreign Funded Projects

Dear Sir:

We respond to your letter dated 10 April 2007 requesting for an opinion on whether the 1% protest fee may be refunded to the bidder of a foreign-funded project.

Based on your representation, there is an on-going housing project funded by the Asian Development Bank under the Pasig River Environmental Management and Rehabilitation Sector Development Program. A bidder has pointed out that the Philippine Bidding Documents Edition II, as harmonized with World Bank, Asian Development Bank, and Japan Bank for International Cooperation, provide for mechanisms on reconsideration/protest of the decisions of the Bids and Awards Committee. However, these do not contain any provision on protest fees.

In the case of *Department of Budget and Management Procurement Service Inter-Agency Bids and Awards Committee vs. Kolonwel Trading*¹, the Supreme Court upheld the applicability of the protest mechanism prescribed under Section 55² of Republic Act No. 9184 and its Implementing Rules and Regulations Part A to both fully-domestically funded and foreign-funded procurement activities:

¹ G. R. No. 175616, 08 June 2007.

² Section 55 of R. A. 9184 provides:

“Sec. 55 Protests on Decision of the BAC. – Decision of the BAC in all stages of procurement may be protested to the head of the procuring entity and shall be in writing. Decisions of the BAC may be protested by filing a verified position paper and paying a non-refundable protest fee. The amount of protest fee and the periods during which the protests may be filed and resolved shall be specified in the IRR.”

“It is to be stressed that **the protest mechanism adverted to is a built-in administrative remedy embodied in the law itself.** It was not prescribed by an administrative agency tasked with implementing a statute through the medium of interpretative circulars or bulletins. Ignoring thus this administrative remedy would be to defy the law itself.

It will not avail the respondent any to argue that the absence of an IRR to make the protest mechanism under R. A. No. 9184 become operative for foreign-funded projects was what prevented it from complying with the protest procedure. As the last sentence of the afore-quoted Section 55 of R. A. No. 9184 is couched, the specific office of an IRR for foreign-funded project, *vis-à-vis* the matter of protest, is limited to fixing “the amount of the protest fee and the periods during which the protest may be filed and resolved. Surely the absence of provisions on the protest fee and reglementary period does not signify the deferment of the implementation of the protest mechanism as a condition sine qua non to resort to judicial relief. As applied to the present case, the respondent had to file a protest and pursue it until its completion before going to court. There was hardly any need to wait for the specific filing period to be prescribed by the IRR because of the protest, as a matter of necessity, has to be lodged before court action.

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As in *Abaya*³, there really should be no reason why the policy behind Section 55.1 of IRR-A on the procedure for protest cannot be applied, even analogously, to foreign-funded procurement projects, such as those in this case. Indeed, there is no discernible justification why a different procedure should obtain with respect to foreign-funded procurement undertakings as opposed to a locally funded project, and certainly there is no concrete foundation in R.A. 9184 to indicate that Congress intended such a variance in the protest procedure.” (Emphasis supplied)

Based on the foregoing, the 1% protest fee shall be non-refundable even for foreign-funded procurement activities.

We trust that this clarifies matters. Should you have additional questions, please do not hesitate to contact us.

Very truly yours,


RUBY U. ALVAREZ
Executive Director III

³ *Abaya v. Ebdane*, G. R. No. 167919, 14 February 2007.