

**MEGASCOPE GENERAL SERVICES, REPRESENTED BY ITS
PRESIDENT, MR. ANDRES M. DAVID, PETITIONER-APPELLANT, VS.
NATIONAL POWER CORPORATION, SVP. ASISCLO T. GONZA-GA,
ATTY. LAMBERTO ...**

Ponente: PERLAS-BERNABE, E., J.

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PERLAS-BERNABE, E., J.:

Before Us is an appeal from the Decision[1] of the Regional Trial Court (RTC), Branch 216, Quezon City, dated February 27, 2004, dismissing the case for injunction, docketed as Civil Case NO. Q-99-36829, filed by petitioner-appellant MEGASCOPE GENERAL SERVICES to enjoin the NATIONAL POWER CORPORATION (NAPOCOR) and its officers from implementing the award of janitorial services, lawn and garden maintenance and other utility services for the Bataan Nuclear Power Plant (BNPP) at Napot Point, Morong, Bataan (Package 1) and the Nuclear Power Village at Bagac, Bataan (Package 2) in favor of private respondents-appellees ULTRA CLEAN SERVICES and ULTIMATE CARE, INC., respectively.

Petitioner-appellant had been for several years the service contractor for lawn and garden maintenance and garbage collection and disposal at NAPOCOR's nuclear power plant facilities in Bataan. In anticipation of the expiration of petitioner-appellant's contract on December 31, 1998, which was extended[2] from January 1, 1999 to February 28, 1999, the Purchase, Bids and Awards Committee (PBAC) of NAPOCOR called all pre-qualified bidders, including petitioner-appellant, to submit their bid proposals on November 20, 1998, on which date, no successful bidder was declared. In a re-bidding conducted on December 21, 1998, the PBAC recommended[3] the award of the contract covering Package 1 to ULTRA CLEAN SERVICES & MANAGEMENT CORPORATION (hereinafter ULTRA CLEAN) and Package 2 to ULTIMATE CARE, INC. (hereinafter ULTIMATE CARE).

Aggrieved, petitioner-appellant filed, on February 22, 1999, the Petition[4] a quo alleging that the PBAC whimsically, capriciously and arbitrarily awarded the above-mentioned contracts and practically rigged the results of the bidding at its expense.[5] Specifically, petitioner-appellant contested its disqualification on two grounds, i.e., (1) its failure to use "314.6 days/year" as multiplier in the computation of wages; and (2) the fact that the total cost of its materials and supplies (administrative expenses) is lower by 10.52% of the Approved Agency Estimate (AAE) of NAPOCOR in violation of the rule laid down in the INSTRUCTIONS TO BIDDERS, which provides that the same "shall not be lower than or more than 10% of the AAE component". [6]

Petitioner-appellant argued that it used the factor "314 days/year", instead of "314.6 days/year" pursuant to the schedule[7] prepared by the Department of Labor and Employment stating that the applicable wage multiplier for Region III was "314 days/year"; and that, in the computation of its administrative expenses, it quoted the price of P10.00/liter for regular gasoline while the AAE was P10.40/liter. However, per Certification[8] dated February 10, 1999 signed by Zenaida A. Cascasan, Manager of the Caltex Service Station at Bagac, Bataan, the actual market price of regular gasoline from December 1, 1998 to January 22, 1999 was P10.10/liter. Hence, the PBAC should have reduced its estimate to reflect the actual market price in the locality where the subject contracts were to be delivered and performed.

Petitioner-appellant further claimed that its quoted prices were the lowest complying and most advantageous as they were all within the “plus/minus 10%” formula, with the exception of four items, whereas the prices of the winning bidders deviated on practically every item. Thus, petitioner-appellant prayed[9] that the award of the subject contracts to the private respondents be nullified and that the PBAC be ordered to award the contract on Package 1 to petitioner-appellant.

On February 25, 1999, the court a quo issued a temporary restraining order[10](TRO). After considering petitioner-appellant’s application, as well as the respective position papers[11] of the respondents, the court a quo ordered the issuance of a writ of preliminary injunction in this wise:

“WHEREFORE, upon petitioner’s filing of a bond in the amount of FIFTY THOUSAND PESOS (P50,000.00), let a writ of preliminary injunction issue in this case enjoining and restraining the private and public respondents National Power Corporation (NPC), SVP Asisclo T. Gonzaga, Atty. Lamberto P. Melencio, Mr. Reynaldo Bacani, Ultra Clean Services and Ultimate Care, Inc. from implementing the award for janitorial services, lawn and garden maintenance and ground and area maintenance and other utility services for BNPP Complex, NPV, Napot Point, Morong, Bataan to Ultra Clean Services, Inc. (Package 1) and Ultimate Care, Inc. (Package II) until further orders from this Court.

SO ORDERED.”[12]

Upon the filing of the requisite bond[13], the writ[14] was issued on March 18, 1999. However, NAPOCOR filed a Verified Motion To Modify Writ of Preliminary Injunction[15] to cover Package 1 only, instead of both packages, on the ground that the ultimate relief sought by petitioner-appellant was the award of the contract for Package 1, hence, the preliminary injunction against Package 2 would unnecessarily expand the protection given to petitioner-appellant. In the Order[16] dated October 15, 1999, the writ was accordingly modified.

In its Answer with Counterclaim[17], NAPOCOR denied having disqualified petitioner-appellant’s bid for having used the “314 days/year” wage multiplier as in fact its labor cost component for both packages were found to be complying. It was in the administrative expense component that petitioner-appellant’s bid was non-complying for having exceeded the “plus/minus 10%” deviation allowed for the total cost thereof. However, even upon re-computation of the AAE based on the reduced gasoline price of P10.10/liter to accommodate petitioner-appellant’s protest, the latter’s bid would still not be the lowest complying and most advantageous bid.

For its part, ULTRA CLEAN argued[18] that there was a substantial difference between its bid for Package 1 in the amount of P6,420,729.16 per annum and that of petitioner-appellant, P6,441,514.20, or P20,636.04[19] per year, which, if computed for the duration of the 2-year contract, would amount to a total of P41,272.08 that the government would stand to lose, if the same is awarded to petitioner-appellant. Moreover, in opposition to the issuance of the TRO and the writ of preliminary injunction, ULTRA CLEAN lamented[20] the fact that the said orders produced the effect of extending the expired contract of petitioner-appellant with NAPOCOR at its expense. Having been issued a Notice of Award[21] on January 13, 1999 and a Notice to Proceed[22] with Package 1 on February 22, 1999, it was ULTRA CLEAN, and not petitioner-appellant, that had an existing right that ought to be protected and enforced. Thus, as counterclaim, ULTRA CLEAN prayed[23] for actual and exemplary damages.

After trial on the merits, the court a quo rendered the assailed Decision dismissing the petition. Hence, this appeal, anchored on the following grounds:

“I.

THE LOWER COURT ERRED IN DISREGARDING OR IGNORING THE USE OF ERRONEOUS WAGE MULTIPLIER BY PUBLIC RESPONDENT NATIONAL POWER CORPORTION (sic) WHICH WAS

USED AS THE BASIS FOR THE REJECTION OF PETITIONER-APPELLANT'S BID.

II.

THE LOWER COURT ERRED IN FAILING TO RECOGNIZE THE IMPORTANCE OR SIGNIFICANCE OF THE DEVIATIONS COMMITTED BY THE ALLEGED WINNING BIDDER ULTRA CLEAN SERVICES AND ULTIMATE CARE IN THEIR BIDS FOR MATERIALS AND SUPPLY VIS-À-VIS THE DEVIATIONS COMMITTED BY PETITIONER-APPELLANT.

III.

THE LOWER COURT FAILED IN NOT FINDING THAT THE AWARD OF THE CONTRACTS TO PRIVATE RESPONDENTS ULTRA CLEAN SERVICES AND ULTIMATE CARE BY PUBLIC RESPONDENT NATIONAL POWER CORPORATION WAS CHARACTERIZED BY CAPRICE, WHIM AND PARTIALITY.

IV.

THE LOWER COURT ERRED IN DISMISSING THE ABOVE-ENTITLED CASE AND IN DISSOLVING THE INJUNCTION.”[24]

It appears that, during the pendency of this case before the court a quo, petitioner-appellant's expired contract was continuously extended on a monthly or tri-monthly basis as a consequence of the issuance of the TRO and the Writ of Preliminary Injunction issued on March 18, 1999. The dissolution[25] of the said Writ in the assailed Decision dated February 27, 2004 provided basis for the Facilities Management Department (FMD) of NAPOCOR to include the requirement for janitorial services of BNPP in the corporate-wide bidding of concerned NAPOCOR installations, as evidenced by the Memorandum[26] dated January 12, 2005 signed by E. A. Canar, Manager of the FMD. The said Memorandum further stated that a final extension for petitioner-appellant was being prepared to cover the period January 1, 2005 to March 31, 2005, at which time the bidding process shall have been completed.

On the basis of the Memorandum, petitioner-appellant filed an Urgent Ex Parte Motion for Issuance of a Temporary Restraining Order[27] alleging that its only means of livelihood is rendering janitorial services at NAPOCOR and the termination of its contract would deprive it of its only source of income and render its lowly employees jobless. Accordingly, in its Resolution[28] dated May 4, 2005, the former Twelfth Division of the Court issued a TRO enjoining the bidding for the BNPP Preservation Project in Morong, Bataan scheduled on May 5, 2005.

We find the instant appeal bereft of merit.

The INSTRUCTIONS TO BIDDERS, which governed the questioned bidding process, contains the following stipulation, to wit:

“IB –15 Reservation of the Corporation to Reject Bids

The Corporation reserves the right to reject any or all bids, to waive any minor informality in the bids received. xxx”[29]

In the recent case of Public Estates Authority vs. Bolinao Security and Investigation Service, Inc.,[30] the Supreme Court expounded on the above-quoted reservation, thus:

“It is a settled rule that where the invitation to bid contains a reservation for the Government to reject any or all bids, the lowest or the highest bidder, as the case may be, is not entitled to an award as a matter of right for it does not become a ministerial duty of the Government to make such an award. Thus, it has been held that

where the right to reject is so reserved, the lowest bid or any bid for that matter may be rejected on a mere technicality, that all bids may be rejected, even if arbitrarily and unwisely, or under a mistake, and that in the exercise of a sound discretion, the award may be made to another than the lowest bidder. And so, where the Government as advertiser, availing itself of that right, makes its choice rejecting any or all bids, the losing bidder has no cause to complain nor right to dispute that choice, unless an unfairness or injustice is shown.”

That no unfairness or injustice was perpetrated in the instant case is evident from the following disquisition of the court a quo, to wit:

“The Approved Agency Estimate (AAE) for Administration Expenses was recomputed at its instance using 314 days/year as wage multiplier and 10.10 of gasoline/liter as multiplier for regular gasoline. Mr. Rolando A. Valeriano, Officer-in-Charge of the Buildings and Grounds Division of the National Power Corporation and a member of the Bidding Committee, testified that upon petitioner’s protest, a recomputation was made using 314 days/year as wage multiplier and Php 10.10/liter as multiplier for regular gasoline. Thus, the Approved Agency Estimate (AAE) was lowered to Php 6,424,030.56 for Package 1 and Php 4,458,206.5 for Package 2. Petitioner’s earlier disqualification for Package 1 was reconsidered as he was found to be complying. Nonetheless, even after the recomputation, the lowest bid and, hence, considered the most advantageous to the government, was that of Ultimate Care, Incorporated. Petitioner’s bid for Package 1 of the subject contract is Php 6,441,415.20 per annum (Exhibit 1-A) while the bid of respondent Ultra Clean Services was Php 6,420,779.164 per annum (Exhibit 2-A). The subject contract is good for two (2) years. As pointed out by private respondent, the government would stand to lose Php 41,272.08 for the duration of the contract if the same is awarded to petitioner. As to package 2, undisputed is the fact that a recomputation of the AAE using Php 10.10/liter for regular gasoline and 314 days as wage multiplier will result in the disqualification of petitioner as its bid would not be within the plus (+) or minus (-) ten percent required deviation of the NPC Approved Agency Estimate (AAE). Ultimate Care Incorporated would still be the lowest complying bidder, its bid being Php 4,415,383.92 per annum compared to petitioner Megascope whose bid is Php 4,432,676.52 per annum. A summary of the original and recomputed AAE of the top two bids are as follows:

FOR PACKAGE 1

Original AAE – Php 6,444,123.3 per annum
Recomputed AAE – Php 6,424,030.5 per annum

BID

Ultra Clean – Php 6,420,779.16 per annum
Megascope – Php 6,441,415.20 per annum

FOR PACKAGE 2

Original AAE – Php 4,468,384.2 per annum
Recomputed AAE – Php 4,458,260.5 per annum

BID

Ultimate Care – Php 4,415,383.92 per annum
Megascope – Php 4,432,676.52 per annum

It can be gleaned from the foregoing that there is no merit in the contention that the award of contracts to private respondents was capricious and whimsical. Respondents Ultraclean Services & Management Corporation and Ultimate Care, Inc., are the lowest bidders for Package 1 and 2, respectively. The findings of the members of the NPC PBAC that their bids are the most advantageous cannot be questioned by this Court.”[31]

Interestingly, the President of petitioner-appellant, Mr. Andres M. David, admitted[32], upon cross-examination, that even if the factor “314 days/year” were used, it would still not be the lowest bidder for the two packages. Notwithstanding, petitioner-appellant insists that it is not the lowest bid but the lowest complying and most advantageous bid that should be declared the winner.

In his testimony in open court, Rolando Valeriano, a member of the PBAC, defined the phrase “lowest complying and most advantageous”, thus:

“Q – I’m more particular now, with respect to the paragraph f, it says: ‘Bidders who submitted the lowest complying and most advantageous bid shall be considered as winner.’ Will you please define what you mean by lowest complying and most advantageous bid?

A – If they are within the 10%, the laborer, the administrative expenses, the profit margin considered, that’s complying and the advantageous is the most lowest price of the bid.”[33]

As correctly pointed out by the court a quo, the findings of the PBAC cannot be questioned by the court involving as it does an exercise of discretion and prerogative, which, as held in *Republic vs. Silerio*[34], is of such wide latitude that cannot be interfered with by the courts.

It is only upon a clear showing of grave abuse of discretion that the courts will set aside the award of a contract made by a government entity. Grave abuse of discretion implies a capricious, arbitrary and whimsical exercise of power. The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined by law, as to act at all in contemplation of law, where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility.[35] No such abuse of discretion was proved in the instant case.

Petitioner-appellant obdurately insists[36] that the PBAC should have itemized the evaluation of the administrative expense and not merely considered the total cost thereof despite the clear stipulation in the INSTRUCTIONS TO BIDDERS, to wit:

“IB-22 Award of Contract
xxx

b. Materials/Supplies total cost shall not be lower than or not more than 10% of the AAE component for materials and supplies, otherwise, the bid shall be disqualified. xxx.”[37]

Such posturing will only serve to highlight the ineligibility of petitioner-appellant to the questioned contract, having admitted to committing four deviations under the administrative expense component. The fact that ULTRA CLEAN and ULTIMATE CARE may have committed more deviations is of no consequence. A deviation in one item should be enough ground for disqualification following petitioner-appellant’s premise.

In sum, petitioner-appellant miserably failed to establish a right in esse that would entitle it to the injunctive writ it is tenaciously seeking. While We commiserate with the plight of petitioner-appellant and its employees concomitant with the expiration of its contract with NAPOCOR, it is beyond the ambit of Our judicial power to supplant NAPOCOR’s contractual prerogatives with that of Our own.

As correctly observed by the Office of the Solicitor General in its appeal brief[38] for the public respondents, the prayer of petitioner-appellant to be awarded the contract for Package 1 is in the nature of an action for mandamus. As a rule, mandamus lies only to compel the performance of a ministerial duty and not a discretionary act. A writ of mandamus will not issue to control or review the exercise of discretion of public officers since it is their judgment that is to be exercised and not that of the court. Thus, the courts will not interfere to modify, control or inquire into the exercise of this discretion unless it be alleged and proven that there has been an abuse or an excess

of authority on the part of the officers concerned[39], which, as priorly stated, is absent in the case at bench.

WHEREFORE, the Decision dated February 27, 2004 of the RTC, Branch 216, Quezon City, is hereby AFFIRMED.

SO ORDERED.

Reyes, JR., and Abdulwahid, JJ., concur.

[1] Records, Vol. 2, pp. 550-555.

[2] Records, Vol. 1, p. 78.

[3] Records, Vol. 1, pp. 50-51.

[4] Records, Vol. 1, pp. 2-11.

[5] Petition, Records, Vol. 1, p. 9.

[6] Exhibit A-5, Records, Vol. 2, p. 427.

[7] Exhibit B, Records, Vol. 2, p. 428.

[8] Exhibit H, Records, Vol. 2, p. 440.

[9] Petition, Records, Vol. 1, p. 10.

[10] Records, Vol. 1, pp. 22-23.

[11] The parties agreed to dispense with a formal hearing, Order dated March 4, 1999. Records, Vol. 1, p. 27.

[12] Records, Vol. 1, p. 127.

[13] Records, Vol. 1, p. 129.

[14] Records, Vol. 1, p. 153.

[15] Records, Vol. 2, pp. 358-362.

[16] Records, Vol. 2, pp. 376-377.

[17] Records, Vol. 1, pp. 169-177.

[18] Answer, Records, Vol. 1, pp. 157-168.

[19] Ibid, p. 162.

[20] Ibid, p. 165.

[21] Records, Vol. 1, p. 199.

[22] Records, Vol. 1, p. 200.

[23] Answer, p. 166.

[24] Brief for Petitioner-Appellant, Rollo, p. 20.

[25] Records, Vol. 2, pp. 554-555.

[26] Rollo, pp. 55-56.

[27] Rollo, pp. 50-54.

[28] Rollo, pp. 76-77.

[29] Exhibit "A", Records, Vol. 2, p. 425.

[30] 472 SCRA 165, 185 (2005), citing JG Summit Holdings, Inc. vs. Court of Appeals, 412 SCRA 10, 32.

[31] Decision dated February 27, 2004, Records, pp. 552-553.

[32] TSN, February 22, 2001, p. 12.

[33] TSN, October 17, 2001, pp. 18-19.

[34] 272 SCRA 280, 289-290.

[35] Bureau Veritas vs. Office of the President, 205 SCRA 705, 718.

[36] Brief for Petitioner-Appellant, Rollo, p. 31.

[37] Exhibit A-5, Records, Vol. 2, p. 427.

[38] Rollo, pp. 234-235.

[39] Republic vs. Capulong, 199 SCRA 134, 148-149.

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