

HON. ANIANO A. DESIERTO, AS OMBUDSMAN, AND HON. GREGORIO R. VIGILAR, AS THE SECRETARY OF THE DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS, PETITIONERS, VS. OLIVO C. OCAMPO, RESPONDENT.

G.R. NO. 155419. March 04, 2005

Ponente: CALLEJO, SR., J.

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CALLEJO, SR., J.:

This is a petition for review on certiorari of the Decision[1] of the Court of Appeals (CA) in CA-G.R. SP No. 58397, which reversed and set aside the decision of the Ombudsman in OMB-ADM-0-94-0841 ordering the suspension of respondent Olivo C. Ocampo for one year for dishonesty and conduct prejudicial to the best interest of the service.

The antecedents are as follows:

After the eruption of Mount Pinatubo, the Department of Public Works and Highways (DPWH) undertook relief and rehabilitation work in the affected areas, including the regravelling projects in Barangay Bahay Pare, Pulong Gubat and Paligui in Candaba, Pampanga. At that time, the Pre-Qualification, Bids and Awards Committee (PBAC) in the 1st Engineering District of the DPWH was composed of the following members: Fernando Nuqui, Jr., Assistant District Engineer, as Chairman; Hipolito Tolentino, Administrative Officer, as Secretary; and Joaquin Guinto, Engineer III, and Olivo Ocampo, Engineer III, as members. The PBAC caused the publication of the invitation to bid for the regravelling projects in the said places on the January 22 and 29, 1992 and February 5, 1992 issues of Mabuhay, a local newspaper.

The bidders, namely, PRT Construction, Carwin Construction and Ed-Mar's Construction, submitted their respective bid documents to the PBAC and participated in the bidding scheduled on February 14, 1992. When the PBAC opened the first envelope of each of the bidders, it noted defects in the bid documents of Carwin Construction,[2] as well as the bid documents submitted by Ed-Mar's Construction.[3] Nevertheless, the PBAC considered the defects as merely formal ones and decided not to conduct another sealed bidding. It then proceeded to open the second envelope for each bidder and evaluate their respective bids for the project, thus:

Participant Amount

PRT Construction P454,064.00

Carwin Construction P463,881.60

Ed-Mar's Construction P474,006.00

Although PRT Construction was the lowest bidder, the PBAC awarded the project to it. On February 17, 1992, the PBAC issued Resolution of Award No. 92-02-09 in favor of PRT Construction for the amount of its bid. The contract for the project was prepared for the signatures of the parties.

On March 26, 1992, a letter of advice of allotment was issued, and later, per Obligation Allotment No. 162, the allotment for the project to the winning contract was issued on April 7, 1992. Subsequently, a contract for the regravelling project was entered into by and between the DPWH and PRT Construction. The regravelling project, thereafter, commenced in earnest.

Sometime in September 1992, then Congressman Emigdio Bondoc of the 4th District of Pampanga, which included the Candaba Area, received letter-complaints from Barangay Chairman Rosalino Mangulabnan of Barangay Bahay Pare, Barangay Chairman Oscar dela Cruz of Barangay Pulong Gubat and Barangay Chairman Felix Manalili of Barangay Paligui. The complainants alleged that there were irregularities and anomalies in the awards of regravelling projects in their respective barangays. Ombudsman Conrado Vasquez referred the matter to the Fact-Finding and Intelligence Bureau (FFIB) of the Office of the Ombudsman for investigation.

Notwithstanding the complaint, the project was completed on April 6, 1994 and was accepted by District Engineer Rogelio N. Fernando.

The FFIB found sufficient cause to file criminal and administrative actions against the members of the PBAC, including respondent Ocampo, as well as the other officers who approved the contract and released the funds for the Bahay Pare Regravelling Project. The FFIB pointed to the following as grounds therefor: (a) the contract entered into by the DPWH and PRT Construction was void because it was entered into on February 19, 1992, before the issuance of the certificate of availability of funds and the letter of advice of allotment were issued; (b) while the bid documents of PRT Construction appear complete and in order, those of Carwin Construction and Ed-Mar's Construction were defective and incomplete; (c) the bidding for the Bahay Pare Regravelling Project was rigged or simulated; (d) the suppliers of materials therein had not yet been paid despite the release of funds; and (e) there was a long delay in the completion of the project.

Consequently, a criminal complaint for violation of Section 3(e) of Republic Act No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act, was filed against the members of the PBAC and the other officers who approved the contract and released the funds for the regravelling project. The complaint, docketed as OMB-ADM-94-0841, was later dismissed by the Ombudsman. However, an administrative complaint for dishonesty and conduct prejudicial to the best interest of the service was also filed against the PBAC members and officers, including Ocampo.

On August 19, 1999, the respondents in OMB-ADM-94-0841 were required to submit their counter-affidavits. Ocampo failed to submit any counter-affidavit. The preliminary conference was held on November 25, 1999, after which the parties agreed to submit the case for resolution upon the filing of their joint memorandum.

On January 13, 2000, the Office of the Ombudsman rendered a decision, the dispositive portion of which is herein quoted:

Foregoing premises considered, respondent OLIVO C. OCAMPO is hereby found guilty of conduct Prejudicial to the Best Interest of the Service and is meted the penalty of ONE (1) YEAR SUSPENSION effective upon receipt hereof.

Respondents CYNTHIA D. ENRIQUEZ and HORACIO A. OIDA are hereby ADMONISHED to be more careful and cautious in the examination of documents and to fill-up and/or correct important entries thereon with a stern warning that a repetition of the same shall be dealt with more severely.

The administrative charge against respondents HIPOLITO N. TOLENTINO, FERNANDO D. NUQUI, Sr. [sic], RAFAEL S. PONIO, JOAQUIN C. GUINTO and MARIANO S. NICDAO is hereby dismissed for being moot and academic.

The administrative charge against respondents EDELMAR SANCHEZ and ROSBE DIZON is hereby dismissed for lack of substantial evidence.

The Honorable Secretary, Department of Public Works and Highways (DPWH), Port Area, Manila for OLIVO C. OCAMPO, Engineer III, is hereby directed to implement this Decision in accordance with law reporting to this Office its compliance after ten (10) days from receipt hereof. [4]

The Ombudsman declared that Carwin Construction, Ed-Mar's Construction and PRT Construction, and the chairman and members of the PBAC, conspired to rig the bidding to insure that PRT Construction would win the same. According to the Ombudsman, this was obtained through the submission of defective or deficient bid documents. Moreover, the Ombudsman found that the PBAC ignored such defects or deficiencies; instead of declaring a failure of bidding and conducting a rebidding, it awarded the project to PRT Construction, to the gross prejudice of the public service.

As regards the alleged nullity of the contract, the Office of the Ombudsman found and declared that the contract was entered into by the DPWH and PRT Construction in April of 1992, and that February 19, 1992 referred to the date when the contract was prepared. According to the Ombudsman, such mistake was only due to a clerical error for which admonition was the appropriate penalty. It further declared that the complaint for the nullification of the contract was unsubstantiated. As to the alleged failure to pay the suppliers of materials, it appeared that the materials delivered were ordered by Chairman Mangulabnan from J.R. Santos Trading in his personal capacity, without authorization from PRT Construction.

Anent the alleged long delay of the completion, the Office of the Ombudsman noted that the project had already been completed on April 6, 1994.

Aggrieved, Ocampo filed a motion for reconsideration of the decision, contending that the defects or deficiencies adverted to by the Ombudsman were merely formal defects that did not necessitate the declaration of failure of bidding and, therefore, did not sustain the allegation that the bidding was rigged or simulated. He asserted that if there was, indeed, an intention to rig the bidding, the PBAC should not have caused the publication of the invitation to bid; or it could have just rejected the bids of Carwin Construction and Ed-Mar's Construction pursuant to Section 561(a) of the Government Accounting and Auditing Manual (GAAM), thereby leaving PRT Construction as the lone bidder for evaluation, per Section 561(b.1) of the GAAM. Ocampo argued that had the PBAC declared a failure of bidding, the PRT Construction could have charged it of rigging the bidding and giving preferential treatment to the other bidders. Besides, he asserted, it was extremely difficult to rig or simulate the bidding because the PBAC is a collegial body. Lastly, Ocampo asserted that he did not have any hand in the waiver of the defects or deficiencies as he was only concerned with the technical aspect of the bids. The Ombudsman denied the motion on July 3, 2000.

Ocampo filed a petition for review under Rule 43 of the Rules of Court with the CA against the Ombudsman, the Secretary of Public Works and Highways, as well as the private complainants, for the reversal of the decision and resolution of the Ombudsman.

On February 28, 2002, the CA rendered judgment granting the petition and setting aside the Ombudsman's ruling. The dispositive portion reads:

WHEREFORE, the instant petition is hereby GRANTED for being meritorious. Accordingly, the Order dated March 3, 2000 and the Decision dated January 13, 2000 issued by the OMB-AAB are hereby REVERSED AND SET ASIDE insofar as petitioner is concerned, who is hereby absolved from any administrative liability.[5]

The CA pointed out that there was no ground to declare a failure of bidding under Section 562(b); neither was

there evidence to support collusion among the bidders. The defects adverted to by the Ombudsman were merely formal and not substantial, thus, per Section 561(a) of the GAAM, the PBAC had the right to waive such defects and proceed with the bidding, which was what it did. The project was 100% complete and had been accepted by the District Engineer, belying the finding that the PBAC, including Ocampo, committed acts or omissions prejudicial to the best interest of the service. The CA also ruled that the charge of collusion was not substantiated.

Aggrieved, the Ombudsman filed a motion for reconsideration, which the CA denied in a Resolution[6] dated September 5, 2002.

Dissatisfied, the Ombudsman and the Secretary of the DPWH filed this instant petition, alleging that:

THE NOTED DEFECTS IN THE BIDS TENDERED BY TWO (2) BIDDERS CANNOT BE BRUSHED ASIDE AS MERE MINOR OR FORMAL DEFECTS. THEY GO TO THE VERY ESSENCE OF THE BIDDING PROCESS.[7]

The petitioners aver that the defects or deficiencies in the bid documents submitted by the losing bidder were not merely formal, but went into the very essence of the bidding process. The PBAC should have exercised its option of rejecting the bids to declare a failure of bidding. According to the petitioners, if the PBAC had rejected the bids of the two bidders, there would have been no real competition to insure the minimum number of bidders, thus paving the way for the declaration of PRT Construction as the winning bidder. In any event, the petitioners assert, the bidding was flawed and irregular. Furthermore, the CA should have refrained from interfering with the Ombudsman's exercise of investigative powers. It is also pointed out that the quantum of proof before administrative proceedings is merely substantial evidence, and not proof beyond reasonable doubt.

For his part, the respondent avers that the decision of the CA had become final and executory, pursuant to Sections 7 and 8, Rule II of Administrative Order No. 7. He argues that assuming that the decision absolving him had not yet become final and executory, he could not be held administratively liable, considering that: (a) there was no ground to declare a failure of bidding; (b) there was failure to prove collusion or conspiracy; (c) the defects pointed by the petitioners did not affect the bids of Carwin Construction and Ed-Mar's Construction as the same were merely formal and not material; and (d) the companion criminal case had already been dismissed. The respondent further argues:

Petitioners herein failed to prove collusion or conspiracy because none existed in the first place. The supposedly glaring defects in the respective bids of Carwin and Ed-Mar's alone cannot justify a finding of collusion between and among the bidders. Neither do they ensure that no competition will occur in the bidding. Sections 562(d) and 561(a) GAAM grant Government the right to waive formal defects. When herein respondent OCAMPO and the PBAC exercised this right, a bid price war erupted between PRT, CARWIN and ED-MAR's. That PRT submitted the lowest responsive bid was just incidental. Had the lowest responsive bid come from CARWIN or ED-MAR's, the project would have been awarded to them. At that point, OCAMPO and the PBAC could not – to favor PRT – reconsider, backtrack and reverse its decision to waive formal defects in the bids.

After careful deliberation, herein respondent OCAMPO and the PBAC honestly believed that the defects in CARWIN's and ED-MAR's bids were merely formalities that did not affect the validity of the same. Under various sections of the GAAM, the following material defects, among others, would have affected the validity of the bid:

- When the bid is not accompanied by the required bid security; [Sec. 560(f)].
- When the bid is higher than 120% or lower than 60% of the AAE; [Sec. 562(b)]
- When the bid is higher than the Allowable Government Estimate or AGE of the Approved Agency Estimate

or AAE, whichever is higher, or lower than 70% of the AGE; [Sec. 562(b)]

- When the bid which is obviously unbalanced; [Sec. 562(d)]

- When the information submitted for prequalification [is] suppressed or false. [Sec. 562(f)]

None of these material defects afflicted the bids of Carwin or Ed-Mar's and, as such, were still valid bids that could not – as they, in fact, were not – be rejected by the PBAC.

The much-ballyhooed defects did not go into the essence of bidding but were matters relevant to accuracy for the preparation of the project award and contract had Carwin or Ed-Mar submitted the lowest responsive bid.

Stripped of non-essentials, petitioners' allegation – that herein respondent OCAMPO and the PBAC should have declared a failure of bidding and, in not so doing, wasted the opportunity to conduct another competitive bid – is nothing more than that – a conjectural allegation. Collusion or conspiracy cannot be based on "what ifs," "should haves" or "could haves." Like the elements of the offense or crime, the elements of conspiracy or collusion must be established through evidence and facts and not supposition and presumptions.

The PBAC's decision to proceed with the bidding notwithstanding the defects – considered formal and not material – is not evidence of collusion but an exercise of sound discretion after careful deliberation allowed under Section 561(a) of GAAM.[8]

The petition is denied for lack of merit.

At the outset, it must be stressed that the questions raised in this case are factual and, under Rule 45 of the Rules of Court, the petition for review on certiorari can raise only questions of law. The jurisdiction of the Court is limited to reviewing issues of law that may have been corrected by the lower court. It is not the function of the Court to analyze or calibrate the evidence of the parties. The well-established rule is that findings of fact of the CA are conclusive on the parties and are not reviewable by the Court, in the absence of any showing that the present case falls under the exceptions under the rule.[9] In this case, however, there are exceptional circumstances which warrant a review of the factual issues, namely, the findings and conclusions of the Ombudsman in its decision are inconsistent with those in the assailed decision and resolution of the CA.

We note that the petitioners maintained in their petition that the bid process was rigged by the three bidders, the chairman and members of the PBAC, and the respondent, a member of the PBAC who is still in the service.[10] As such, the respondent should be dealt with administratively and meted the penalty of one-year suspension. However, if the submission of the petitioners is to be followed to its logical conclusion, then the contract executed by the petitioner DPWH Secretary and the PRT Construction following the award of the project to the latter should have been nullified by the petitioner Ombudsman; the appropriate information for violation of Section 3(e) of Rep. Act No. 3019 should, likewise, have been filed against the parties responsible therefor. But then, in his decision, the petitioner Ombudsman ruled that the complainants failed to substantiate that the contract is void:

As regard the alleged nullity of the contract awarded to PRT Construction due to the absence of the CAF, we find it unsubstantiated by sufficient evidence.[11]

The Office of the Ombudsman even dismissed the criminal complaint.

The petitioners' submission that the respondent must be held administratively liable considering that the bid process was rigged by the contractors and the PBAC members, including the respondent, is frontally inconsistent with their contention that the contract entered into between petitioner DPWH Secretary and PRT Construction is valid. The petitioner Ombudsman even took note that the project had been completed.

We agree with the petitioners that the defects in the bids of Carwin Construction and Ed-Mar's Construction were

substantial, hence, could not be validly waived by the PBAC. However, we find and so rule that the complainants failed to adduce clear and convincing evidence that the respondent, who was a member of the PBAC, conspired with the chairman and the other members thereof, as well as the contractors, in rigging the bid process to insure that PRT Construction would win the bid.

Section 561(a) of the GAAM provides that the PBAC may reserve the right to waive the consideration of minor deviations in the bids received, which do not affect their substance and validity:

Sec. 561. Evaluation of bids. – The Committee shall follow these guidelines:

- A bid which does not comply with the condition or requirements of the bid documents shall be rejected by the PBAC (or the Bids and Awards Committee as the case may be) giving the reason or reasons for its rejection. The Government, however, in the evaluation of bids received, reserves the right to waive the consideration of minor deviations in the bids received which do not affect the substance and validity of the bids.

Per Section 556 of the GAAM, the PBAC is mandated to issue the plans, specifications and proposal book form(s) for the project to be bid.[12] Section 567 of the GAAM further requires a bidder to submit the following bid documents:

Sec. 567. Documents comprising the contract and its supporting papers. – The following documents shall form part of the contract:

- Contract Agreement
- Conditions of Contract
- Drawings/Plans
- Specifications
- Invitation to Bid
- Instructions to Bidders
- Addenda
- Bid Form including the following Annexes:
 - authority of the signing official
 - bid prices in the bill of quantities
 - detailed estimates
 - construction schedule and S-Curve
 - construction methods
 - project organizational chart
 - manpower schedule
 - equipment utilization schedule and duly executed contract of lease of all equipment and machineries which shall be intended for use exclusively for the project, if any
 - cash flow by quarter and payments schedule
 - affidavit of site inspection

- Performance security
- Prequalification statements
- Credit line issued by an authorized bank in amount equal to the average operating expenses of the project for two (2) months or ten percent (10%) of the total project cost, whichever is less
- Notice of award of contract and contractor's "Conforme" thereto
- Other contract documents that may be required by the office/agency/corporation concerned.

To facilitate the approval of the contract, the following supporting documents shall be submitted:

- Duly Approved Program of Work and Cost Estimates
- Certificate of Availability of Funds
- Approved Agency Estimate (AAE) and Allowable
- Abstract of Bids
- Resolution of the PBAC or the PBAC recommending Award
- Approval of Award by Approving Authority
- Concurrence of Lending Institution in case of Foreign-Assisted Projects
- Other pertinent documents as may be reasonably required by existing laws.

The bids submitted for consideration by the PBAC partake of the nature of an offer to contract with the government. A duly accomplished and signed Form of Bid submitted to the bidding committee, with the government agency's acceptance of the bid, constitute a binding preliminary contract governing the relationship between the bidder and the government agency, during examination and evaluation period of the bid proposal until the Notice of Award is given to and the project contract is executed by the winning bidder.[13] The standard bid form contains an offer to undertake work in conformity with the documents accompanying the bid, to wit: conditions of contract, technical specifications, bid schedule and drawings for specified sums of money. Indeed, the bidder is required to submit the authority of the signing official as part of the bid form. Likewise, the contract agreement containing the conditions of the contract must be signed by the duly authorized official of the bidder. Unless the bid form is signed by such duly authorized official, the bid is only a scrap of paper. There would then be nothing to accept on the part of the government agency. As the Court emphasized in *National Power Corporation v. Philipp Brothers Oceanic, Inc.*: [14]

The very purpose of requiring a bidder to furnish the awarding authority its pre-qualification documents is to ensure that only those "responsible" and "qualified" bidders could bid and be awarded with government contracts. It bears stressing that the award of a contract is measured not solely by the smallest amount of bid for its performance, but also by the "responsibility" of the bidder. ...[15]

That the bid documents are substantial requirements is bolstered by Section 560 of the GAAM, which requires such bids to be submitted in two sealed envelopes. Under paragraph (b) of the said section, the first envelope shall contain the following informations/documents:

- Authority of the signing official
- Construction schedule and S-curve
- Construction methods

- Project organizational chart
- Manpower schedule
- Equipment utilization schedule and duly executed contract of lease of all equipment and machineries which shall be intended for use exclusively for the project, if any
- Affidavit of site inspection
- Bid security
- Certification that the detailed estimates, cash flow by quarter, and payments schedule are in the second envelope.

The documents enumerated in paragraph (b) of the provision are so indispensable, considering that the second envelope will not be opened unless the bidders submit all the documents required to be contained in the first envelope.

On the other hand, the second envelope shall contain the following informations/documents:

- Bid prices in the bill of quantities
- Detailed estimates
- Cash flow by quarter and payments schedule

In this case, the bids of Carwin Construction and Ed-Mar's Construction contain the following defects:

CARWIN CONSTRUCTION ED-MAR'S CONSTRUCTION

- The Contract Proposal:
 - Was not signed
 - Project description was not filled-up
 - The Certificate of Site Inspection was not, likewise, signed;
 - The Contractor's Confidential Prequalification Requirement although unsigned and undated by the Affiant was nevertheless notarized by Atty. ZENaida G. CRUZ-DUCUT;
 - The Affidavit of the Civil Engineer employed by the contractor although signed by the notary does not indicate the notarial date, the notarial document, the notarial document number and the Residence Certificate of the Affiant;
 - The Foreman's Certificate of Employment contain similar infirmities as that of no. 4 above.[16]
-
- Contract Proposal was not signed;
 - The Contractor's Confidential Prequalification Statement:
 - Does not indicate the name and address of the owner of the contracting company
 - Was not signed by the Contract/Owner
 - Was not notarized
 - The affidavit of Equipment Lessor; was erroneously signed by EDILBERTO UTULO as equipment lessor:
 - Was not notarized nor dated

- Does not indicate the name of equipment leased to Ed-Mar's Construction
- The Affidavit of the Civil Engineer to be employed by the Contractor:
- Does not indicate the Professional License Number of the engineer
- Does not indicate project of similar nature which he supervised previously
- Was not notarized
- The Foreman's Certificate of Employment
- Was not notarized nor dated
- Does not indicate the project previously supervised by the Foreman.[17]

The first three defects in the bids of Carwin Construction are substantial, while those of Ed-Mar's Construction are all substantially defective; hence, the same could not be waived by the PBAC. As such, the bid forms submitted by the two contractors are mere scraps of paper, and the acceptance thereof by the PBAC was of no legal effect. The PBAC thus erred in waiving the defects, in considering the bids of Carwin Construction and Ed-Mar's Construction, and in evaluating the same, in tandem with that of PRT Construction. In so doing, it violated Section 561 of the GAAM. Since the bids of Carwin Construction and Ed-Mar's Construction were mere scraps of paper, there was only one bidder left, namely, PRT Construction. What the PBAC should have done was to comply with Section 561(b) of the GAAM which provides:

b. In case there is only one bidder, the PBAC has the option to either:

- In cases where it is held confidential, announce the AAE and open the bid (second envelope) and, subsequently, consider the lone bid for award provided that it complies with the requirements of Section 562(b) hereof, and provided further that it does not exceed the AAE; or
- Return the second envelope of the lone bidder unopened and conduct a rebidding thru sealed canvass of at least five (5) qualified contractors within fifteen (15) days from the date of the failed opening of bids. However, for projects costing P3 million and below, the number of qualified contractors to be invited may be reduced to at least three (3). The prospective bidders shall not be limited to those previously prequalified for the project, and may include those whose classification is higher than that corresponding to the subject project with the lone complying bidder automatically participating.

The bidders to be invited shall have shown satisfactory performance in previous projects undertaken for the government as may be determined by the head of office/agency/corporation concerned and shall have not incurred any delays in all its on-going government and private projects.

Generally, the discretion to accept or repeat a bid and award contract is of such wide latitude that the Court will not interfere therewith, unless it is apparent that it is used as a shield to a fraudulent award. The exercise of the discretion is a policy decision vested in the government agencies entrusted with that function. However, the chairman and members of the PBAC may be meted administrative sanctions for dishonesty and conduct prejudicial to the government service if they conspired with the contractors to rig the bid process.

The petitioner Ombudsman ruled that there is evidence that the bidding process was simulated and/or rigged, and concluded that all the members of the PBAC are administratively liable, thus:

Anent the issue that there was simulation and/or rigging of the bidding process, we find the existence of substantial evidence to support the same.

Records will bear that in the bidding for the Bahay Pare Regravelling Project, three (3) contractors participated in the bidding, namely, PRT Construction, Carwin Construction and Ed-Mar's Construction. Although the bid documents submitted by the PRT Construction appeared complete and in order, that of Carwin Construction

and Ed-Mar's Construction contain glaring defects as earlier pointed out which clearly affects the substance and validity of the bids. This only shows that the bidding was truly rigged/simulated and that the winner thereof had been pre-determined by the concerned officials and the participating contractors.

Moreover, under such circumstances, the PBAC, composed of respondents GUINTO, OCAMPO, TOLENTINO and NUQUI, SR. should have declared a failure of bidding and instead conducted another sealed bidding pursuant to Sections 560, 561, 562 and 567 of the Government Accounting and Auditing Manual. However, contrary thereto, the PBAC issued Resolution of Award PBAC No. 92-02-09 dated 17 February 1992 (p. 102, Records) in favor of PRT Construction, thus negating the possibility of conducting another sealed bidding.

Clearly, the act of the members of the PBAC (all have retired except respondent OCAMPO) constitutes Conduct Grossly Prejudicial to the Best Interest of the Service.[18]

For its part, the CA ruled that collusion was not established by the complainants before the Ombudsman, and absolved the respondent of administrative liability:

However, this Court finds that the existence of collusion was not substantially established.

First, without any other evidence to prove rigging or simulation of the bids, mere defects in the bids of the two (2) losing bidders, albeit glaring, cannot justify a finding of collusion among the participating contractors and the PBAC. This holds more water in this case since the defects and/or deficiencies are not those which can be considered material under the GAAM, e.g., lack of bid security, obviously unbalanced bid, etc.

Second, Section 561(a) reserves to the Government the right to waive the consideration of minor deviations in the bids received which do not affect the substance and validity of the bids. In fact, the Invitation to Bid published by the PBAC contained the standard provision that the Government reserves the right to waive any required formality in any or all of the bids submitted.

If, in their sound discretion and after careful deliberation, PBAC finds that the defects in the bids submitted by Carwin and Ed-Mar's Construction are merely formal and do not affect the substance of their bids, then it is within their reserved right to waive the same and proceed with the bidding. Since petitioner is being charged with an offense which is considered grave under Civil Service standards, then public respondents, more than relying on presumptions and deductions, must offer more convincing proof on record that petitioner and the retired PBAC members committed unlawful behavior in the discharge of their official functions or transgressed some established and definitive rules of action. Otherwise, the legal presumption on the regularity in the performance of official functions of public officials and employees shall be accorded petitioner.[19]

We find no clear and convincing evidence to warrant a finding of collusion to rig the bid process to insure the awarding of the contract to PRT Construction. The PBAC is responsible for the conduct of prequalification, bidding, evaluation of bids and recommending the award of contracts.[20] After evaluation, when the PBAC awards the project and the contract to the winning bidder, it indubitably binds the government with the said winning bidder. It is herein stressed that contracts for infrastructure, like the regravelling projects for Barangay Bahay Pare in Candaba, Pampanga, always involve public funds.[21] A public official deliberately depriving the government, in violation of mandatory laws, or in a capricious and arbitrary manner, of an opportunity to choose the best qualified bidder to accomplish the regravelling project involving the relief and rehabilitation of the areas affected by the eruption of Mt. Pinatubo should be dealt with severity and penalized accordingly.

Collusion implies a secret understanding whereby one party plays into another's hands for fraudulent purposes.[22] It may take place between and every contractor resulting in no competition, in which case, the government may declare a failure of bidding.[23] Collusion may also ensue between contractors and the chairman and members of the PBAC to simulate or rig the bidding process, thus insuring the award to a favored bidder, to

the prejudice of the government agency and public service. For such acts of the chairman and the members of the PBAC, they may be held administratively liable for conduct grossly prejudicial to the best interest of the government service. Collusion by and among the members of the PBAC and/or contractors submitting their bids may be determined from their collective acts or omissions before, during and after the bidding process. The complainants are burdened to prove such collusion by clear and convincing evidence because if so proved, the responsible officials may be dismissed from the government service or meted severe administrative sanctions for dishonesty and conduct prejudicial to the government service.[24]

We believe that in this case, the complainants failed to prove that there was collusion by and among the contractors and the chairman and members of the PBAC. The PBAC may have erred in waiving the defects in the bids of Carwin Construction and Ed-Mar's Construction on the belief that the defects were minor, but it does not follow that its members, including the respondent, conspired with the contractors to rig the bid process. Carwin Construction and Ed-Mar's Construction may have, likewise, submitted defective bid documents but, absent any other evidence, it cannot thereby be concluded that there was conspiracy to rig the bid process to insure that PRT Construction would emerge the lone and winning bidder. The chairman and members of the PBAC may have, likewise, erred in the performance of their duties, but it does not necessarily mean that they did so in bad faith or with dishonesty.

Moreover, there is no evidence on record that the three contractors and the chairman and members of the PBAC knew each other, or had close business or personal relationships before the bidding process took place. The chairman and the members of the PBAC and the contractors knew or should have known that if they conspired to rig the bid process to favor PRT Construction, they may be held liable for violation of Section 3(e) of Rep. Act No. 3019, and that the chairman and members of the PBAC may be meted the severest of administrative sanctions, that of the dismissal from the government service for dishonesty and conduct prejudicial to the government service. It is contrary to ordinary human experience that the proprietors of Carwin Construction and Ed-Mar's Construction and the chairman and members of the PBAC would conspire among themselves to favor the proprietor PRT Construction, a complete stranger to them.

We reiterate that while it is true that the contractors and the chairman and members of the PBAC were criminally charged, the complaint was dismissed by no less than the Office of the Ombudsman itself.

IN LIGHT OF ALL THE FOREGOING, the petition is DENIED for lack of merit. No costs.

SO ORDERED.

Puno, (Chairman), Austria-Martinez, Tinga, and Chico-Nazario, JJ., concur.

[1] Penned by Associate Justice Eloy R. Bello, Jr. (retired), with Associate Justices Godardo A. Jacinto and Josefina Guevara-Salonga, concurring.

[2] Rollo, pp. 41-42.

[3] Id. at 42-43.

[4] Id. at 50-51.

[5] Id. at 25.

[6] Id. at 27.

[7] Id. at 9.

[8] Id. at 137-139.

[9] (1) When the conclusion is a finding grounded entirely on speculations, surmises or conjectures; (2) when the inference made is manifestly mistaken, absurd or impossible; (3) when there is grave abuse of discretion; (4) when the judgment is based on a misapprehension of facts; (5) when the findings of fact are conflicting; (6) when the Court of Appeals, in making its findings, went beyond the issues of the case and the same is contrary to the admissions of both appellant and appellee; (7) when the findings of the Court of Appeals are contrary to those of the trial court; (8) when the findings of fact are conclusions without citation of specific evidence on which they are based; (9) when the Court of Appeals manifestly overlooked certain relevant facts not disputed by the parties, which, if properly considered, would justify a different conclusion; and (10) when the findings of fact of the Court of Appeals are premised on the absence of evidence and are contradicted by the evidence on record. (Commissioner of Internal Revenue v. Embroidery and Garments Industries [Phils.], Inc., 305 SCRA 70 [1999], citing Misa v. Court of Appeals, 212 SCRA 217 [1992]; Golangco v. Court of Appeals, 283 SCRA 493, 503 [1997]; Fule v. Court of Appeals, 286 SCRA 698, 710 [1998]; Halili v. Court of Appeals, 287 SCRA 465, 470 [1998]; Remalante v. Tibe, 158 SCRA 138 [1988]; Ayala Corporation v. Ray Burton Development Corporation, 294 SCRA 48 [1998].) (Nokom v. National Labor Relations Commission, 336 SCRA 97, 110 [2000])

[10] The chairman and the other members of the PBAC had already retired.

[11] Rollo, p. 48.

[12] Section 556 of the Government Accounting and Auditing Manual.

[13] Republic v. Judge Capulong, 199 SCRA 134 (1991).

[14] 369 SCRA 629 (2001).

[15] Id. at 644.

[16] Rollo, pp. 41-42.

[17] Id. at 42-43.

[18] Id. at 47-48.

[19] Id. at 24-25.

[20] Section 549 of the Government Accounting and Auditing Manual.

[21] Section 535. Definition and Scope. – Infrastructure projects are investments in capital goods by the government in the form of horizontal or vertical projects, such as roads and bridges, water supplies, flood control, irrigation systems, drainage, harbors, ports and buildings. The infusion of Government funds into these projects can be categorized into construction, betterment, improvement, rehabilitation and/or maintenance. (GAAM)

[22] Brainerd Dispatch Newspaper Co. v. Crow Wing County, 264 N.W. 779 (1936).

[23] Section 562(d) of the Government Accounting and Auditing Manual.

[24] Marasigan v. Buena, 284 SCRA 1 (1998).

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