

NEW BIAN YEK COMMERCIAL, INC. REPRESENTED BY DANFORD S. SY, PETITIONER, VS. OFFICE OF THE OMBUDSMAN (VISAYAS), RODOLFO V. GONZALES, JR., MAYOR OF THE MUNICIPALITY OF VALENCIA, NE...

G.R. No. 169338. January 20, 2009

Ponente: CORONA, J.

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CORONA, J.:

On August 13, 2000, the municipality of Valencia, Negros Oriental awarded to Legacy Construction (Legacy), a corporation owned by respondents Alex Abelido and Dominador Abelido, the P14,621,967.79, 300-day[1] contract for the improvement of its waterworks system (Valencia project).

In connection with the Valencia project, Legacy through its project engineer, Jaime Lu, purchased from petitioner New Bian Yek Commercial, Inc. pipes worth P2,816,590.[2] As payment for the pipes, Lu issued two personal checks[3] to petitioner. The said checks were, however, dishonored upon presentment but Legacy did not replace them. Because Legacy had already received a significant portion of the contract price from the municipality, petitioner demanded payment for the pipes (amounting to P1,766,950) on December 11, 2002. Legacy, however, ignored petitioner's demand.

On April 15, 2002, petitioner requested respondent Rodolfo V. Gonzales, Jr., municipal mayor of Valencia, Negros Oriental, to pay for Legacy's obligation using the retention money[4] withheld by the municipality for the Valencia project. Unsure of what to do, Gonzales referred the matter to Negros Oriental provincial attorney, respondent Erwin B. Vergara.

On January 29, 2003, petitioner filed a complaint for sum of money with a prayer for the issuance of a writ of preliminary attachment[5] against Legacy, Alex Abelido, Lu and the municipality of Valencia in the Regional Trial Court (RTC) of Dumaguete City, Branch 44.

On February 4, 2003, Vergara issued an opinion wherein he noted that Lu, pursuant to the special power of attorney extended by Legacy, was only authorized "to sign vouchers, paper documents which [were] incidental with any transaction." He was not allowed to purchase supplies for the Valencia project on behalf of Legacy. Consequently, because petitioner failed to prove that the pipes were used in the said project, it could not invoke its supplier's lien. Thus, Vergara recommended that the municipality release the retention money to Legacy.[6]

Meanwhile, after conducting the requisite hearing, the RTC found that Alex Abelido had left the country and the balance of the contract price (amounting to P3 million) was the only fund petitioner could run after to recover Legacy's liability. Thus, in its February 7, 2003 order,[7] the RTC ordered the issuance of a writ of preliminary attachment prohibiting Gonzales or his agents or representatives from releasing any payment (including the retention money) to Legacy.[8]

On February 11, 2003, a writ of preliminary attachment was issued pursuant to the February 7, 2003 order of the

RTC. Despite the issuance thereof, Gonzales adopted Vergara's recommendation and instructed the municipal treasurer, respondent Rolando Obañana, to release the retention money to Legacy on March 12, 2003.[9]

On November 19, 2004, petitioner filed an affidavit-complaint against respondents in the Office of the Ombudsman.[10] Gonzales, Vergara and Obañana allegedly violated Section 3(e) of the Anti-Graft and Corrupt Practices Act (RA 3019)[11] when they released the retention money to Legacy in spite of the February 11, 2003 writ of preliminary attachment. They conspired with the Abelidos in depriving petitioner of payment for Legacy's just obligation. Such act was therefore undertaken in bad faith, with manifest partiality and in utter disregard of petitioner's rights under PD 1594.

The Ombudsman found no probable cause for violation of Section 3(e) of RA 3019. He held that Vergara's opinion was in accord with law and jurisprudence. Consequently, because they adopted Vergara's opinion, Gonzales and Obañana acted in good faith. Thus, in his March 10, 2005 resolution, the Ombudsman dismissed the complaint for lack of merit.[12]

Petitioner moved for reconsideration but it was denied.[13] Thus, it filed this petition for certiorari asserting that the Ombudsman committed grave abuse of discretion in dismissing the complaint against respondents insofar as their criminal liability was concerned.

The petition is partially granted.

To afford the Ombudsman a wide latitude of discretion, the Court, as a general rule, does not interfere with the Ombudsman's determination of whether or not there is probable cause against the respondent. The Court only exercises its power of judicial review when the Ombudsman committed grave abuse of discretion such as when he ignores the clear sufficiency of evidence to support a finding of probable cause.[14]

In this case, petitioner insists that Gonzales, Vergara and Obañana extended unwarranted benefits, advantage or preference to the Abelidos when they released the retention money to Legacy despite the presence of a writ of preliminary attachment.[15]

Under the rules on government procurement, retention money is a form of security which seeks to ensure that the work is satisfactorily done and on schedule. It is withheld by the procuring entity (i.e., the government) from progress payments due to the contractor to guarantee indemnity for uncorrected discovered defects and third-party liabilities in infrastructure projects.[16]

CI6 of the Implementing Rules and Regulations of PD 1594[17] provides for two instances when the procuring entity may release the retention money. First, the contractor is entitled, as a matter of right, to receive the total retention money upon final acceptance by the procuring entity of the works. Second, when the procuring entity has paid at least 50% of the total contract price, the contractor may request the procuring entity to release the retention money provided that it (contractor) submits, in lieu thereof, a surety bond callable on demand.

Notably, in this case, the municipality released the retention money more than a year after the project should have been completed. Moreover, petitioner neither averred that Gonzales and Obañana released the retention money prior to the final acceptance of the work nor required Legacy to submit a surety bond callable on demand in favor of the municipality.[18] Thus, petitioner failed to show that the said officials violated PD 1594 when they released the retention money to Legacy.

Nevertheless, there was sufficient ground to engender a well-founded belief that Gonzales and Obañana violated Section 3(e) of RA 3019.

The February 11, 2003 writ of preliminary attachment prohibited Gonzales and Obañana from paying the balance

of the contract price (including the retention money) to Legacy and created a lien over the said money in favor of petitioner. By releasing the balance of the contract price, they impaired petitioner's lien and caused it (petitioner) undue injury. In effect, Gonzales and Obañana extended unwarranted benefits to Legacy and, ultimately, the Abelidos who were able to take full control of the money which, by virtue of the February 11, 2003 writ of preliminary attachment, was in custodia legis.

Thus, the Ombudsman committed grave abuse of discretion in finding that there was no probable cause against Gonzales, Obañana and the Abelidos for violation of Section 3(e) of RA 3019. However, he correctly ruled that there was no probable cause against Vergara. He rendered his opinion on February 4, 2003, that is, before the RTC ordered the issuance of the writ of preliminary attachment and neither facilitated nor participated in releasing the balance of the Valencia project's contract price.

WHEREFORE, the petition is hereby PARTIALLY GRANTED. The March 10, 2005 and May 24, 2005 resolutions of the Office of the Ombudsman (Visayas) in OMB-V-C-04-0609-K are REVERSED and SET ASIDE except insofar as respondent Erwin B. Vergara is concerned. New judgment is hereby rendered finding probable cause for violation of Section 3(e) of the Anti-Graft and Corrupt Practices Act (RA 3019) against respondents Rodolfo V. Gonzales, Jr., Rolando Obañana, Alex Abelido and Dominador Abelido. Accordingly, the Office of the Ombudsman (Visayas) is directed to file the necessary information against respondents.

SO ORDERED.

Puno, C.J., (Chairperson), Carpio, Azcuna, and Leonardo-De Castro, JJ., concur.

[1] The Valencia project should have been completed on May 13, 2001.

[2] Legacy returned P350,000 worth of pipes.

[3] Lu issued the following Philippine National Bank checks to petitioner:

Check No.

Amount

0014298

P 800,000.00

0014299

966,950.00

TOTAL

P1,766,950.00

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[4] Implementing Rules and Regulations of Presidential Decree (PD) 1594, CI6 provides:

CI 6. RETENTION MONEY

1)

Progress payments are subject to retention of ten percent (10%) referred to as "retention money." Such retention shall be based on the total amount due to the contractor prior to any deduction and shall be retained from every progress payment until fifty percent (50%) of the value of works, as determined by the Government, are completed. If after fifty percent (50%) completion, the work is satisfactorily done and on schedule, no additional retention shall be made; otherwise, the ten percent (10%) shall be imposed.

2)

The total "retention money" shall be due for release upon acceptance of the works. The contractor may however request the substitution of the retention money for each progress billing with surety bonds callable on demand of amounts equivalent to the retention money substituted for and acceptable to government, provided that the project is on schedule and is satisfactorily undertaken. Otherwise, the ten percent (10%) retention shall be made. Said surety bonds, to be posted in favor of government, shall be valid for a duration of to be determined by the concerned government implementing agency and will answer for the purpose for which the ten percent (10%) retention is intended, i.e., to cover uncorrected discovered defects and third party liabilities.

(This has been superseded by paragraph 6 of Annex-E of the Implementing Rules and Regulations of RA 9184 which was published in the Manila Times on September 23, 2003 and took effect on October 8, 2003.)

Compare paragraph IX-c of the construction contract between the Municipality of Valencia and Legacy which provides:

c.

The total retention money shall be released after 50% of the contract work is satisfactorily completed and on schedule, provided further, that [Legacy] posts an irrevocable standby letter of credit in favor of the government to answer and ... for the ... purpose for which the ten percent (10%) retention is intended; and warrant immediately correction works on those found defective and below standard specification;

[5] Docketed as Civil Case No. 13318.

[6] Annex "C," Rollo, pp. 63-64.

[7] Issued by Judge Alvin Tan. Annex "D," id., pp. 65-65.

[8] Upon the motion of respondents, the RTC, in its April 11, 2003 order, ordered the quashal of the writ of preliminary attachment. It, however, reinstated the said writ in its December 3, 2003 order.

[9] The municipality fully paid the contract price on March 23, 2003.

[10] Docketed as OBM-V-C-04-0609-K. Annex "A," Rollo, pp. 23-31. (Petitioner's administrative complaint against respondents was docketed as OMB-V-A-0609-K.)

[11] RA 3019, Sec. 3(e) provides:

Section 3. Corrupt practices of public officers.--In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

x x x x x x x x

(e) Causing any undue injury to any party, including the Government, or giving any private party unwarranted benefits, advantage or preference in the discharge of his official, administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

x x x x x x x x

See *Peralta v. Desierto*, G.R. No. 153152, 19 October 2005, 473 SCRA 322.

To be criminally liable for violating Section 3(e) of RA 3019, the following requisites must be proven:

- the accused is a public officer or a private person charged in conspiracy with the former;
- that he or she caused undue injury to any party, whether the government or a private party;
- that the said public officer commits the prohibited acts during the performance of his or her official duties or in relation to his or her public responsibilities;
- such undue injury is caused by giving unwarranted benefits, advantage or preference to such parties; and
- that the public officer acted with manifest partiality, evident bad faith or gross inexcusable negligence.

[12] Penned by graft investigation and prosecutor officer II Sarah Jo A. Vergara and approved by deputy ombudsman for the Visayas Primo C. Miro on March 21, 2005. Rollo, pp. 101-106.

[13] Dated May 24, 2005. Id., pp. 119-121.

[14] *Tilendo v. Ombudsman*, G.R. No. 165975, 13 September 2007, 533 SCRA 331, 346.

[15] See *Constantino v. Sandiganbayan*, G.R. No. 140656, 13 September 2007, 533 SCRA 205, 221. (There are two modes of committing a violation of Section 3(e) of RA 3019.)

[16] Implementing Rules and Regulations of PD 1594, CI6, supra note 3.

[17] Id.

[18] *Contrast Ombudsman v. Tiongson*, G.R. No. 169029, 22 August 2006, 499 SCRA 567.

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