

Republic of the Philippines
SUPREME COURT
Manila

THIRD DIVISION

G.R. No. 183260 **July 4, 2012**

PHILIPPINE SPORTS COMMISSION, CESAR PRADAS, NOEL ELNAR, EMERENCIANA SAMSON, CESAR ABALON, JULIA LLANTO, EDGARDO MATEO AND ERIC BUHAIN, Petitioners,
vs.

DEAR JOHN SERVICES, INC., Respondent.

DECISION

MENDOZA, J.:

Before the Court is a petition for review under Rule 45 of the Rules of Court seeking the reversal of the April 17, 2008 Decision¹ and the June 11, 2008 Resolution² of the Court of Appeals (CA) in CA-G.R. CV No. 88606, which reversed and set aside the November 29, 2006 Decision³ of the Regional Trial Court, Branch 196, Parañaque City (RTC), in Civil Case No. 02-0212, entitled "*Dear John Services, Inc. v. Philippine Sports Commission.*"

The Facts:

In December 2001, respondent Philippine Sports Commission (PSC) published an "*Invitation to Bid*" for its janitorial and security services. Pursuant thereto, respondent Dear John Services, Inc. (*Dear John Services*) submitted its letter⁴ signifying its intent to participate in the bidding and subsequently paid the bidding fee.⁵

On March 8, 2002, PSC Chairman Eric Buhain (*Buhain*), in a memorandum,⁶ cancelled the pre-bidding conference pending evaluation of all procedures and documents relative to the bidding policies.

When the review was completed, the "*Invitation to Apply for Eligibility and to Bid*" was re-advertised in order to comply with the requirements set forth in Executive Order (E.O.) No. 40, Series of 2001 and in its Implementing Rules and Regulations.⁷ The pre-bidding and bidding dates were then scheduled to April 16, 2002 and April 26, 2002, respectively.

Among the bidders who qualified and submitted the necessary documents for prequalification were Dear John Services⁸ and Consolidated Building Maintenance, Inc.⁹ (CBMI). A procedure for the conduct of the public bidding, entitled "*Instruction to Bidders*,"¹⁰ was given to the qualified bidders.

The bidding was held as scheduled and the sealed bids were opened. Dear John Services' bid amounted to ₱18,560,078.00 while that of CBMI amounted to ₱ 27,419,097.00. PSC, however, awarded the contract to CBMI because Dear John Services allegedly failed to reach the 60% lower limit of the Approved Agency Estimate(AAE).¹¹

Dear John Services sent a letter,¹² dated May 8, 2002, to Buhain requesting that its bid be reconsidered and stating therein that the AAE amounting to ₱ 32,554,050.00 should have been disclosed prior to the bidding and that its revelation after the opening of the bid was highly irregular.

Subsequently, Dear John Services filed a Complaint¹³ against PSC for injunction before the RTC praying, among others, that a temporary restraining order (TRO) be issued enjoining PSC and its officers (*petitioners*) from awarding the janitorial services to CBMI; that a preliminary injunction be issued restraining PSC from availing of CBMI's janitorial services; and that after the hearing, the injunction be made permanent.

On May 14, 2002, the RTC issued a TRO, enjoining PSC from awarding its janitorial services to CBMI and/or allowing the latter to perform its contract in the event that it had been awarded.¹⁴ The said TRO was extended until May 20, 2002.¹⁵

Thereafter, the prayer for the extension of the TRO and the request for the issuance of the writ of preliminary mandatory injunction were denied in the RTC Order,¹⁶ dated May 20, 2002.

The Complaint was later on amended to include Buhain, in his capacity as Chairman of PSC, and the chairman and members of the Bids and Awards Committee (BAC), namely, Cesar Pradas, Eugene De Vera, Noel Elnar, Emerenciana Samson, Cesar Abalon, Julia Llanto, and Edgardo Mateo.¹⁷

After the trial on the merits, the RTC dismissed the complaint, in its November 29, 2006 Decision, for lack of merit. It upheld the authority of the PSC to award the service contract to CBMI because the latter's bid was advantageous to the government.

On appeal, the CA, in the subject decision, reversed and set aside the RTC decision, as it disposed:

WHEREFORE, premises considered, the present appeal is hereby GRANTED. The appealed Decision dated November 29, 2006 of the Regional Trial Court of Parañaque City, Branch 196 in Civil Case No. 02-0212 is hereby REVERSED and SET ASIDE. A new judgment is hereby entered ordering the individual defendants-appellees, jointly and severally, to pay plaintiff-appellant the sum of Two Hundred Thousand Pesos (₱ 200,000.00) as nominal damages.

Needless to reiterate, the Amended Complaint as against defendant-appellee Philippine Sports Commission is dismissed.

No pronouncement as to costs.

SO ORDERED.¹⁸

In coming up with the said decision, the CA explained:

x x x

The controversy revolved around the so-called "Agency Approved Estimate" which is nowhere found or mentioned in EO 40 or its IRR. What EO 40 mandates is the use of the lowest calculated and responsive bid intended to be transparent, objective and non-discretionary criteria, and the approved budget contract (*ABC*) as the ceiling of the bid price. It is significant to note that appellees are mandated to disclose the "approved budget for the contract" in the Invitation to Bid pursuant to Sec. 14 of EO 40, another feature of the law aimed at ensuring transparency and objectivity in the bidding process. Records do not show compliance with said requirement. While Sec. 27, bids tendered must be post-qualified to determine if they satisfied all the conditions and requirements in the bidding documents, specifically the condition imposed in the Instructions to Bidders that the bid amount should not be lower than 60% of the "AAE", this lower limit violates the rule laid down in EO 40 which prohibits such lower limit to the contract amount. Sec. 25 of the IRR reiterated the rule that "there shall be no lower limit to or floor on the amount of the award."

Moreover, the non-disclosure of the AAE prior to the bidding contravenes the policy of transparency, on the assumption that such AAE is equivalent to *ABC* since the latter amount is required to be disclosed in the Invitation to Bid. Neither can the AAE be equated with the "Lowest Calculated and Responsive Bid" considering the admission in the testimony of BAC Chairman Cesar Pradas that the AAE was determined even prior to the bidding held on April 26, 2002, or more precisely as early as April 18, 2002. The imposition of the 60% below AAE ceiling for the bids therefore has no legal basis and contrary to the prohibition against a floor price for the amount of the award under EO 40.

4.2 Award of Contract

Award of Contract will be made in accordance with the provisions of EO 40 and its implementing Rules and Regulations (IRR). The PSC, however, is not bound to accept the lowest bid or any bid nor will be responsible for or pay any expenses which maybe incurred by any Bidder in the preparation or submission of its Bid. The PBAC-BAC also reserves the right to award the contract to the bidder whose Bid is evaluated to be the most advantageous to the government.

No award of contract shall be made to a Bidder whose bid price is higher than the allowable government estimate (AGE) or the Approved Agency Estimate (AAE) whichever is higher, or lower than seventy percent (70%) of the AGE, for the purpose of these implementing rules and regulations, the AGE shall be equal to one-half (1.5) of all responsive bids. For purpose of

determining the average of all responsible bids, bids higher than One Hundred Twenty Percent (120%) of the AAE or lower than sixty percent (60%) of the AAE shall not be considered.

Upon careful and thorough evaluation of Bids, the winning Bidder shall be informed through written Notice of Award.

The PSC is not bound to justify the selection of the successful Bidder to any Bidder or other interested party.

The above conditions in the Instruction to Bidders does not comply with the requirements of EO 40 and its IRR, and are offensive to due process as they contravene the principles of transparency, objectivity and non-discretionary criteria established therein. The fact that appellant voluntarily accepted these conditions and submitted its bid without any question regarding the existence of or amount of the AAE is of no moment, in view of the irregular bidding procedure. Appellees had not been transparent and objective about the so-called AAE as to whether it represents the approved budget contract or the lower calculated and responsive bid provided in EO 40. Thus, although it is conceded that there is no evidence of collusion or that the conditions imposed by appellees were made the basis of a fraudulent award, it cannot be gainsaid that the bidding instructions were arbitrarily issued and the entire bidding procedure did not comply with EO 40 and its IRR.

Appellees' reliance on the following reservation clause in the Instruction to Bidders, likewise holds no water.

1.4 Rejection of Bids, Disqualification of Bidder and other sanctions

The office of the PSC reserves the right to reject any or all bids and waives any required formality in the bids received. The right is also reserved to reject the bid of any bidder (a) that is above AAE or AGE (b) who had previously failed to satisfactorily perform or complete any contract services undertaken by him/her or was eligible on the basis of suppressed or false information.

The PSC assumes no obligation whatsoever to compensate or indemnify bidders for any expenses or loss that may be incurred in the preparation of the bids nor does it guarantee that an award will be made.

The PSC will reject any non-complying Bid, i.e., a Bid that fails to meet any requirement, terms or condition set forth in the Tender Documents as well as relevant laws, rules and regulations.

Notwithstanding the eligibility of any contractor to submit Bids for the proposed contract, PSC reserves the right to review its Eligibility requirements, statements and other relevant information before and/or after the submission and before award of the Contract. Should such review uncover any misrepresentation made in the Eligibility statement, the BAC shall disqualify

the contractor from submitting a Bid or shall not make any award to prospective Contracting Agencies.

Under Sec. 29 of EO 40, such reservation clause is essential.

Sec. 29. Reservation Clause. The government reserves the right to reject any all bids, or declare a failure of bidding, or not award the contract for any justifiable reason including among others, if there is evidence of collusion between relevant public officers or employees of the agency or the BAC and any of the which restricts, suppresses or nullifies competition, or if the BAC is found to have failed to follow the prescribed bidding procedures.

The Supreme Court has ruled in *National Power Corporation vs. Philipp Brothers Oceanic, Inc.* where the right to reject is so reserved, the lowest bid or any bid for that matter may be rejected on a mere technicality. And where the government as advertiser, availing itself of that right, makes its choice in 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. Accordingly, a bidder has no ground of action to compel the Government to award the contract in his favor, nor compel it to accept his bid. Even the lowest bid or any bid may be rejected.

Generally, the discretion to accept or repea[l] 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. The exercise of that discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation. This task can best be discharged by the concerned government agencies, not by the courts. The role of the courts is to ascertain whether a branch or instrumentality of the government has transgressed its constitutional boundaries. Courts will not interfere with executive or legislative discretion exercised within those boundaries.

This policy has been reiterated in a more recent case, thus:

Further, LWUA made a reservation to reject bids as the Invitation to Prequalify and Bid published in the June 6, 1992 issue of the Philippine Daily Inquirer shows:

LWUA reserves the right to reject any or all the bids, to waive any formality found therein and to accept such bid or a part thereof as may be deemed most advantageous to LWUA. (Empahsis and underscoring supplied)

The discourse in his "A TREATISE ON GOVERNMENT CONTRACT UNDER PHILIPPINE LAW" of former Commissioner of the Commission on Audit Bartolome C. Fernandez, Jr. is enlightening:

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 highest bidder, as the case may be, is not entitled to an award as a matter of right for it does not become the ministerial duty of the Government to

make such 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 unwise, 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 in 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. Accordingly, he has no ground of action to compel the Government to award the contract in his favor, nor to compel it to accept his bid.

Verily, a reservation in the advertisement for bids of the right to reject any bid generally vests in the authorities a wide discretion as to who is the best and most advantageous bidder. The exercise of such discretion involves inquiry, investigation, comparison, deliberation and decision, which are quasi-judicial functions, and when honestly performed, may not be reviewed by the courts. In such cases, there is no binding obligation to award the contract to any bidder and in the exercise of such discretion the award may be made validly to whoever among the participating bidders has submitted the most advantageous bid.

Contrary then to the assertion of petitioner, the bidding was carried out in accordance with its purpose of protecting public interest by giving the public the best possible advantages through open competition.

However, a reading of the decisional rule on reservation of right to reject cautions against injustice, unfairness, arbitrariness, fraudulent acts or grave abuse of discretion. A contrary conclusion would be anathema to the purposes for which public biddings are founded – to give the public the best possible advantages through open competition – as it would give the unscrupulous a plain escape to rig the bidding process. Grave abuse of discretion is committed when an act is: 1) done contrary to the Constitution, the law or jurisprudence, or 2) executed whimsically or arbitrarily in a manner so patent and so gross as to amount to an evasion of a positive duty, or to a virtual refusal to perform the duty enjoined. The bidding conducted by the appellees is clearly tainted with irregularity and grave abuse, resulting in prejudice and material loss to appellant.¹⁹

x x x.

Petitioners filed their motion for reconsideration but was denied in the June 11, 2008 CA Resolution. Hence, this petition, anchored on the following:

GROUND S RELIED UPON IN THE PETITION

THE HONORABLE COURT OF APPEALS GRAVELY ERRED IN REVERSING THE JUDGMENT OF THE LOWER COURT CONSIDERING THAT:

RESPONDENT FAILED TO REACH THE 60% LOWER LIMIT OF THE AAE.

II

PETITIONER PSC HAD BASIS TO REJECT RESPONDENT'S BID BECAUSE OF THE RESERVATION CLAUSE IN THE INSTRUCTION TO BIDDERS.²⁰

Petitioners point out that the "*Instruction to Bidders*" clearly provides that the bid price should not be less than 60% of the AAE. When Dear John Services submitted its bid, it expressed its assent in the "*Instruction to Bidders*" and so it was bound by the terms and conditions stated therein.

They explain that the condition that the bid amount should not be lower than 60% of the AAE is necessary in order to ensure compliance with the minimum wage, 13th month pay, state insurance and other benefits imposed by statutes, and to guarantee efficient and effective performance by the winning bidder.

Petitioners further aver that there is nothing in E.O. No. 40 that mandates the disclosure of the AAE to bidders. Besides, Dear John Services never demanded its disclosure during the opening of the bids.

The Court finds no merit in the petition.

Public bidding, as a method of government procurement, is governed by the principles of transparency, competitiveness, simplicity, and accountability.²¹ By its very nature and characteristic, a competitive public bidding aims to protect the public interest by giving the public the best possible advantages thru open competition and in order to avoid or preclude suspicion of favoritism and anomalies in the execution of public contracts.²² Except only in cases in which alternative methods of procurement are allowed, all government procurement shall be done by competitive bidding.²³

In the case of *Agan, Jr. v. Philippine International Air Terminals Co, Inc.*,²⁴ the Court held:

Competition must be legitimate, fair and honest. In the field of government contract law, competition requires, not only bidding upon a common standard, a common basis, upon the same thing, the same subject matter, the same undertaking, but also that it be legitimate, fair and honest; and not designed to injure or defraud the government.

It has been held that the three principles in bidding are the offer to the public, opportunity for competition, and a basis for the exact comparison of bids. A regulation of the matter which excludes any of these factors destroys the distinctive character of the system and thwarts the purpose of its adoption.²⁵

As pointed out in the case of *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated*,²⁶ an essential element of a publicly bid contract is that all bidders must be on equal footing, not simply in terms of application of the procedural rules and regulations imposed by the relevant government agency, but more importantly, on the contract bid upon.

In the case at bench, PSC-BAC failed to comply with the requirements and procedures for competitive bidding specified under E.O. No. 40.

Section 14 of E.O. No. 40 provides:

Section 14. Invitation to Bid. The invitation to bid shall contain, among others: a brief description of the items to be procured; the eligibility requirements; the place, date and time of the deadlines for receipt of eligibility requirements and bids; the approved budget for the contract to be bid; time and place of the opening of bids; and the contract duration or delivery. [Underlining supplied]

Section 14 of the Implementing Rules and Regulations (*IRR*) of E.O. No. 40 specifically mandates the BAC to include in the "*Invitation to Apply for Eligibility and to Bid*" the following information to guide the prospective bidders, to wit:

Section 14. Invitation to Bid

14.1. Contents of the Invitation to Apply for Eligibility and to Bid

x x x x

1. The name, address, telephone number, facsimile number, e-mail and website addresses of the concerned agency, as well as its designated contact person;
2. For the procurement of:
 - a) Goods, the name of the contract to be bid and a brief description of the goods to be procured;
 - b) Civil works, the name and location of the contract to be bid, the project background and other relevant information regarding the proposed contract works, including a brief description of the type, size, major items, and other important or relevant features of the works; and
 - c) Consulting services, the name of the contract to be bid, a general description of the project and other important or relevant information;

3. The criteria to be used by the agency in the following: (i) eligibility check of prospective bidders; (ii) examination and evaluation of bids; and (iii) post qualification; which shall be on a non-discretionary "pass/fail" basis;

4. The approved budget for the contract to be bid and the source of funding;

5. The period of availability of the bidding documents, the place where the bidding documents may be secured and, where applicable, the price of the bidding documents;

6. The date, time and place of the deadline for the submission and receipt of the eligibility requirements, the pre-bid conference if any, the submission and receipt of bids, and the opening of bids; and

7. The contract duration or delivery schedule. [Emphasis supplied]

Essentially, the procurement process involves the following steps: (1) pre-procurement conference; (2) advertisement of the invitation to bid; (3) pre-bid conference; (4) eligibility check of prospective bidders; (5) submission and receipt of bids; (6) modification and withdrawal of bids; (7) bid opening and examination; (8) bid evaluation; (9) post qualification; (10) award of the contract; and (11) notice to proceed.²⁷ Parenthetically, from the first step of the procurement procedure, E. O. No. 40 and its implementing rules are clear to the effect that the approved budget for the contract and the source of the funding should be divulged to prospective bidders.

Under the Rules Implementing E.O. No. 40, the BAC shall indicate in the Invitation to Bid relevant information regarding the proposed project and the standards that would be used in determining the pre-qualification and post-qualification of the prospective bidders and in the evaluation of bids. It shall indicate, among others, a brief description of the project to be bid; the approved budget for the contract to be bid; the criteria to be used by the agency concerned for the eligibility check; the availability of the bidding documents; and the date, time and place of the deadline for the submission of the eligibility requirements. In other words, the BAC shall furnish all information on the projects necessary for prospective bidders to properly prepare their bids in order to give them fair and equal opportunity to bid.

Admittedly, PSC-BAC did not disclose in any of the bidding documents the amount of the AAE.¹ The Bid Bulletin which was posted in conspicuous places and the "Instruction to Bidders" that was distributed to qualified bidders did not indicate the amount of the AAE. Petitioners' contention, that they were not bound to disclose the AAE and that Dear John Services never demanded its disclosure, is untenable. Under the law, the PSC-BAC is mandated to disclose not only the description of the items to be procured, and the eligibility requirements, among others, but also the approved budget of the project. Competitive bidding is an essential element of a public bidding. Thus, it should be conducted fairly and openly with full and free opportunity for competition among bidders. It has been held in a long line of cases that a contract granted without the competitive bidding required by law is void and the party to

whom it is awarded cannot benefit from it.²⁸ Had Dear John Services and CBMI known all the information regarding the bidding, a different set of bids might have emerged.

Moreover, Section 25 of E.O. No. 40 and its IRR prohibit the BAC from imposing a minimum amount to be offered in the bid. It states:

Section 25. Ceiling for Bid Price. The approved budget for the contract shall be the upper limit or ceiling for the bid price. Bid prices which exceed this ceiling shall be disqualified outright from further participating in the bidding. There shall be no lower limit to the amount of the award. For this purpose, the approved budget for the contract shall be that approved by the head of the agency. [Underscoring supplied]

Consequently, the provision in the "*Instruction to Bidders*" stating that no award of the contract shall be made to a bidder whose bid price is lower than the allowable government estimate (AGE) or AAE is not valid. The rule on the matter is clear. The PSC-BAC is obliged to observe and enforce the same in the procurement of goods and services for the project. The law on public bidding is not an empty formality.²⁹ A strict adherence to the principles, rules and regulations on public bidding must be sustained if only to preserve the integrity and the faith of the general public on the procedure.³⁰

WHEREFORE, the petition is DENIED. The April 17, 2008 Decision and the June 11, 2008 Resolution of the Court of Appeals in CA-G.R. CV No. 88606 are AFFIRMED.

SO ORDERED.

JOSE CATRAL MENDOZA

Associate Justice

WE CONCUR:

PRESBITERO J. VELASCO, JR.

Associate Justice

Chairperson

DIOSDADO M. PERALTA

Associate Justice

BIENVENIDO L. REYES*

Associate Justice

ESTELA M. PERLAS-BERNABE

Associate Justice

A T T E S T A T I O N

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

PRESBITERO J. VELASCO, JR.

Associate Justice

Chairperson, Third Division

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ANTONIO T. CARPIO

Senior Associate Justice

(Per Section 12, R.A. No. 296, The Judiciary Act of 1948, as amended)

Footnotes

* Designated Acting Member in lieu of Associate Justice Roberto A. Abad, per Special Order No. 1244 dated June 26, 2012.

¹ *Rollo*, pp. 52-67. Penned by Associate Justice Martin S. Villarama, Jr. (now member of this Court) and concurred in by Associate Justice Noel G. Tijam and Associate Justice Myrna Dimaranan Vidal.

² *Id.* at 68.

³ Records, pp. 580-587.

⁴ Annex "A," records, p. 496.

⁵ Annex "B," *id.* at 498-499.

⁶ Annex "E," *id.* at 501.

⁷ Annex "G," *id.* at 503.

⁸ Annex "I," *id.* at 505.

⁹ Records, p. 515.

¹⁰ Annex "J," records, pp. 506-514.

¹¹ Annex "K," *id.* at 515.

¹² Annex "L," *id.* at 516.

¹³ Records, pp. 49-58.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 83.

¹⁶ *Id.* at 89.

¹⁷ *Id.* at 261-267.

¹⁸ *Rollo*, p. 66.

¹⁹ *Id.* at 61-65.

²⁰ *Id.* at 35.

²¹ *Commission on Audit v. Link Worth International, Inc.*, G.R. No. 182559, March 13, 2009, 581 SCRA 501, 509.

²² *Danville Maritime, Inc. v. Commission on Audit*, 256 Phil. 1092, 1103 (1989).

²³ *Commission on Audit v. Link Worth International, Inc.*, *supra* note 21.

²⁴ 450 Phil. 744, 814 (2003).

²⁵ *Malaga v. Penachos, Jr.*, G.R. No. 86695, September 3, 1992, 213 SCRA 516, 526.

²⁶ G.R. No. 183789, August 24, 2011, 656 SCRA 214, 231-232.

²⁷ Sections 13-30 of E.O. No. 40.

²⁸ *Malaga v. Penachos, Jr.*, *supra* note 25.

²⁹ *Nava v. Palattao*, 531 Phil. 345, 367 (2006).

³⁰ *Agan, Jr. v. PIATCO*, 450 Phil. 744, 812-813.