

THIRD DIVISION

[G.R. No. 236383, June 26, 2019]

OFFICE OF THE OMBUDSMAN, PETITIONER, VS. MARILYN H. CELIZ AND LUVISMINDA H. NARCISO, RESPONDENTS.

DECISION

REYES, A., JR., J.:

This is a petition for review on *certiorari*^[1] under Rule 45 of the Rules of Court, seeking to reverse and set aside the Court of Appeals' (CA) Decision^[2] dated September 15, 2017 and Resolution^[3] dated December 11, 2017 in CA-G.R. CEB-SP. No. 10438. The CA partially granted the appeal of respondents Marilyn H. Celiz (Marilyn) and Luvisminda H. Narciso (Luvisminda) from the Decision of the Office of the Ombudsman (OMB), which found them guilty of Grave Misconduct and imposed the penalty of dismissal from the service.

Factual Antecedents

On November 20, 2007, the Department of Public Works and Highways (DPWH) Region VI Director, Rolando M. Asis (Director Asis), submitted the approved Program of Works and Estimates for the proposed Asphalt Overlay Project in Iloilo City to the DPWH Secretary. In the program, it was estimated that the amount of P54,500,000.00 is necessary to implement the project, which intends to repair about 2.4 kilometers of the Iloilo-Jaro Diversion Road, starting from the Iloilo-Antique Road up to Dungon Bridge.^[4]

In a letter dated November 23, 2007, former Iloilo City Mayor Jerry P. Treñas requested Director Asis to immediately implement the project, in time for the upcoming Dinagyang Festival on January 25 to 26, 2008.^[5] Director Asis, thus, requested then DPWH Secretary Hermogenes E. Ebdane, Jr. (Secretary Ebdane) for clearance to implement the project through negotiated procurement. He reasoned that the project is urgent because this was the primary route for the Dinagyang Festival, and there is a need to further promote tourism in the region. On November 29, 2007, Secretary Ebdane approved the request.^[6]

At that time, the DPWH Region VI Bids and Awards Committee (BAC) was composed of Berna C. Coca (Berna) as the Chairman, Luvisminda as the Vice-Chairman, Danilo M. Peroy (Danilo) as a Member, and Fernando S. Tuares (Fernando) and Marilyn as Provisional Members.^[7] On January 2, 2008, the BAC unanimously approved an unnumbered Resolution, which recommended the direct negotiation of the contract for the Asphalt Overlay Project to International Builders' Corporation (IBC). Director Asis approved the Resolution.^[8] Thus, BAC Chairman Berna sent an invitation to the President of IBC, requesting them to submit a quotation for the project, together with the other bid requirements.^[9]

On January 7, 2008, IBC's bid offer was opened and negotiated at the DPWH Regional Office. The following day, the BAC unanimously approved another unnumbered Resolution recommending the award of the project to IBC, with an Approved Budget for the Contract (ABC) in the amount of P54,308,803.44.^[10]

In a letter dated January 9, 2008, Director Asis informed IBC of BAC's recommendation, with the caveat that the Notice to Proceed cannot be issued until the funds to cover the contract cost are released. In light of the unavailability of funds, Director Asis asked the IBC President whether they were willing to take the risk of proceeding with the project, pending the release of an appropriation. He likewise guaranteed to process the payment as soon as the funds for the project are released.^[11] In response, the IBC President agreed to take on the risk, and committed to immediately proceed with the implementation of the Asphalt Overlay Project.^[12]

Meanwhile, on March 5, 2008, the Assistant Ombudsman for Visayas sent a letter to the Regional Cluster Director of the Commission on Audit (COA) Region VI, requesting the conduct of a special audit examination on the Asphalt Overlay Project.^[13] The State Auditor reported that there were no entries in the books showing that allotments were received, and that obligation requests were made for the implementation of the project. Moreover, the DPWH Region VI Budget Officer and the Fiscal Comptroller informed the State Auditor that there was no project contract submitted for certification as to the availability of allotments and availability of funds. Seeing that there are no records of disbursement, the State Auditor concluded that the COA was not yet in a position to conduct the audit of the Asphalt Overlay Project.^[14]

In a letter dated March 17, 2008, the BAC, including respondents Luvisminda and Marilyn, explained to the Assistant Ombudsman for Visayas that the Asphalt Overlay Project was implemented through negotiated procurement because of the urgent and immediate need to repair a primary national road in time for the Dinagyang Festival on January 24 to 26, 2008. The BAC likewise reasoned that IBC's offer complied with the requirements of the project. Considering its past performance in previous asphalting projects, the Asphalt Overlay Project was awarded to IBC.^[15]

On May 13, 2008, an accountant of the DPWH Region VI, Aurora S. Tingzon, certified that there are no available funds, no Sub-Allotment Release Order (SARO), and no Sub-Allotment Advice (SAA) issued for the Asphalt Overlay Project.^[16]

Several months later, or on December 24, 2008, DPWH Undersecretary Bashir D. Rasuman approved the SARO for the project, authorizing the expenditure of P53,595,000.00.^[17] Thereafter, an unnumbered BAC Resolution was issued on January 26, 2009, recommending the award of the contract to IBC in the amount of P52,110,000.00. The BAC also resolved to pay the remaining balance to IBC upon availability of funds. This time, the BAC was composed of Engineer Juby B. Cordon (Juby) as the BAC Chairman, Luvisminda as the BAC Vice-Chairman, Danilo as a Member, and Fernando and Marilyn as Provisional Members. Director Asis approved this BAC Resolution.^[18]

On the same day, Fernando, acting in his capacity as the Officer-in-Charge (OIC) of the Maintenance Division and as the "Project In-Charge," informed the BAC Chairman that the DPWH Region VI had received the SARO in the amount of P53,595,000.00. However, Fernando noted that the amount available for the payment of the project is only P52,110,000.00, as the sum of P1,485,000.00 should be deducted in order to pay for the Engineering and Other Administrative Overhead expenses. For this purpose, Fernando suggested to make an additional request for the remaining balance of P2,198,803.45, to cover the contract amount with IBC.^[19]

On January 28, 2009, the Notice of Award^[20] was issued to the IBC President. Soon after, or on January 29, 2009, the DPWH Region VI and the IBC executed a contract^[21] for the Asphalt Overlay Project. The contract was signed by the DPWH Region VI through BAC Chairman Juby, in her capacity as the OIC-Assistant Regional Director, and Fernando, in his capacity as the OIC-Maintenance Division.^[22]

Subsequently, the OMB Region VI Field Investigation Office (FIO) filed their March 20, 2014 Complaint-Affidavit,^[23] charging the respondents and several other officials and employees of the DPWH Region VI with violating Republic Act (R.A.) No. 9184^[24] and R.A. No. 3019,^[25] and holding them liable for Grave Misconduct. It was specifically alleged that the application of negotiated procurement was unwarranted under the circumstances. There was also no available appropriation at the time of the execution of the contract for the Asphalt Overlay Project. In light of their participation in the procurement and implementation of the Asphalt Overlay Project, the OMB Region VI FIO alleged that the respondents were guilty of Grave Misconduct for patently intending to violate or disregard the procurement law, and for violating Section 3(e) of R.A. No. 3019.^[26]

In their Joint Counter-Affidavit, the respondents and the other DPWH Region VI officials justified the conduct of negotiated procurement by reiterating the urgent necessity for the project. The two-kilometer road was supposedly the primary route for the parade during the Dinagyang Festival, a major access road, and a central part of the province.^[27]

Ruling of the OMB

In a Joint Resolution^[28] dated October 6, 2015, the OMB found probable cause to charge the respondents with a violation of Section 3(e) of R.A. No. 3019. The OMB, likewise, found all of them guilty of Grave Misconduct, and meted the penalty of dismissal from the service, thus:

WHEREFORE, let the attached Information for Violation of Section 3(e) of RA No. 3019 be FILED against respondents Rolando M. Asis, Berna C. Coca, Luvisminda H. Narciso, Fernando S. Tuares, Danilo M. Peroy and Marilyn H. Celiz.

Respondents Rolando M. Asis, Berna C. Coca, Luvisminda H. Narciso, Fernando S. Tuares, Danilo M. Peroy and Marilyn H. Celiz are found GUILTY OF GRAVE MISCONDUCT and hereby meted the penalty of DISMISSAL from the service, which shall carry with it cancellation of eligibility, forfeiture of retirement benefits and the perpetual

disqualification from re-employment in the government service.

In the event that the penalty of dismissal can no longer be imposed due to their separation from the service, it shall be converted into FINE amounting to respondents' salary for ONE (1) YEAR, payable to the Office of the Ombudsman, and may be deducted from their accrued leave credits or any receivable from their office. It is understood, however, that the accessory penalties of forfeiture of retirement benefits, cancellation of eligibility and perpetual disqualification to hold public office shall still be applied.

SO ORDERED.^[29] (Citation omitted)

Aggrieved by the decision of the OMB, the respondents moved for its reconsideration. However, the OMB found the motion unmeritorious in the Order^[30] dated March 21, 2016:

WHEREFORE, respondents' Motion for Reconsideration is DENIED.

SO ORDERED.^[31]

Insofar as their administrative liability was concerned, the respondents filed a Petition for Review under Rule 43 of the Rules of Court before the CA. According to the respondents, they are mere subordinates with no power to question the decision of their superior officers to negotiate the procurement of the Asphalt Overlay Project. They also argued that their participation was limited to signing the BAC resolutions, and as such, there was no corrupt motive on their part.^[32]

Ruling of the CA

In its Decision^[33] promulgated on September 15, 2017, the CA ruled that the respondents violated Section 85(1) of Presidential Decree (P.D.) No. 1445^[34] for entering into the contract with IBC without an appropriation sufficient to cover the cost of the project.^[35] The CA also found that they violated Section 53 of R.A. No. 9184 when they resorted to negotiated procurement without complying with the requirements of the law.^[36] This notwithstanding, the CA found the respondents' appeal partially meritorious. Instead of Grave Misconduct, they were deemed liable for Simple Misconduct because there was no evidence of corrupt motives on their part.^[37] The dispositive portion of the CA's decision, thus, reads:

WHEREFORE, the *Petition For Review under Rule 43* filed by petitioners Marilyn H. Celiz and Luvisminda H. Narciso is PARTIALLY GRANTED. The Office of the Ombudsman's 6 October 2015 *Joint Resolution* in OMB-V-C-14-0182 and OMB-V-A-14-0174 is MODIFIED. We find petitioners Marilyn H. Celiz and Luvisminda H. Narciso guilty of SIMPLE MISCONDUCT and are hereby meted the penalty of SUSPENSION for ONE (1) MONTH and ONE (1) DAY.

Petitioners who have not retired shall be REINSTATED after serving their suspension. They shall be entitled to payment of backwages and all benefits from the time that they served the foregoing suspension up to

the time of their actual reinstatement.

SO ORDERED.^[38]

The decision of the CA to hold the respondents liable for Simple Misconduct constrained the OMB to file a Motion for Partial Reconsideration. But in the CA's Resolution^[39] dated December 11, 2017, the OMB's motion was denied for failing to assert new matters that would warrant the reversal of the decision. The CA further ruled that the motion was filed late.^[40]

Disagreeing with the findings of the CA, the OMB filed the present petition for review, attributing reversible errors on the CA. The OMB argues that the CA clearly found that the respondents violated P.D. No. 1445 and R.A. No. 9184 in the procurement of the Asphalt Overlay Project. For this reason, the OMB asserts that respondents, as BAC members who assented to the violation of the relevant procurement laws, should be held liable for Grave Misconduct. The OMB further claims that the respondents were not entitled to the award of backwages.^[41]

As to the belated filing of their motion for partial reconsideration, the OMB argues that work in all government offices was suspended on October 16 and 17, 2017 in view of the nationwide transport strike. Thus, the filing of the motion on the next working day, or on October 18, 2017, was timely.^[42]

Ruling of the Court

Essentially, the Court is tasked to resolve whether the respondents should be held administratively liable for Grave Misconduct, rather than Simple Misconduct. In view of the factual circumstances of this case, the Court finds the petition meritorious.

The OMB's motion for partial reconsideration was timely filed.

Preliminarily, it bears noting that the CA incorrectly denied the OMB's motion for partial reconsideration on the ground that it was belatedly filed.

The OMB concedes that the last day for the filing of its motion for reconsideration was on October 16, 2017, and that its motion was actually filed on October 18, 2017. Nevertheless, as the OMB clearly pointed out in its petition, the Office of the President declared a suspension of government work on October 16-17, 2017 due to the nationwide transport strike.^[43] As such, the deadline for the OMB's motion for reconsideration lapsed on the next working day, or on October 18, 2017. Since the OMB filed its Motion for Partial Reconsideration on said date, the motion was not filed out of time.

The respondents violated R.A. No. 9184 and P.D. No. 1445 in the procurement of the Asphalt Overlay Project.

Generally, all government procurement must be done through competitive bidding.^[44] Alternative methods of procurement, however, are available under the conditions provided in R.A. No. 9184.^[45] For infrastructure projects in particular, the only alternative mode is negotiated procurement.^[46]