

EN BANC

[G.R. No. 157838, March 08, 2011]

CANDELARIO L. VERZOSA, JR. (IN HIS FORMER CAPACITY AS EXECUTIVE DIRECTOR OF THE COOPERATIVE DEVELOPMENT AUTHORITY), PETITIONER, VS. GUILLERMO N. CARAGUE (IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE COMMISSION ON AUDIT), RAUL C. FLORES, CELSO D. GANGAN, SOFRONIO B. URSAL AND COMMISSION ON AUDIT, RESPONDENTS.

DECISION

VILLARAMA, JR., J.:

The present petition for review on certiorari assails the Decision Nos. 98-424^[1] and 2003-061^[2] dated October 21, 1998 and March 18, 2003, respectively, of the Commission on Audit (COA) affirming the Notice of Disallowance No. 93-0016-101 dated November 17, 1993 and the corresponding CSB No. 94-001-101 dated January 10, 1994.

The facts are:

On two separate occasions in December 1992, the Cooperative Development Authority (CDA) purchased from Tetra Corporation (Tetra) a total of forty-six (46) units of computer equipment and peripherals in the total amount of P2,285,279.00. Tetra was chosen from among three qualified bidders (Tetra, Microcircuits and Columbia). In the technical evaluation of the units to be supplied by the qualified bidders, CDA engaged the services of the Development Academy of the Philippines-Technical Evaluation Committee (DAP-TEC). The bidding was conducted in accordance with the Approved Guidelines and Procedures of Public Bidding for Information Technology (IT) Resources and Memorandum Order No. 237 issued by the Office of the President. Petitioner who was then the Executive Director of the CDA approved the purchase.

On May 18, 1993, the Resident Auditor sought the assistance of the Technical Services Office (TSO), COA in the determination of the reasonableness of the prices of the purchased computers.^[3] In its reply-letter dated October 18, 1993, the TSO found that the purchased computers were overpriced/excessive by a total of P881,819.00. It was noted that (1) no volume discount was given by the supplier, considering the number of units sold; (2) as early as 1992, there were so much supply of computers in the market so that the prices of computers were relatively low already; and (3) when CDA first offered to buy computers, of the three qualified bidders, Microcircuits offered the lowest bid of P1,123,315.00 while Tetra offered the highest bid of P1,269,630.00.^[4] The Resident Auditor issued Notice of Disallowance No. 93-0016-101 dated November 17, 1993, for the amount of P881,819.00.^[5]

In a letter^[6] dated May 13, 1994, CDA Chairman Edna E. Aberilla appealed for reconsideration of the disallowance to COA Chairman Celso D. Gangan, submitting the following justifications:

[1.] The basis of comparison (Genesis vs. Trigem computers and ferro-resonant type UPS vs. ordinary UPS) is erroneous, as it is like comparing apples to oranges. x x x Genesis, a non-branded computer, is incomparable to Trigem, a branded computer in the same manner as the MAGTEK-UPS, a ferro-resonant type of UPS, should not be compared with APC-1000W, ADMATE 1000W and PK 1000W, which are all ordinary types of UPS.

x x x It would have been more appropriate, therefore, to compare the acquired computer equipment and peripherals with the same models of other branded computers.

[2.] The technical specifications and other added features were given due weight. x x x [T]he criteria for determining the winning bidder is as follows:

Cost/price 50%
Technical Specifications 30%
Support Services 20%

[3.] The same technical specifications and special features explained the advantages of the acquired computer equipment and peripherals with those that are being compared with. With regards to our branded computer, the advantages include the following:

[a.] Original and Licensed Copy of its Disk Operating System specifically MS-DOS Ver 5.0.

[b.] Original and Licensed Operating System Diskettes and its Manuals.

x x x x

[c.] User's Manual and Installation Guide x x x

[d.] Computers offered should run PROGRESS Application Development System as indicated in the Bid Document x x x because the developing system for the establishment of the agency's Management Information System (MIS) is based on PROGRESS Application Software.

[e.] Legal Bios/License Agreement for the particular brand of computers offered to CDA. x x x

With these features, the agency is assured that the computers were acquired through a legitimate process (not smuggled/"pirated"), thereby, upholding the agency's respect for Intellectual Property Law or P.D. No. 49.

With regard to the UPS, x x x it is a ferro-resonant type x x x [which has] advantages to ensure greater reliability and will enable users to operate without interruption.

[4.] [As declared in] COA Circular No. 85-55-A, "the price is not necessarily excessive when the service/item is offered with warranty or special features which are relevant to the needs of the agency and are reflected in the offer or award. As will be seen from the criteria adopted by the agency, both the warranty and special features were considered and given corresponding weights in the computation for the support services offered by the bidder.

[5.] x x x [T]here is no overpricing because in the process of comparing "apples vs. apples", the other buyers in effect procured their units at a higher price than those of the CDA. We x x x are still in the process of gathering additional data of other transactions to further support our stand. x x x

[6.] x x x The rapid changes due to research and development in Information Technology (I.T.) results in the significant reduction of prices of computer equipment. x x x [M]aking a comparison given two different periods (December 1992 vs. August 1993) may be invalid x x x.

[7.] The procedures of the public bidding as adopted by the [CDA] x x x demonstrate a very effective mechanism for avoiding any possible overpricing.

[7]

In compliance with the request of the Legal Office Director, the TSO submitted its comments on the justifications submitted by the CDA. On the non-comparability of Genesis and Trigem brands, it explained that the reference values were in accordance with the same specifications but exclusive of the "branded" information, since this was not stated in the P.O./Invoice, which was used as basis of the canvass. Since the said brands are both computers of the same general characteristics/attributes, the branded and non-branded labels propounded by the supplier is of scant consideration. As regards the UPS, it was pointed out that the enumerated advantages of the delivered items are the same advantages that can be generated from a UPS of the same specifications and standard features; in this case, the reference value pertains to a UPS with the same capacity, input, output, battery pack and back-up time, except for the brand. As to the period of purchase by the CDA, the TSO noted that based on its monitoring from October 1993 to May 1994, prices of Star and Epson printers and hard disk (120 MB Model St-3144A) either remained the same or even increased by 2% to 5%. It is therefore valid that the price of an item is the same from one period to another, and that an item may be available unless it is out of stock, or phased out, with or without a replacement. In this case, the reference value cannot be considered as the reduced price as a result of rapid changes due to research since the said reference value is the price for the same model already existing in December 1992 when the purchase was made and still available in August 1993, and not an equivalent nor replacement of a phased out model.[8]

On the other hand, the Resident Auditor maintained her stand on the disallowance and submitted to Assistant Commissioner Raul C. Flores her replies to the CDA's justifications, as follows: (1) on the allegedly erroneous comparison between Genesis and Trigem brands, if this will be the basis, then their bidding will not be acceptable because in the Abstract of Bids, the comparison of prices was not based on similar brands, *i.e.*, Tetra offered Trigem-Korean for P1,269,620, Microcircuits offered Arche-US brand for P1,123,315, and Columbia offered Acer-Taiwan brand for P1,476,600; what is important is that, the specifications and functions are similar; (2) the 2nd, 3rd and 4th justifications are of no moment as all the offers of the three qualified bidders were of similar technical specifications, features and warranty as contained in the Proposal Bid Form; (3) on the 5th justification -- the companies referred to procured only one unit each and of much higher grade; (4) on the 6th justification -- while the date of the canvass conducted by the TSO does not coincide with the date of purchase, there is no showing that foreign exchange rate changed during the latter part of 1992 which will significantly increase the prices of computers; and (5) on the 7th justification -- while the COA witnessed the public bidding, the post-evaluation was left to the Pre-qualifications, Bids and Awards Committee (PBAC). The National Government Audit Office I concurred with the opinion of the Resident Auditor that CDA's request may not be given due course.[9]

On October 21, 1998, respondent COA issued the assailed decision affirming the disallowance. It held that whether or not the product is branded is irrelevant in the determination of the reasonableness of the price since the brand was not stated in the Call

for Bids nor in the Purchase Order. The bids of the three qualified bidders were based on similar technical specifications, features and warranty as contained in their proposals. It was also found that the performance of the competing computer equipment would not vary or change even if the attributes or characteristics of said computers cited by petitioner were to be factored in. The difference in brands, microprocessors, BIOSes, as well as casings will not affect the efficiency of the computer's performance.^[10]

Further, COA declared that CDA should not have awarded the contract to Tetra but to the other competing bidders, whose bid is more advantageous to the government. It noted that Microcircuits offered the lowest bid of P1,123,315.00 for the US brand said to be more durable than the Korean brand supplied by Tetra. CDA also should have been entitled to volume discount considering the number of units it procured from Tetra. Lastly, COA emphasized that the requirements and specifications of the end-user are of prime consideration and the other added features of the equipment, if not specified or needed by the end-user, should not be taken into account in determining the purchase price. The conduct of public bidding should be made objectively with the end in view of purchasing quality equipment as needed at the least cost to the government. The price for the equipment delivered having been paid, when such equipment could be acquired at a lower cost, the disallowance of the price difference was justified.^[11]

Petitioner's motion for reconsideration having been denied, he now comes to this Court for relief on the following grounds:

RESPONDENT COMMISSION ON AUDIT'S FINDING THAT THE AMOUNT OF P881,819.00 SHOULD BE DISALLOWED IN THE PURCHASE OF THE COMPUTER EQUIPMENT BY THE CDA IS NOT SUPPORTED BY EVIDENCE AND IS CONTRADICTORY TO LAW AND JURISPRUDENCE.

RESPONDENT COMMISSION ON AUDIT ERRED IN HOLDING THE PETITIONER PERSONALLY AND SOLIDARILY LIABLE FOR THE DISALLOWED SUM OF P881,819.00, ABSENT ANY FINDING MUCH LESS EVEN AN ALLEGATION THAT HE HAD ACTED IN BAD FAITH, WITH MALICIOUS INTENT OR WITH NEGLIGENCE IN THE PURCHASE OF THE COMPUTER EQUIPMENT BY THE CDA.

^[12]

Petitioner reiterates his argument that price was not the sole criteria in determining the winning bid for the purchased computers, price comprising only 50% of the criteria, while technical evaluation and support services were accorded 30% and 20%, respectively. He points out that the computer/hardware of generic class which was provided to the COA-TSO with low-priced quotations for comparison with the winning bid and as bases for disallowance in audit, never underwent technical or physical evaluation as did the computer equipment of the three final bidders. Moreover, the CDA-PBAC Bidding Procedure was designed in such a way that generic type (cloned) computers were eliminated even in the pre-qualification stage. It is for this reason that the final bidders all offered *branded computers* which, by their very nature, were all considered to be efficient by no less than the Information Technology Center (ITC) of the COA, as mentioned in the memorandum dated December 9, 1996 of Director Marieta SF. Acorda. The mere fact that the offered computers had different manufacturers can lead to a reasonable conclusion that the life spans of the same and reliability would also vary.^[13]

As to the COA's position that even if only the price was considered, the contract should have been awarded to Microcircuits, petitioner points out that in such a case, CDA's disallowance would have been only P140,000.00, much lower than the present

P881,819.00 disallowance. But as it is, on the basis of the three criteria applied during the pre-qualification stage, Tetra garnered the highest points as certified by the PBAC in its memorandum-update dated November 20, 1992. The application of all three criteria meets the standard set by COA Circular No. 85-55-A. Thus, although Microcircuits got the highest percentage on Cost/Price factor, it only ranked second in over-all performance, to Tetra, as evaluated by the PBAC.^[14]

Petitioner cites the dissenting opinion^[15] of COA Commissioner Emmanuel M. Dalman who found no overpricing in this case and the CDA decision as one done in good faith and with the presumption of regularity in the performance of official functions. Indeed, it behooved on COA to prove that the standards set by the COA circular were met in audit disallowance; it even failed to produce actual canvass sheets and/or price quotations from identified suppliers. The Summary of Price Data and comparison sheets attached to the Notice of Disallowance by themselves are not sufficient basis for the disallowance herein since they do not satisfy the requirement highlighted in the case of *Arriola v. Commission on Audit*.^[16] The COA auditor herself (author of the Notice of Disallowance) admitted that she did not personally prepare actual canvass sheets and only a telephone canvass was conducted. As to the volume discount, again no evidence was adduced to show that the other bidders would have given the same if the contract was awarded to them. What is certain is that, owing to the consideration of the two major criteria of "technical evaluation" and "after-sales support", most of the computer equipments provided by Tetra pursuant to the disallowed transaction are still functioning to date, even after twelve (12) years of continued use.^[17]

Finally, petitioner contends that he should not be made personally liable for the disallowed expense. He invokes the prevailing doctrine that unless they have exceeded their authority, corporate officers, as a general rule, are not personally liable for their official acts, because a corporation, by legal fiction, has a personality separate and distinct from its officers, stockholders and members. CDA though a government corporation, there is no single allegation or imputation, much less any evidence of any act, constituting bad faith, malice or negligence on the part of petitioner during his service as Executive Director of the CDA, he being a mere signatory to the documents after the winning bidder had been chosen, and was only a recommending officer on these matters.^[18]

In its Manifestation and Motion^[19] dated September 10, 2003, the Office of the Solicitor General stated that after a thorough review of the records of the case, it is constrained to adopt a position adverse to the COA.

Respondents filed their Comment, arguing that this Court's jurisdiction was not correctly invoked by petitioner who filed a petition for review under Rule 45 and not a petition for certiorari under Rule 65. Petitioner failed to allege that respondents acted without or in excess of their jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction. On the allegation that their finding of overprice was not supported by evidence, respondents assert that the evaluation report of the DAP-TEC clearly showed that Tetra ranked last in its evaluation while Microcircuits ranked the highest. It was clear that the most advantageous deal for the government should have been concluded with Microcircuits since their computer specifications were at par with those of Tetra and they offered a much lower cost to the government - *lower than half the price offered by Tetra*.^[20]

Moreover, respondents point out that petitioner's contention that price was not the only basis for the award is negated by the finding of the Resident Auditor (Luzviminda V. Rubico) that the DAP-TEC technical evaluation report which became the basis for declaring Tetra as the winning bidder, was fraudulently acquired. Director Mesina signed the same