

EN BANC

[G.R. No. 175608, June 08, 2007]

DEPARTMENT OF BUDGET AND MANAGEMENT PROCUREMENT SERVICE (DBM-PS) AND THE INTER-AGENCY BIDS AND AWARDS COMMITTEE (IABAC), PETITIONERS, VS. KOLONWEL TRADING, RESPONDENT.

[G.R. NO. 175616]

VIBAL PUBLISHING HOUSE, INC., LG & M CORPORATION AND SD PUBLICATIONS, INC., PETITIONERS, VS. KOLONWEL TRADING, RESPONDENT.

[G.R. NO. 175659]

DEPARTMENT OF EDUCATION, PETITIONER, VS. KOLONWEL TRADING, RESPONDENT.

D E C I S I O N

GARCIA, J.:

Before the Court are these consolidated three (3) petitions for review under Rule 45 of the Rules of Court, with a prayer for a temporary restraining order, to nullify and set aside the **Order^[1] dated December 4, 2006** of the Manila Regional Trial Court (RTC), Branch 18, in *SP Civil Case No. 06-116010*, a special civil action for *certiorari* and prohibition thereat commenced by herein respondent Kolonwel Trading (Kolonwel for short) against the Department of Budget and Management Procurement Service (DBM-PS), *et al.*

At the core of the controversy are the bidding and the eventual contract awards for the supply and delivery of some 17.5 million copies of *Makabayan* (social studies) textbooks and teachers manuals, a project of the Department of Education (DepEd).

The factual antecedents:

In the middle of 2005, the DepEd requested the services of the DBM-PS to undertake the aforementioned procurement project which is to be jointly funded by the World Bank (WB), through the Second Social Expenditure Management Program (SEMP2) of the Philippines (RP) – International Bank for Reconstruction and Development (IBRD) Loan Agreement No. 7118-PH^[2] (Loan No. 7118-PH, hereinafter) dated September 12, 2002; and the Asian Development Bank (ADB), through SEDIP Loan No. 1654-PHI. Earlier, the Executive Director of the Government Procurement Policy Board (GPPB), in reply to a DepEd query, stated that "*procurement[s] for MAKABAYAN ...textbooks where funds therefore (sic) are sourced from World Bank Loan shall be governed by the applicable procurement*

guidelines of the foreign lending institution. The 2005 Call for Submission of Textbooks and Teacher's Manuals shall be viewed vis-à-vis relevant World Bank guidelines."^[3]

On October 27, 2005, the DBM-PS Inter-Agency Bids and Awards Committee (IABAC) called for a bidding for the supply of the *Makabayan* textbooks and manuals, divided into three (3) lots, to wit: Lot 1 for *Sibika* Grades 1-3; Lot 2 for *HeKaSi* Grades 4-6 and Lot 3 for *Araling Panlipunan* Years I-IV. Of the entities, foreign and local, which responded and procured the *Bidding Documents*,^[4] only eleven (11) bidders submitted, either as principal or in joint venture arrangement, proposals for the different lots. Among them were **Watana Phanit Printing & Publishing Co., Ltd.**, of Thailand (Watana, for short), petitioner **Vibal Publishing House, Inc.**, (Vibal, hereinafter), **Daewoo International Corporation of South Korea** (Daewoo, for brevity) and respondent **Kolonwel**. Kolonwel's tender appeared to cover all three (3) lots.^[5]

Following the bid and the book content/body evaluation process, the IABAC, via Resolution (Res.) No. 001-2006^[6] dated March 9, 2006, resolved "*to recommend to the [WB] and the [ADB] failure of bids for all lots in view of the abovementioned disqualifications, non-compliance and reservations of [DepEd].*" Issues of "*Conflict of interest*" with respect to Watana and Vibal, "*failure in cover stock testing*" for Kolonwel and DepEd's "*reservation*" were among the disqualifying reasons stated in the resolution.

On March 15, 2006, the IABAC submitted to WB for its review and information Res. No. 001-2006. Appended to the covering letter was a document entitled "*Bid Evaluation Report and Recommendation for Award of Contract.*"^[7]

The following events, as recited in the assailed Manila RTC order and as borne out by the records, then transpired:

1. In a letter^[8] dated April 24, 2006 to the DepEd and the DBM-PS IABAC Chairman, the WB, through its Regional Senior Economist, Ms. Rekha Menon, disagreed, for stated reasons, with the IABAC's finding of conflict of interest on the part of Vibal and Watana and the rejection of their bids. Ms. Menon, however, upheld the disqualification of all the other bidders. She thus asked the IABAC to review its evaluation and to provide the WB with the revised Bid Evaluation Report (BER), taking into account the **December 31, 2006 RP-IBRD Loan closing date**.
2. On May 11, 2006, the IABAC informed Kolonwel of its or its bid's failure to post qualify and of the grounds for the failure.^[9]

In its reply-letter of May 18, 2006,^[10] Kolonwel raised several issues and requested that its disqualification be reconsidered and set aside. In reaction, IABAC apprised WB of Kolonwel's concerns stated in its letter-reply.

3. Subsequently, the IABAC, agreeing with WB's position articulated in Ms. Menon, issued **Res. No. 001-2006-A** effectively **recommending** to WB the contract award to **Vibal** of *Sibika* 1 & 3 and *HekaSi* 5; to **Watana** of *Sibika* 2 and *HeKaSi* 4 & 5 and to Daewoo of *Sibika* 3. Upon review, WB offered "no objection" to the recommended award.^[11]
4. The issuance of notices of award and the execution on September 12, 2006 of the corresponding **Purchaser-Supplier** contracts followed.^[12]
5. On June 23, 2006, the DBM-PS IABAC chairman informed Kolonwel of the denial of its request for reconsideration and of the WB's concurrence with the denial.^[13] The IABAC denied, on September 8, 2006, a second request for reconsideration of Kolonwel^[14] after WB found the reasons therefor, as detailed in PS IABAC Res. No. 001-2006-B^[15] dated July 18, 2006, unmeritorious, particularly on the aspect of cover stock testing.

Such was the state of things when on, October 12, 2006, Kolonwel filed with the RTC of Manila a special civil action for *certiorari* and prohibition with a prayer for a temporary restraining order (TRO) and/or writ of preliminary injunction. Docketed as *SP Civil Case No. 06-116010*, and raffled to Branch 18 of the court,^[16] the petition sought to nullify IABAC Res. Nos. 001-2006 and 001-2006-A and to set aside the contract awards in favor of Vibal and Watana. In support of its TRO application, Kolonwel alleged, among other things, that the supply-awardees were rushing with the implementation of the void supply contracts to beat the loan closing-date deadline.

A week after, the Manila RTC scheduled - and eventually conducted - a summary hearing on the TRO application. In an order^[17] of October 31, 2006, as amended in another order^[18] dated November 20, 2006, the court granted a 20-day TRO enjoining the IABAC, *et al*, starting November 6, 2006, from proceeding with the subject September 12, 2006 purchase- supply contracts. In the original order, the court set the preliminary conference and hearing for the applied preliminary injunction on November 7, and 8, 2006, respectively.

In the meantime, Vibal filed an urgent motion to dismiss^[19] Kolonwel's petition on several grounds, among them want of jurisdiction and lack of cause of action, *inter alia* alleging that the latter had pursued judicial relief without first complying with the protest procedure prescribed by Republic Act (R.A.) No. 9184, otherwise known as the "*Government Procurement Reform Act*." The DepEd later followed with its own motion to dismiss, partly based on the same protest provision. As records show, the trial court did not conduct a hearing on either dismissal motions, albeit it heard the parties on their opposing claims respecting the propriety of issuing a writ of preliminary injunction.

On December 4, 2006, the Manila RTC issued its assailed Order ^[20] finding for Kolonwel, as petitioner a quo, disposing as follows:

WHEREFORE, the court grants the petition for certiorari and prohibition. The IABAC **Resolution No. 001-2006-A** dated May 30, 2006 **is annulled** and set aside. IABAC Resolution No. 001-2006 is declared validly and regularly issued in the absence of a showing of grave abuse of discretion or excess of jurisdiction. **All subsequent actions of the respondents resulting from the issuance of IABAC Resolution No. 001-2006-A are consequently nullified and set aside.** This court grants a final injunction pursuant to Sec. 9 of Rule 58 of the Rules of Court as amended, restraining respondents Department of Education and Culture (sic), [DBM-PS], [IABAC], Vibal Publishing House, Inc., LG & M Corporation and SD Publications from the commission or continuance of acts, contracts or transactions proceeding from the issuance of IABAC Resolution No. 001-2006-A.

SO ORDERED. (Emphasis and words in brackets supplied)

Hence, these three (3) petitions which the Court, per its Resolution^[21] of January 16, 2007, ordered consolidated. Earlier, the Court issued, in *G. R. No. 175616*, a TRO^[22] enjoining the presiding judge^[23] of the RTC of Manila, Branch 18, from proceeding with *SP Civil Case No. 06-116010* or implementing its assailed order.

Petitioners urge the annulment of the assailed RTC **Order dated December 4, 2006**, on jurisdictional ground, among others. It is their parallel posture that the Manila RTC erred in assuming jurisdiction over the case despite respondent Kolonwel's failure to observe the protest mechanism provided under Sec. 55 in relation to Secs. 57 and 58 of R.A. No. 9184, respectively reading as follows:

Sec. 55. *Protest on Decision of the BAC*.- Decisions of the BAC [Bids and Awards Committee] in all stages of procurement may be **protested to the head of the procuring entity....** Decisions of the BAC may be protested by filing a verified position paper and paying a non-refundable protest fee. The **amount of the protest fee and the periods during which the protest may be filed and resolved shall be specific in the IRR.**

Sec. 57. *Non-interruption of the Bidding Process*. In no case shall any process taken from any decision treated in this Article stay or delay the bidding process. Protests must first be resolved before any award is made.

Sec. 58. *Report to Regular Courts; Certiorari*.-Court action may be resorted to **only after the protests** contemplated in this Article shall have been completed. Cases that are filed in violation of the process specified in this article shall be dismissed for lack of jurisdiction. The [RTC] shall have **jurisdiction over final decisions** of the head of the procuring entity. (Emphasis and words in bracket added.)

As a counterpoint, the respondent draws attention to its having twice asked, and having been twice spurned by, the IABAC to reconsider its disqualification, obviously agreeing with the Manila RTC that the judicial window was already opened under the exhaustion of available administrative remedies principle. In the same breath, however, the respondent would argue, again following the RTC's line, that it was

prevented from filing a protest inasmuch as the government had not issued the Implementing Rules and Regulations (IRR) of R.A. No. 9184 to render the protest mechanism of the law operative for foreign-funded projects.

The Court is unable to lend concurrence to the trial court's and respondent's positions on the interplay of the protest and jurisdictional issues. As may be noted, the aforequoted Section 55 of R.A. No. 9184 sets three (3) requirements that must be met by the party desiring to protest the decision of the Bids and Awards Committee (BAC). These are: 1) the protest must be in writing, in the form of a verified position paper; 2) the protest must be submitted to the head of the procuring entity; and 3) the payment of a non-refundable protest fee. The jurisdictional caveat that authorizes courts to assume or, inversely, precludes courts from assuming, jurisdiction over suits assailing the BAC's decisions is in turn found in the succeeding Section 58 which provides that the courts would have jurisdiction over such suits only if the protest procedure has already been completed.

Respondent's letters of May 18, 2006^[24] and June 28, 2006^[25] in which it requested reconsideration of its disqualification cannot plausibly be given the status of a protest in the context of the aforequoted provisions of R.A. No. 9184. For one, neither of the letter-request was addressed to the head of the procuring entity, in this case the DepEd Secretary or the head of the DBM Procurement Service, as required by law. For another, the same letters were unverified. And not to be overlooked of course is the fact that the third protest-completing requirement, *i.e.*, payment of protest fee, was not complied with.

Given the above perspective, it cannot really be said that the respondent availed itself of the protest procedure prescribed under Section 55 of R.A. No. 9184 before going to the RTC of Manila *via* a petition for *certiorari*. Stated a bit differently, respondent sought judicial intervention even before duly completing the protest process. Hence, its filing of *SP Civil Case No. 06-116010* was precipitate. Or, as the law itself would put it, cases that are filed in violation of the protest process "shall be dismissed for lack of jurisdiction."

Considering that the respondent's petition in RTC Manila was actually filed in violation of the protest process set forth in Section 55 of R.A. No. 9184, that court could not have lawfully acquired jurisdiction over the subject matter of this case. In fact, Section 58, *supra*, of R.A. No. 9184 emphatically states that cases filed in violation of the protest process therein provided "*shall be dismissed for lack of jurisdiction.*"

It is to be stressed that the protest mechanism adverted to is a built-in administrative remedy embodied in the law itself. It was not prescribed by an administrative agency tasked with implementing a statute through the medium of interpretative circulars or bulletins. Ignoring thus this administrative remedy would be to defy the law itself.

It will not avail the respondent any to argue that the absence of an IRR to make the protest mechanism under R.A. No. 9184 become operative for foreign-funded projects was what prevented it from complying with the protest procedure. As the last sentence of the afore-quoted Section 55 of R.A. No. 9184 is couched, the specific office of an IRR for foreign-funded project, *vis-à-vis* the matter of protest, is limited to fixing "*the amount of the protest fee and the periods during which the*