

EN BANC

[G.R. NO. 151987, March 18, 2005]

DIRECTOR FREDRIC VILLANUEVA, ATTY. JOSEPH HUMIDING, ENGR. FRANCIS BASALI, AND TESSIE BRINGAS, PETITIONERS, VS. THE COMMISSION ON AUDIT, HEREIN REPRESENTED BY GUILLERMO N. CARAGUE, RAUL C. FLORES AND EMMANUEL DALMAN, IN THEIR CAPACITY AS CHAIRMAN AND COMMISSIONERS, RESPECTIVELY, RESPONDENTS.

D E C I S I O N**CHICO-NAZARIO, J.:**

This original action for *certiorari* with prayer for temporary restraining order and preliminary injunction seeks the reversal of the 12 September 2000 Decision of the Commission on Audit (COA) as well as its 06 December 2001 Resolution denying the motion for reconsideration of petitioners herein.^[1] The assailed decision and resolution both affirmed the Special Audit Office (SAO) Report No. 95-31 of the Special Audit Office of the COA recommending the filing of criminal charges against petitioners for violation of Section 3(e) of Republic Act No. 3019,^[2] as amended, and requiring petitioners to refund the amount of P316,138.50 representing an alleged overprice in the purchase of polyethylene plastic bags which the Special Audit Team disallowed on post-audit.

From the parties' respective pleadings, the generative facts of the case are as follows:

1. On 6 August 1993, an unnumbered Special Order of 1993 of the Department of Environment and Natural Resources (DENR) was issued designating the Chief of Planning Division (herein petitioner Engr. Francis Basali) and the Chief of the Legal Division (herein petitioner Atty. Joseph Humiding) as members of the Bids and Awards Committee of the DENR-Cordillera Administrative Region (DENR-CAR), Baguio City. They were to join the previous appointee, herein petitioners Director Fredric Villanueva and the Secretariat Tessie B. Bringas;^[3]
2. In 1994, petitioners held the same positions in a hold-over capacity as there were yet no appointees to take their place. Petitioner Veneracion then took over as the Officer-In-Charge Regional Executive Director (OIC-RED) of DENR-CAR;^[4]
3. During the said time, the DENR-CAR was tasked as implementing agency of a national project dubbed "Adopt-A-Street/Park Program" throughout the Cordillera Administrative Region pursuant to the provisions of Executive Order No. 100 (1993) and Joint Memorandum Circular No. 1 (1993). E.O. No. 100, in particular, specifically mandated the active participation of all government agencies nationwide in the "urban greening" program. As lead agency, the DENR-CAR had to produce as many pine tree seedlings as possible for the tree-planting activities of the other government agencies in the Cordillera Administrative Region;^[5]
4. Polyethylene plastic bags needed by the DENR-CAR in the production of pine tree seedlings had to be purchased at the soonest possible time as the propagation of pine seedlings had to be conducted before the end of the rainy season. Hence, petitioner Veneracion, as OIC-RED, directed the conduct of a bidding for the procurement of polyethylene plastic bags;^[6]
5. In preparation for the bidding that was to be conducted on 12 July 1994, the following steps were taken by the office of petitioner Veneracion:
 - a. The preparation of the Invitation to Bid which invited "all interested bidders to submit sealed bids for the purchase of polyethylene plastic bags for use in seedling production";^[7]
 - b. The posting of said Invitation To Bid at the bulletin boards of the different sectors under the DENR-CAR;^[8]
 - c. The preparation of canvass papers inviting the submission of quotations on the lowest prices of the plastic bags sought to be purchased;^[9]
 - d. The distribution of said canvass papers and invitation to bid, by mail and personal delivery, to known suppliers of the DENR-CAR;^[10]
6. Suppliers of the DENR-CAR were invited to submit bid offers, either by mail or through personal delivery of the canvass papers. These were:^[11]
 - a. Fluid Air Technologies (Fluid Air), based in Quezon City, Metro Manila;
 - b. Kinship Industrial Sales and Services (Kinship Industrial), also based in Quezon City, Metro Manila;

c. Torquoise Commercial and Industrial Sales and Services, Inc., based in Parañaque City, Metro Manila; and

d. Prince Enterprises, based in Baguio City.

7. The first three (3) establishments submitted their sealed bids to the Office of the Regional Executive Director which forwarded the same to the Prequalification Bids and Awards Committee (PBAC). Petitioners Villanueva, Humiding and Basali were members of the PBAC;^[12]
8. On 12 July 1994, the PBAC, composed of herein petitioners, conducted its deliberations. Estrellita B. Belandres, the resident auditor of the DENR-CAR from the respondent COA Regional Office of the Cordillera Administrative Region, personally attended the deliberations;^[13]
9. During the opening of the sealed bids, with COA Auditor Belandres in attendance, the PBAC found that the bids tendered by Fluid Air and Kinship Industrial were the "most advantageous to the government," hence, they were declared the winning bidders;^[14]
10. Pursuant thereto, the DENR-CAR purchased from Kinship Industrial and from Fluid Air polyethylene plastic bags in varying sizes and quantities;^[15]
11. In her "Independent Auditor's Report" dated 14 February 1995, auditor Belandres stated in part:

In our opinion, except for the effect of any adjustments which might have been made had the agency conducted a physical count of its inventories and fixed assets as of December 31, 1994 or had the records allowed us to apply alternative procedures, the financial statements referred to above present fairly, in all material respects, the financial position of the Department of Environment and Natural Resources as of December 31, 1994, and the results of its operations for the year ended in accordance with applicable laws and regulations and in conformity with generally accepted state accounting principles;^[16]

12. From 2 March to 5 May 1995, however, a special audit was conducted by the Special Audit Office of respondent COA, in compliance with COA Assignment Order 95-030 dated 23 February 1995, on selected financial transactions and operations of the DENR-CAR for the calendar years 1992 to 1994. The reasons behind the audit were contained in a Memorandum dated 6 March 1997, addressed to the COA Chairman, from Gregoria S. Ong, Director of the Special Audit Office, COA, where Director Ong stated that "disbursements for purchases of plastic bags, office supplies and equipment were examined for legality, regularity and propriety;"^[17]
13. In its report (SAO Report No. 95-31), the audit team declared that the purchase of plastic bags were made without a public bidding and that the acquisition was marked by an overprice of as much as P316,138.50. The audit team thus recommended the filing of criminal charges against the officers concerned pursuant to Section 3(e) of Republic Act No. 3019, as amended, and recovery of the amount of P316,138.50 representing the alleged overprice in the purchase of said plastic bags;^[18]
14. On 11 March 1997, the Special Audit Office, through State Auditor Vivencio C. Quiambao, Jr., issued a Notice of Disallowance of the amount of P154,664.90 representing the total alleged overprice in the purchase of plastic bags from Kinship Industrial. Another Notice of Disallowance was issued against plastic bags supplied by Fluid Air in the amount of P161,473.60;^[19]
15. On 2 July 1997, petitioners filed a letter-request for reconsideration of the findings of the Audit Team;^[20]
16. On 12 September 2000, respondent COA rendered the first assailed decision dismissing petitioners' request for reconsideration, the dispositive portion of which reads:

Accordingly, the instant appeal for reconsideration of the findings under SAO Report No. 95-31, specifically Findings No. 1, 7 and 8, except for the procurement of 24 units of overhead projectors covered by Notice of Disallowance No. 014-03-97 for P27,960.00, cannot be given due course. It is directed that a copy of this decision be furnished the Office of the Ombudsman for Luzon for filing of appropriate criminal action against those accountable officers responsible for the irregularities committed relative thereto.^[21]

17. On 17 October 2000, petitioners filed a Motion for Reconsideration which was denied, for lack of merit by respondent COA in the second assailed Resolution dated 6 December 2001.^[22]

Hence, the instant petition where it is averred that respondent COA gravely abused its discretion amounting to lack or excess of jurisdiction –

. . . IN FINDING THAT PETITIONERS SHOULD BE HELD LIABLE AND THUS SHOULD BE CHARGED BEFORE THE OFFICE OF THE OMBUDSMAN FOR GRAFT AND CORRUPTION PRACTICES;. . . IN NOT EVALUATING THE FACTS AND CIRCUMSTANCES AS PRESENTED BY THE EVIDENCE OF THE PETITIONERS;. . . IN NOT APPLYING THE CORRECT LAW AND JURISPRUDENCE IN THE CASE SUBMITTED BEFORE IT FOR

RESOLUTION; [and]. . . IN FAVORING AND EXONERATING ITS OWN AUDITOR AND INSTEAD FINDING FAULT IN THE PETITIONERS.

At the pith of the controversy is the scope of the Commission on Audit's authority and the limits of its participation in public biddings of government agencies.

The assailed COA Decision, among other things, stated that the various plastic bags were purchased without the benefit of public bidding and were overpriced by as much as P344,098.50.^[23] And, in its Resolution denying petitioners' motion for reconsideration, respondent COA underscored the Special Audit Team's observation that:

The alleged failure of the Resident Auditor in the performance of her duties can not also be given credence. COA Circular No. 78-87 dated September 6, 1978 states the extent of auditorial involvement with regard to the opening of bids, to wit:

1. maintenance of documentary integrity;
2. physical security of the records of the bidding;
3. identification and security of alteration of bids.

Parenthetically, the technical and financial evaluation of the bids rests with the members of the bidding committee who exercise discretionary functions and for that matter it is presumed that so much is reposed in their integrity, ability, acumen and judgment. The determination, therefore, of the overpricing of the bidden items is the responsibility of the bidding committee and not of the representative of this Commission.^[24]

Petitioners, in refutation, argue in the main that they cannot be charged for causing undue injury to the government (Section 3[e] of Rep. Act No. 3019) considering that if there had been any suspicion of irregularity or any deliberate act on their part to prejudice the government, the resident auditor should have caused the immediate stoppage or suspension of the deliberations. In contrast, during the public bidding on 12 July 1994, resident auditor Estrellita B. Belandres stated that for as long as the bidding was not contrary to Presidential Decree No. 1594,^[25] it can be conducted through simplified bidding even for amounts exceeding Fifty Thousand Pesos (P50,000) and that it can be done thru sealed canvass.^[26] During the deliberations and opening of the sealed bids, auditor Belandres never caused the stoppage of the bidding process. She even affixed her signature on the Minutes of the Proceedings, the attendance sheet, and on the Resolution of the PBAC finding Fluid Air and Kinship Industrial to be the lowest bidders whose offers were the most advantageous to the government.^[27] After the plastic bags were bought and paid for, auditor Belandres did not disallow the transaction as evidenced by her "Independent Auditor's Report" dated 14 February 1995.^[28] In fine, petitioners argue that as they relied on the expertise of the COA representative, they cannot be made liable for the alleged irregularities in the bidding process considering that they complied with the requirements of bidding and they conducted the bidding itself in the presence of and under the advisement of the COA representative.

Parenthetically, petitioners challenge the ruling of respondent COA that the role of the COA representative in public bidding is merely as witness as this would make government representatives tasked with protecting government interests mere automatons.

Respondent COA, as represented by the Office of the Solicitor General, replied that it did not act in grave abuse of discretion as its findings were anchored on the report of the Special Audit Office (SAO) that conducted a special audit of the financial transactions and operations of the DENR-CAR for the years 1992 to 1994. Under the "Manual On Public Bidding" published by the COA, petitioners, as members of the PBAC were "responsible for the conduct of prequalification, bidding, evaluation of bids and recommending awards of contracts." The resident auditor, as representative of the COA, on the other hand, serves only as an "observer" who can only perform post-audit functions and who cannot participate or be actively involved in the bidding "as this would be tantamount to exercising pre-audit functions and encroaching into the government agency's management prerogatives."^[29] Respondent thus concluded that the ultimate responsibility in the bidding process falls on the PBAC members.

We affirm the findings of respondent COA.

There is no doubt that the Commission on Audit, under the Constitution, is empowered to examine and audit the use of funds by an agency of the national government on a post-audit basis.^[30] For this purpose, the Constitution has provided that the COA "shall have exclusive authority, subject to the limitations in this Article, to define the scope of its audit and examination, establish the techniques and methods required therefore, and promulgate accounting and auditing rules, and regulations including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant or unconscionable expenditures, or uses of government funds and properties."^[31]

Among the rules and regulations issued by the COA pursuant to the above-quoted mandate is COA Circular No. 78-87 dated 06 September 1978 which requires the attendance of an auditor or his duly authorized representative in the opening of bids. The scope of the functions of the auditor during the opening of bids is clearly delineated by the said circular, viz:

2. Authority for the Auditor's Presence:

Executive Order No. 269, Series of 1940, requires the presence of the Auditor during the above occasions.

The pertinent portion of said Executive Order reads as follows:

" . . . that the opening of all bids and quotations for similar services (contract for public service or for furnishing supplies, materials, or equipment) be made in the presence of a representative of the Auditor General, who is hereby authorized to secure and identify such papers and samples of the materials submitted by the bidders as will ensure the proper safeguard of the interests of the Government."

3. Nature and Extent of the Auditor's Participation:

The Executive Order enjoins the presence of the Auditor to be present and secure the papers and samples at said bidding. The term "secure" necessarily implies:

1. Maintenance of documentary integrity.
2. Physical security of the records of the bidding.

The Auditor's presence or that of his duly authorized representative is **as witness only** with specific functions to perform as hereunder delineated and explained. (Emphasis supplied)"Maintenance of documentary integrity," under the said circular, only means that "(e)very document should be properly identified by each and every member of the Committee on Bids and by the Auditor or his duly authorized representative by affixing at some convenient portion of the document, usually the right up-hand corner of the document, their initials or other identifying marks."^[32] On the other hand, "physical security of the records of the bidding" means that "(c)opies of the tenders or offers should be furnished the Auditor or his duly authorized representative for his file and reference and to secure the same against tampering and/or improper handling."^[33]

As respondent COA obviously relied on the foregoing circular in affirming SAO Report No. 95-31 of the Special Audit Team finding that the responsibility for determining whether there has been an overprice in the items up for bid pertains to the members of the PBAC and not the COA auditor, it cannot be said that respondent COA acted in grave abuse of its discretion. In *Danville Maritime v. Commission on Audit*,^[34] where the petitioner thereat likewise argued that the bidding conducted was valid as the COA representative who was then present made no objections to the same, we ruled that "the role of the COA representative at the time of the bidding was only as a witness to insure documentary integrity, i.e., by ensuring that every document is properly identified and/or marked and that the records of the bidding are securely kept."

Moreover, it must be kept in mind that as early as 1989, COA had already passed COA Circular No. 89-299 lifting the pre-audit of government transactions.^[35] A pre-audit is an examination of financial transactions **before** their consumption or payment.^[36] A pre-audit seeks to determine that: "(1) The proposed expenditure complies with an appropriation law or other specific statutory authority; (2) Sufficient funds are available for the purpose; (3) The proposed expenditure is not unreasonable or extravagant and the unexpended balance of appropriations where it will be charged to is sufficient to cover the entire amount thereof; and (4) The transaction is approved by proper authority and the claim is duly supported by authentic underlying evidences."^[37]

Applying the foregoing to the facts before us, it can be safely said that at the time of the subject public bidding in 1994, the COA auditor was not conducting a pre-audit. Her presence thereat, as correctly pointed out by respondent, was merely as a witness to ensure documentary integrity.

In contrast to the duties of the COA auditor in public bidding, the PBAC members, under the Administrative Code of 1987, are specifically tasked with the "conduct of prequalification of contractors, bidding, evaluation of bids and recommending of awards of contracts."^[38] And rightfully so. Between the COA auditor who can only perform post-audit functions and the PBAC members of the procuring entity (i.e., DENR-CAR), it is the latter which has the technical expertise to determine the offers that will best meet the needs and requirements of its office. Upon the agency that called for the bidding, therefore, rests the burden of ensuring that the process undertaken is above-board and that the outcome thereof is most advantageous to the government.^[39] The presence of the COA representative, as witness or observer,^[40] on the other hand, is fundamental only to the extent of guaranteeing documentary integrity and transparency in the bidding process. Petitioners, however, harp on their alleged good faith to negate criminal liability, claiming that the COA auditor did more than just observe and that they merely relied on her representations made during the opening of the bids. This argument is a matter of defense in the criminal case, if any, filed against petitioners. Verily, whether respondent COA's recommendation to file criminal charges will be able to survive prosecutorial and/or judicial scrutiny is a different matter altogether. The important thing to bear in mind is that for purposes of the instant petition, respondent COA cannot be estopped by the acts of its resident auditor during the public bidding of 12 July 1994. In *Development Bank of the Philippines v. Commission on Audit*,^[41] we had occasion to rule that the COA is not estopped from questioning, in the process of post-audit, the previous acts of its officials considering the well-established principle that estoppel does not lie against the government; more so if