



Republic of the Philippines
Supreme Court
Manila

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Wilfredo V. Lapitan
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Third Division

SUPREME COURT OF THE PHILIPPINES
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THIRD DIVISION

OFFICE OF THE OMBUDSMAN,
Petitioner,

G.R. No. 236383

Present:

- versus -

PERALTA, J.,
Chairperson,
LEONEN,
REYES, A., JR.,
HERNANDO, and
INTING, JJ.

MARILYN H. CELIZ and
LUVISMINDA H. NARCISO,
Respondents.

Promulgated:

June 26, 2019

Wilfredo V. Lapitan

X-----X

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) Decision² dated September 15, 2017 and Resolution³ 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.

¹ *Rollo*, pp. 20-36.

² Penned by Associate Justice Germano Francisco D. Legaspi, with Associate Justices Pamela Ann Abella Maxino and Gabriel T. Robeniol concurring; *id.* at 55-74.

³ *Id.* at 76-77.

Reyes

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 ₱54,500,000.00 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 ₱54,308,803.44.¹⁰

⁴ Id. at 117-124.

⁵ Id. at 89, 125.

⁶ Id. at 126.

⁷ Id. at 87.

⁸ Id. at 127-128.

⁹ Id. at 89, 129.

¹⁰ Id. at 130.

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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 asphaltting 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

¹¹ Id at 131.

¹² Id. at 90, 132.

¹³ Id. at 101.

¹⁴ Id. at 102.

¹⁵ Id. at 103-104.

¹⁶ Id. at 92, 142.

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Several months later, or on December 24, 2008, DPWH Undersecretary Bashir D. Rasuman approved the SARO for the project, authorizing the expenditure of ₱53,595,000.00.¹⁷ Thereafter, an unnumbered BAC Resolution was issued on January 26, 2009, recommending the award of the contract to IBC in the amount of ₱52,110,000.00. 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 ₱53,595,000.00. However, Fernando noted that the amount available for the payment of the project is only ₱52,110,000.00, as the sum of ₱1,485,000.00 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 ₱2,198,803.45, to cover the contract amount with IBC.¹⁹

On January 28, 2009, the Notice of Award²⁰ was issued to the IBC President. Soon after, or on January 29, 2009, the DPWH Region VI and the IBC executed a contract²¹ 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. 9184²⁴ 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

¹⁷ Id. at 133.

¹⁸ Id. at 134.

¹⁹ Id. at 92, 135.

²⁰ Id. at 136.

²¹ Id. at 137-141.

²² Id. at 90-91.

²³ Id. at 87-94.

²⁴ AN ACT PROVIDING FOR THE MODERNIZATION, STANDARDIZATION AND REGULATION OF THE PROCUREMENT ACTIVITIES OF THE GOVERNMENT AND FOR OTHER PURPOSES (Approved on January 10, 2003).

²⁵ ANTI-GRAFT AND CORRUPT PRACTICES ACT (Approved on August 17, 1960).

Meyer

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 Resolution²⁸ 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)

²⁶ *Rollo*, pp. 91-94.

²⁷ *Id.* at 44.

²⁸ Rendered by Graft Investigation and Prosecution Officer I Gil Rose O. Corcino-Inovejas; *id.* at 42-48.

²⁹ *Id.* at 46-47.

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Aggrieved by the decision of the OMB, the respondents moved for its reconsideration. However, the OMB found the motion unmeritorious in the Order³⁰ 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 Decision³³ promulgated on September 15, 2017, the CA ruled that the respondents violated Section 85(1) of Presidential Decree (P.D.) No. 1445³⁴ 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.

³⁰ Id. at 49-53.

³¹ Id. at 52.

³² Id. at 62.

³³ Id. at 55-74.

³⁴ ORDAINING AND INSTITUTING A GOVERNMENT AUDITING CODE OF THE PHILIPPINES (Approved on June 11, 1978).

³⁵ *Rollo*, pp. 65-68.

³⁶ Id. at 70.

³⁷ Id. at 71-72.

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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 Resolution³⁹ 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.

³⁸ Id. at 73.

³⁹ Id. at 76-77.

⁴⁰ Id. at 77.

⁴¹ Id. at 28-35.

⁴² Id. at 27.

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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

In negotiated procurement, the procuring entity directly negotiates the contract with a technically, legally and financially capable supplier, contractor or consultant.⁴⁷ It may be resorted to in the following cases:

- (a) when there has been a failure of public bidding for the second time;
- (b) when there is imminent danger to life or property during a state of calamity, or when time is of the essence arising from natural or man-made calamities or other causes where immediate action is necessary to prevent damage or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities;
- (c) in take-over of contracts that were rescinded or terminated for cause and immediate action is necessary;
- (d) where the contract is adjacent or contiguous to an on-going infrastructure project, the original contract of which was the result of a competitive bidding; or

⁴³ Office of the President, Memorandum Circular No. 28, October 15, 2017; Office of the President, Memorandum Circular No. 29, October 16, 2017.

⁴⁴ *R.A. No. 9184*, Article IV, Section 10.

⁴⁵ *Id.* at Article XVI, Section 48.

⁴⁶ Implementing Rules and Regulations Part A (*JRR-A*) of R.A. No. 9184, Rule XVI, Section 53 (Approved: September 18, 2003); *see also* Government Procurement Policy Board (*GPPB*) Manual of Procedures for the Procurement of Infrastructure Projects, Vol. 3, p. 73, <<https://www.gppb.gov.ph/downloadables/forms/GPM%20-%20Vol.3.pdf>> (last accessed May 28, 2019).

⁴⁷ *Id.*

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(e) under other instances specified in the implementing rules and regulations of R.A. No. 9184.⁴⁸

Here, the respondents argued before the OMB that the Asphalt Overlay Project must be negotiated because time was of the essence. The Dinagyang Festival was soon approaching, and the road used for its primary route needs major repairs.⁴⁹ But invoking this circumstance does not automatically warrant the application of negotiated procurement; otherwise, it would be easy to dispense with competitive bidding. As aptly held by the CA,⁵⁰ there must be an immediate and compelling need to justify negotiated procurement other than that provided by the respondents. The requirement of urgency is qualified under the law as “arising from natural or man-made calamities or other causes where immediate action is necessary to prevent damage to or loss of life or property.”⁵¹ As such, it does not cover situations outside this qualification, which this Court explained in *Office of the Ombudsman v. De Guzman*,⁵² to wit:

[N]egotiated procurement under Republic Act No. 9184, Section 53(b) involves situations beyond the procuring entity’s control. Thus, it speaks of “imminent danger . . . during a state of calamity . . . natural or man-made calamities [and] other causes where immediate action is necessary.” Following the principle of *ejusdem generis*, where general terms are qualified by the particular terms they follow in the statute, the phrase “other causes” is construed to mean a situation similar to a calamity, whether natural or man-made, where inaction could result in the loss of life, destruction of properties or infrastructures, or loss of vital public services and utilities.⁵³ (Citation omitted)

Section 53(b), Article XVI of R.A. No. 9184 evidently does not contemplate a yearly occasion and the promotion of tourism to justify resort to negotiated procurement. Since the Dinagyang Festival is an annual event that has always been scheduled to take place in the middle of January, there

⁴⁸ R.A. No. 9184, Article XVI, Section 53; Under the IRR-A of R.A. No. 9184, Rule XVI, Section 53, the following instances likewise justify negotiated procurement:

(a) Procurement of infrastructure, consulting services and goods from another agency of the Government tasked with a centralized procurement of commonly used goods for the government;

(b) In cases of individual consultant hired to do work that is highly technical or proprietary, or primarily confidential or policy determining, where trust and confidence are the primary consideration for the hiring of the consultant;

(c) With the prior approval of the President, and when the procurement for use by the Armed Forces of the Philippines involves major defense equipment and/or defense-related consultancy services, when the expertise or capability required is not available locally, and the Secretary of National Defense has determined that the interests of the country shall be protected by negotiating directly with an agency or instrumentality of another country with which the Philippines has entered into a defense cooperation agreement or otherwise maintains diplomatic relations;

(d) Where the amount involved is Php50,000.00 and below, and the procurement does not result in splitting of contracts;

(e) Lease of privately owned real estate for official use; and

(f) When an appropriation law or ordinance earmarks an amount to be specifically contracted out to Non-Governmental Organizations.

⁴⁹ *Rollo*, p. 44.

⁵⁰ *Id.* at 70.

⁵¹ R.A. No. 9184, Article XVI, Section 53(b).

⁵² G.R. No. 197886, October 4, 2017, 841 SCRA 616.

⁵³ *Id.* at 637-638.

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was plenty of time for the preparation of the necessary infrastructure. Furthermore, aside from the promotion of tourism, there was no showing that the repairs were necessitated by a calamity, that there was imminent danger to life or property, or that there was a loss of vital public services and utilities. Evidently, the decision of the respondents and other DPWH Region VI officials to begin the repairs for the Iloilo Diversion Road with only two (2) months left before the Dinagyang Festival is not the urgent situation contemplated under Section 53(b), Article XVI of R.A. No. 9184.

Even if the resort to negotiated procurement is justified, its application does not warrant dispensing with the other requirements under R.A. No. 9184.⁵⁴ The respondents and the other concerned officials should still, among other things: (a) conduct a pre-procurement conference; (b) post the procurement opportunity in the Philippine Government Electronic Procurement System, the website of the Procuring Entity and its electronic procurement service provider, if any, and any conspicuous place in the premises of the Procuring Entity; and (c) require the submission of a bid security and a performance security.⁵⁵

Most important is the pre-procurement conference, which the BAC is mandated to hold for each and every procurement, except for small procurements such as infrastructure projects costing ₱5,000,000.00 and below.⁵⁶ It is at this stage that the BAC checks the availability of the appropriations and programmed budget for the contract, the readiness of the budget release (*i.e.*, the SARO), and the adherence of the bidding documents, technical plans, specifications, and scope of work to the relevant general procurement guidelines.⁵⁷

Sufficient appropriation is also required before the government enters into a contract.⁵⁸ While Sections 85 and 86 of the Government Auditing Code requires an appropriation prior to the *execution* of the contract, the enactment of R.A. No. 9184 modified this requirement by requiring the availability of funds upon the commencement of the procurement process. As the Court explained in *Jacomille v. Sec. Abaya, et al.*:⁵⁹

The requirement of availability of funds before the execution of a government contract, however, has been modified by R.A. No. 9184. **The said law presents a novel policy which requires, not only the sufficiency of funds at the time of the signing of the contract, but also upon the commencement of the procurement process.** This progressive shift can be gleaned from several provisions of R.A. No. 9184, to wit:

⁵⁴ Id. at 633-635.

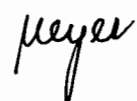
⁵⁵ Also GPPB Manual of Procedures for the Procurement of Infrastructure Projects, Vol. 3, pp. 76-77, <<https://www.gppb.gov.ph/downloadables/forms/GPM%20-%20Vol.3.pdf>> (last accessed May 28, 2019).

⁵⁶ R.A. No. 9184, Article VII, Section 20; IRR-A of R.A. No. 9184, Rule VII, Section 20.2.

⁵⁷ IRR-A of R.A. No. 9184, Rule VII, Section 20.1.

⁵⁸ P.D. No. 1445, Sections 85-86.

⁵⁹ 759 Phil. 248 (2015).



Section 5. Definition of Terms. - xxx

(a) Approved Budget for the Contract (ABC) - refers to the budget for the contract duly approved by the Head of the Procuring Entity, **as provided for in the General Appropriations Act and/or continuing appropriations**, in the National Government Agencies; the Corporate Budget for the contract approved by the governing Boards, pursuant to E.O.No.518, series of 1979, in the case of Government Financial Institutions and State Universities and Colleges; and the Budget for the contract approved by the respective Sanggunian, in the case of Local Government Units.

x x x x

Section 7. Procurement Planning and Budgeting Linkage[.]
- **All procurement should be within the approved budget of the Procuring Entity** and should be meticulously and judiciously planned by the Procuring Entity concerned. Consistent with government fiscal discipline measures, only those considered crucial to the efficient discharge of governmental functions shall be included in the Annual Procurement Plan to be specified in the IRR.

Section 20. Pre-Procurement Conference. - Prior to the issuance of the Invitation to Bid, the BAC is mandated to hold a pre-procurement conference on each and every procurement, except those contracts below a certain level or amount specified in the IRR, in which case, the holding of the same is optional.

The pre-procurement conference shall assess the readiness of the procurement in terms of confirming the certification of availability of funds, as well as reviewing all relevant documents and the draft Invitation to Bid, as well as consultants hired by the agency concerned and the representative of the [end-user].

The above-cited provisions of R.A. No. 9184 demonstrate that the law requires the availability of funds before the procuring entity commences the procurement of a government project. As early as the conception of the ABC, the procuring entity is mandated by law to ensure that its budget is within the GAA and/or continuing appropriation. In the procurement planning stage, the procuring entity is again reminded that all procurement must be within its approved budget. Also, even before the issuance of the invitation to bid, the law requires a pre-procurement conference to confirm the certification that the funds for the government project are indeed available.⁶⁰ (Emphases Ours)

⁶⁰ Id. at 273-274.

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In this case, the BAC, of which the respondents were members, approved the direct negotiation of the contract to IBC on January 2, 2008.⁶¹ Eventually, on January 8, 2008, the BAC proceeded to recommend the award of the Asphalt Overlay Project to IBC in the amount of ₱54,308,803.44.⁶² By January 10, 2008, IBC started the implementation of the Asphalt Overlay Project.⁶³

But in a letter dated May 13, 2008, the DPWH Region VI Accountant stated that there were no available funds, SARO, or SAA for the Asphalt Overlay Project.⁶⁴ This was later confirmed by the belated issuance of the SARO on December 24, 2008. The SARO also authorized the expenditure of only ₱53,595,000.00,⁶⁵ an amount less than the ABC of ₱54,308,803.44 in the BAC's unnumbered Resolution dated January 2, 2008. Finally, the SARO was issued after the award of the contract to IBC, and about 11 months following the commencement of the project.

On January 26, 2009, the BAC again resolved to recommend the award of the contract for the Asphalt Overlay Project to IBC. This time, the award to IBC was for the amount of ₱52,110,000.00, with an undertaking to pay the remaining amount of ₱2,198,803.45 upon availability of funds.⁶⁶ Thereafter, the Notice of Award was issued to IBC, and a contract was executed between DPWH Region VI and IBC.⁶⁷

Clearly, the respondents and the other DPWH officials intended to circumvent the requirement that there should be prior appropriation. The execution of the contract with IBC, as well as the issuance of the Notice of Award, was delayed until such time that the SARO was issued. By the time the funds for the project were released, the award of the contract to IBC was already a foregone conclusion. IBC had commenced construction activities as early as January 10, 2008, almost a year prior to the execution of the contract for the project.

The respondents are liable for Grave Misconduct.

While the CA found that the respondents, as BAC members, violated the relevant procurement laws and regulations in the Asphalt Overlay Project, the CA nonetheless ruled that the respondents are liable only for

⁶¹ *Rollo*, pp. 127-128.

⁶² *Id.* at 130.

⁶³ *Id.* at 43, 132.

⁶⁴ *Id.* at 142.

⁶⁵ *Id.* at 133.

⁶⁶ *Id.* at 134.

⁶⁷ *Id.* at 136-141.

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Simple Misconduct.⁶⁸ The OMB disagrees and claims that the CA erred in downgrading the administrative liability of the respondents.⁶⁹

The Court agrees with the OMB.

Misconduct is a transgression of some established and definite rule of action, more particularly, unlawful behavior or gross negligence by a public officer.⁷⁰ *Grave Misconduct*, as distinguished from simple misconduct, involves the additional element of corruption, willful intent to violate the law or disregard established rules.⁷¹ Mere failure to comply with the law, however, is not sufficient. There should be a showing of deliberateness on the part of the respondents, with the purpose of securing benefits for themselves or for some other person.⁷²

The respondents in this case agreed with all the BAC resolutions that: (a) recommended directly negotiating with IBC for the Asphalt Overlay Project; (b) recommended awarding the contract to IBC; and (c) recommended the award to IBC for the lesser amount stated in the SARO, with the promise to pay the remaining balance once the funds are made available. Despite the glaring absence of an appropriation for the Asphalt Overlay Project, and notwithstanding the absence of a justification for the application of negotiated procurement, the respondents repeatedly signed off on these resolutions.

Worse, the respondents participated in circumventing the requirement under Section 85 of P.D. No. 1445 that there should be an appropriation before the execution of the contract. This was manifest in their agreement to issue the BAC Resolution dated January 26, 2009, even after IBC has commenced the project a year before. In this manner, the respondents and the other concerned DPWH Region VI officials were able to make it appear that the contract with IBC was executed only after the issuance of the SARO on December 24, 2008. **It should be emphasized, however, that at the time of the issuance of the SARO, IBC already proceeded with the project pursuant to two (2) previous BAC resolutions recommending the direct negotiation of the project to IBC and the award of the contract to IBC. The respondents were also signatories of these prior BAC resolutions.**

⁶⁸ Id. at 71-72.

⁶⁹ Id. at 31-34.

⁷⁰ See *Office of the Ombudsman-Visayas, et al. v. Castro*, 759 Phil. 68, 75 (2015); and *Atty. Valera v. Office of the Ombudsman, et al.*, 570 Phil. 368, 385 (2008), citing *Bureau of Internal Revenue v. Organo*, 468 Phil. 111, 118 (2004).

⁷¹ *Atty. Valera v. Office of the Ombudsman, et al.*, id., citing *Civil Service Commission v. Ledesma*, 508 Phil. 569, 580 (2005).

⁷² *Office of the Ombudsman v. De Guzman*, supra note 52, at 641.

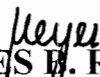
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As a result, the respondents, through their actions, gave unwarranted benefits and advantages to IBC. Their actions also show a willful disregard for the established procurement rules. Without their repeated participation in this highly irregular procurement process, the award of the project to IBC would not have been accomplished. The respondents' defense of being mere subordinates is without merit, as their conduct show a blatant and willful violation of the procurement rules. Thus, they should be held liable for Grave Misconduct, which carries the penalty of dismissal from the service.⁷³

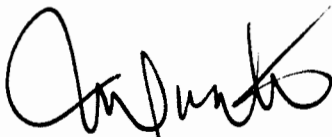
Section 12 of R.A. No. 9184 holds the BAC responsible for ensuring that the procuring entity complies with the provisions of the statute and the relevant rules and regulations. This is echoed in Section 12 of the IRR-A. For this reason, the functions of the respondents, as BAC members, are not merely ceremonial. They are tasked to safeguard the mandate of R.A. No. 9184 in order to ensure that the government and the public get the best possible goods, services, and infrastructure.

WHEREFORE, premises considered, the present petition is **GRANTED**. The Decision dated September 15, 2017 and the Resolution dated December 11, 2017 of the Court of Appeals in CA-G.R. CEB-SP. No. 10438 are hereby **REVERSED** and **SET ASIDE**. A new judgment is entered finding respondents Marilyn H. Celiz and Luvisminda H. Narciso **GUILTY** of **GRAVE MISCONDUCT**. As such, they are **DISMISSED** from the government service with all the accessory penalties of cancellation of eligibility, forfeiture of leave credits and retirement benefits, and disqualification for re-employment in the government service.

SO ORDERED.



ANDRES H. REYES, JR.
Associate Justice


WE CONCUR:


DIOSDADO M. PERALTA
Associate Justice
Chairperson

⁷³ Civil Service Commission Revised Rules on Administrative Cases, Rule 10, Section 46(A)(3); *See also* the Resolution dated June 20, 2018 in G.R. No. 237503, entitled *Office of the Ombudsman v. Asis; rollo*, pp. 194-196.

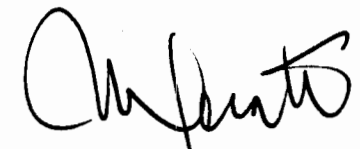

MARVIC M.V.F. LEONEN
 Associate Justice


RAMON PAUL L. HERNANDO
 Associate Justice


HENRI JEAN PAUL B. INTING
 Associate Justice

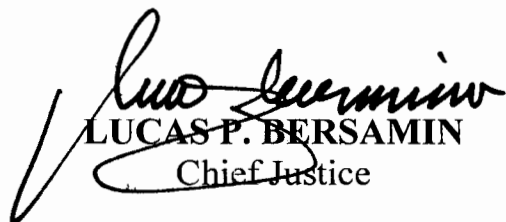
ATTESTATION

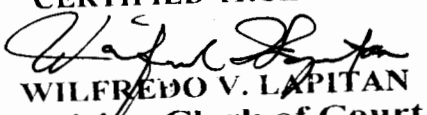
I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.


DIOSDADO M. PERALTA
 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.


LUCAS P. BERSAMIN
 Chief Justice

CERTIFIED TRUE COPY

WILFREDO V. LAPITAN
 Division Clerk of Court
 Third Division

JUL 24 2019

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