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[G.R. No. 101678. February 3, 1992]

BUREAU VERITAS, represented by THEODOR H. HUNERMANN, *petitioner, vs.* **OFFICE OF THE PRESIDENT, SECRETARY OF FINANCE, SECRETARY OF TRADE AND INDUSTRY, and GOVERNOR OF THE CENTRAL BANK OF THE PHILIPPINES (as Chairman and Members of the COMMITTEE ON IMPORT SUPERVISION SCHEME), COMMISSIONER OF CUSTOMS, FINANCE UNDERSECRETARY TOMAS V. APACIBLE, CUSTOMS DEPUTY COMMISSIONER TITUS VILLANUEVA, BUREAU OF IMPORT SERVICES DIRECTOR LEOPOLDO ABAD, JR., and CBP DIRECTOR JUAN BAUTISTA (as Chairman and Members of the CISS-SUBCOMMITTEE), and SOCIETE GENERALE DE SURVEILANCE S.A. (SGS),** *respondents.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; PUBLIC BIDDING; IMPLIED IN AN INVITATION TO BID IS THE CONDITION THAT IT IS SUBJECT TO GOVERNMENT DISCRETION. — As held in the case of *A.C. Esguerra & Sons v. Aytona, et al*., (L-18751, 28 April 1962, 4 SCRA 1245), in an "invitation to bid, there is a condition imposed upon the bidders to the effect that the bidding shall be subject to the right of the government to reject any and all bids subject to its discretion. In the case at bar, the government has made its choice and unless an unfairness or injustice is shown, the losing bidders have no cause to complain nor right to dispute that choice. This is a well-settled doctrine in this jurisdiction and elsewhere."

2. ID.; ID.; ID.; COURTS NOT TO INTERFERE IN THE AWARD OF GOVERNMENT CONTRACT, SUCH FUNCTION IS BEST LEFT TO THE SOUND DISCRETION OF THE PROPER GOVERNMENT

Supreme Court E-Library

AGENCY.— The discretion to accept or reject a bid and award contracts is vested in the Government agencies entrusted with that function. The discretion given to the authorities on this matter is of such wide latitude that the Courts will not interfere therewith, unless it is apparent that it is used as a shield to a fraudulent award (*Jalandoni v. NARRA*, 108 Phil. 486[1960]). This is especially true in the case at bar where the subject contract involves matters of technical nature dealing with the inspection of the quality, quantity, volume and prices of imports shipped to the Philippines on a global and regional basis. The inspection contract is designed to curb practices such as overvaluation, undervaluation and misdeclaration of shipments, technical smuggling, and dollar salting. The choice of who among the bidders is best qualified to perform this task should be left to the sound discretion of the proper Government authorities in the executive branch since they are in a better position than the Courts to make the determination owing to the experience and knowledge that they have acquired by virtue of their functions. The exercise of this discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation. This task can best be discharged by the Government agencies concerned, not by the Courts.

3. **ID.; ID.; ID.; COURTS, HOWEVER, WILL INTERFERE WHEN THERE IS A CLEAR SHOWING OF GRAVE ABUSE OF DISCRETION IN THE AWARD OF A GOVERNMENT CONTRACT.—** It is only upon a clear showing of grave abuse of discretion that the Courts will set aside the award of a contract made by a Government entity. Grave abuse of discretion implies a capricious, arbitrary and whimsical exercise of power. The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined by law.

4. **ID.; ID.; ID.; AN EXPRESS RESERVATION MADE BY GOVERNMENT ENTITY NEGATES GRAVE ABUSE OF DISCRETION.—** In the "Invitation to Pre-qualify and Bid," the CISS Committee made an express reservation of the right of the Government to "reject any or all bids or any part thereof or waive any defects contained thereon and accept an offer most advantageous to the Government." It is a well-settled

Supreme Court E-Library

rule that where such reservation is made in an Invitation to Bid, the highest or lowest bidder, as the case may be, is not entitled to an award as a matter of right (*C & C Commercial Corp. v. Menor*, L-28360, 27 January 1983, 120 SCRA 112). Even the lowest Bid or any Bid may be rejected or, in the exercise of sound discretion, the award may be made to another than the lowest bidder.

5. ID.; ID.; ID.; THE CONTROLLING CRITERION IN AWARDING GOVERNMENT CONTRACT; MOST ADVANTAGE, LEAST PAYOUT TO GOVERNMENT.— It explained in its Memorandum that "the main controlling criterion in awarding the contract is whether or not the bid secures for the Government the most advantage, one of the key considerations being whether the bid entails the least Government payout, in this instance, to the inspection company in the form of fees."

D E C I S I O N

MELENCIO-HERRERA, *J.*:

This Petition for *Certiorari* and *Mandamus* with prayer for Preliminary Injunction and or Temporary Restraining Order was instituted by Petitioner, Bureau Veritas, to assail the Agreement for Comprehensive Import Supervision Scheme (CISS) executed between the Republic of the Philippines and private respondent Societe Generale de Surveillance S.A. (SGS), dated 23 August 1991, and Memorandum Order No. 391, dated 2 September 1991, of the Office of the President approving the aforesaid Agreement.

The background facts follow:

On 13 February 1986, the Government of the Philippines entered into an agreement with private respondent SGS for a Comprehensive Import Supervision Scheme (CISS). Under the CISS, a pre-shipment inspection of the quality, quantity and price of imports coming into the Philippines is conducted at the country of export. The pre-shipment inspection is intended to prevent the undervaluation, misdeclaration and overvaluation

Supreme Court E-Library

of imports shipped to the Philippines which defraud the Government of revenues. If a shipment is found in order, a Clean Report of Finding (CRF) is issued. Letters of Credit (L/Cs) carry the condition that the beneficiaries thereunder may draw on said L/CS only upon presentation of the CRF.

Initially, only three (3) Asian countries were covered by the CISS, namely Japan, Hongkong and Taiwan. Subsequently, the coverage of the CISS was expanded to include, aside from the three mentioned, other countries such as South Korea, Singapore, Thailand, Malaysia, Indonesia, Brunei and Macau. The SGS, after bidding, was awarded the contract for the expanded coverage of the CISS.

On 16 August 1990, before the expiration of the SGS contract with the Government, the CISS Subcommittee caused to be published in the Manila Bulletin an "Invitation to Pre-qualify and Bid" (Annex "C," Petition, *Rollo*, p. 72). It invited duly registered firms to participate in the pre-qualification and public bidding for pre-shipment inspection services for the Philippine Government. At the pre-bidding conference held on 4 September 1990, Standard Pre-qualification Forms (Annex "I," Petition, Rollo, p. 84) and Bid Forms (Annex "J," Petition, Rollo, p. 88) were issued to prospective bidders. The "Invitation to Pre-qualify and Bid" and the Standard Pre-qualification Form reserved in favor of the Government "the right to reject any or all bids, or any part thereof or waive any defects contained therein and accept an offer most advantageous to the government."

The Standard Pre-qualification Form also included, among others, the following:

"6. General Terms and Conditions.

b. Regular and minimum fees should be based on FOB value inclusive of Philippine taxes."

Four (4) bidders pre-qualified and participated in the bidding. They were Petitioner Bureau Veritas, Respondent SGS, Cotecna-International Limited, and Specialist Services International Limited (SSI). The sealed bids submitted by them were opened on 6 November 1990 in the presence of all the bidders. The

Supreme Court E-Library

Bids were read aloud and initialed by representatives of the bidders on every page.

In its Original Bid, Petitioner did not state any assumed tax rate for the fees quoted in its Bid. However, in Annex "C" of its Bid, Petitioner made reference to BIR Ruling 537, dated 14 November 1988, which provided that the present Inspector is exempted from all Philippine taxes of whatsoever nature. On the other hand, Respondent SGS quoted fees inclusive of income taxes, which it stated to be 35% of said fees.

On 5 December 1990, all the bidders were invited to appear before the CISS Subcommittee to answer clarificatory questions. Another meeting was held on 20 March 1991 wherein the CISS Subcommittee asked the bidders whether or not they would agree to have their Bids evaluated on net basis or net of any tax rate. This move was prompted by the unequal tax rates bidded, from a range of 0%, 10% to 35%. Bidders were requested to give their written conformity as well as their comments on each other's position. The CISS Subcommittee, however, made it clear that in the determination of the net fees, the bidders are bound by what they have expressly stated in their Bids.

All the bidders, including herein Petitioner, agreed to the evaluation of the bids on net basis, or net of Philippine taxes. However, in its letter, dated 29 March 1991, addressed to the CISS Subcommittee (Annex "S," Petition, *Rollo*, p. 174). Petitioner stated that since it submitted its bid "without any qualification *inclusive of Philippine taxes as called for by Section 6 b, of the Standard Pre-Qualification Form of the Tender*, it is thus imperative for us now to remove the taxes from our bid, which were added to comply with the conditions of Section 6 b, of the Standard Pre-qualification Form of the Tender in order now to arrive at net of Philippine taxes so that our bid could be evaluated under the same level as the bids of the other bidders who had already informed the Sub-committee of their net bids." Accordingly, Petitioner submitted in the same letter its reduced fees, which were lower than the fees in its Original Bid. A comparison of the original and revised fees quoted by Petitioner is shown hereunder:

Supreme Court E-Library

	Fees Quoted in Original Bid	*Fees Quoted in Letter of March 29, 1991*
REGULAR		
Global Coverage	0.85%	0.70%
Group I	0.95%	0.78%
Group II	0.87%	0.72%
Group III	0.87%	0.72%
Group II + Group III	0.85%	0.70%
MINIMUM FEE (FOB)		
Global Coverage	US$203.-	US$167.-
Group I	US$222.-	US$183.-
Group II	US$210.-	US$173.-
Group III	US$210.-	US$173.-
Group II = Group III	US$203.-	US$167.-
Latin America other than Brazil	US$222.-	US$183.-
Africa	US$222.-	US$183.-
Latin America other than Brazil and Africa	US$211.-	US$174.

In submitting the revised fees, Petitioner deducted the taxes it claims to have imputed in its original fees in order to arrive at its Net Bid.

The three (3) other bidders protested the revision by Petitioner of its originally quoted fees. One of the bidders, Specialist Services International Inc. (SSI), wrote the CISS Subcommittee that, in submitting the revised figures, Petitioner made a clear attempt to alter its Original Bid long after the bidding process had been completed and after it had already known the bids of the others (Annex "4", Comment, *Rollo*, p. 310). Cotecna International Limited (CIL), another bidder, wrote the CISS Subcommittee that Petitioner had altered its Original Bid and deviated from the Bid regulations agreed upon in order to show at a late stage that its Bid is the cheapest among the four bidders (Annex "2", Comment, *Rollo*, p. 296). Respondent SGS also protested Petitioner's revised fees saying that it could not propose to deduct

Supreme Court E-Library

any tax from the service fees quoted in its Bid so as to arrive at a lower Net Bid since the tax component of its written Bid was zero tax based on the assumption that it would be tax exempt (Annex "1", Comment, *Rollo*, p. 284).

Petitioner, however, insisted on the reduction of its originally quoted fees and claimed that it was the lowest bidder by virtue of said revised fees, and which, it avers, are the most advantageous to the Government.

On 16 August 1991, after an evaluation of all the Bids, Respondent Secretary of Finance announced that SGS was awarded the global CISS contract. On 23 August 1991, the Government and SGS executed the Agreement for the CISS (Annex "B", Petition, *Rollo*, p. 48). Thereafter, on 2 September 1991, President Corazon C. Aquino signed Memorandum Order No. 391 approving the Agreement and directing the other public respondents to take the necessary steps for its implementation (Annex "A", Petition, *Rollo*, p. 47).

Before us now, Petitioner avails of this recourse challenging the execution and approval of the said CISS Agreement. Comments were separately filed by the Solicitor General for public respondents and by SGS' counsel, to which Petitioner filed its Replies.

The pivotal issue in this controversy is whether or not public respondents committed grave abuse of discretion in awarding and approving the CISS contract in favor of Respondent SGS. Corollary thereto is the question of whether or not public respondents gravely abused their discretion in changing the rule on evaluating the Bids from "inclusive" to "exclusive" of taxes, or on net basis, and in refusing to consider the revised fees quoted by Petitioner after it had deducted the taxes it claims to have imputed in its Original Bid.

There is no question that the Standard Pre-qualification Form issued to the bidders specified that "Regular and minimum fees should be based on FOB value *inclusive of Philippine taxes*" (Annex "I", *supra*). The decision to change the rule regarding

Supreme Court E-Library

the evaluation of the Bids from "inclusive" to "exclusive" of taxes was not, however, whimsically or capriciously made by the CISS Subcommittee. It explained the rationale for this change in a Memorandum, dated 7 March 1991, (Annex "Q", Petition, *Rollo*, p. 164), thus:

"It should be mentioned that the Bid Form required the participants to indicate their bid prices, *inclusive* of Philippine taxes.

1.1.5 After receipt of the bids, which were opened in the presence of the four (4) participants the Sub-Committee called them to another conference for them to explain/clarify their qualifications/assumptions and related statements in view, particularly, of the Sub-Committee's observation that the bid prices were either GROSS or NET of taxes and the bases of the assumed taxes were not uniform.

The Sub-Committee was thus confronted with two (2) possible options, namely:

1) To treat the amount/rate of the bid price, with due consideration of, and subject to, the therein stated qualifications/assumptions; or

2) To disregard the qualifications/assumptions and treat the bid prices quoted as the final amount of the bid.

1.1.6 Following due deliberation, the Sub-Committee agreed to adopt the first option, *i.e.*, to treat the bid price, subject to the stated qualifications/assumptions and related statements, more particularly, those relating to Philippine taxes.

In adopting the first option, the Sub-Committee duly recognized that the terms of the bid per Bid Form should be deemed binding not only upon the Sub-Committee itself in representation of the Inter-agency Committee on CISS, but also upon the participating bidders, and therefore, the bid prices submitted should be taken as their final bids, respectively, but subject to and including the terms, assumptions and/or qualifications indicated by them and which could no longer be changed, altered or modified subsequently. The Sub-Committee noted that where such statements, qualifications/ assumptions or representations (made subsequent to the submission and opening of the bids) be in conflict with, and/or substantially modify, the terms of the Bid Form and/or the bids submitted, the same should have no force and effect and should, perforce, be ignored.

Supreme Court E-Library

The Sub-Committee also agreed that to adopt the second option would place the Sub-Committee in an untenable position since it was evident that all the bidders did, in fact, take into consideration Philippine taxes, whether assumed existent or in relation to cited BIR rulings. The Sub-Committee, moreover, noted that under the second option *there would be no uniform basis of comparison, no common denominator that would enable proper comparison and evaluation* (Italics supplied).

1.1.7 SGS quoted on the basis of GROSS (with the assumption that the rate of tax is 35%); CIL quoted both NET and GROSS (assuming a 10% withholding tax); and both SSI and B. Veritas quoted NET (assuming the fee to be exempt from all taxes of whatever nature, citing pertinent BIR rulings)."

The foregoing explanation negates any suggestion of arbitrariness or caprice on the part of public respondents when it proposed to change the rule in the evaluation of the bids from "inclusive" to "exclusive" of taxes. All the bidders had given their written consent to the CISS Subcommittee to exclude Philippine taxes in the evaluation of the bids of all the bidders. Thus, Petitioner, in a letter to the CISS Subcommittee, stated: "On this question, we hereby agree to the proposition that the bidders' bid be evaluated on *net bases, net of Philippines taxes*" (Annex "S", *supra*). It is true that Petitioner had indicated that it was imperative that it remove the taxes from its Bid to put it on the same level as the other bidders. The CISS Subcommittee, however, rejected the reduced fees that Petitioner had submitted.

The question now, therefore, shifts to whether or not public respondents committed grave abuse of discretion in rejecting the revised fees submitted by Petitioner after it had deducted the taxes it had allegedly imputed to the fees quoted in its Original Bid. Resolution thereof, in turn, hinges on whether Petitioner, had indeed, imputed taxes in its Original Bid.

Petitioner charges the CISS Subcommittee with partiality and evident bad faith for refusing to deduct from its original fees the taxes it had allegedly imputed while making such deductions from the proposals of the other bidders. Petitioner stoutly alleges that its consent to a re-evaluation of the bids on net basis or net

Supreme Court E-Library

of taxes was on the condition that it would be allowed to remove the taxes it had imputed in its bid.

In support of its stand, Petitioner attached to the Petition Annex "L" (*Rollo*, p. 98) purportedly the "Original Bid" submitted to the CISS Subcommittee. The cover page of said Bid, as presented to the Court, reads: "BUREAU VERITAS ORIGINAL BID (incl. of Philippine taxes) (percentage of taxes: 35%) (FILIPINO-FRANCO TAX-TREATY CONSIDERED)." Notably, however, in the Petition itself, Petitioner states that although it was aware of a possible taxation on gross income of 35%, it imputed only 17.65% tax rate in its bid because it can claim tax credits under the Filipino-Franco Tax Treaty (Petition, p. 25).

Traversing such submission, the Solicitor General states in his Comment that the aforesaid cover page (Annex "L") purportedly showing an imputed tax rate of 35% was spurious since it was not part of the Original Bid submitted by Petitioner, as shown by the fact that the said cover page does not bear the initials of the other bidders. The Solicitor General charges that the cover page was apparently attached as an afterthought and accuses Petitioner of foisting a material falsehood before this Court.

Indeed, nowhere in Petitioner's Original Bid of 6 November 1990 is there any mention of an assumed 35% tax rate. That was stated only in Petitioner's letter to the CISS Subcommittee dated 17 June 1991 (Annex S-1, Petition). There was no indication either in the Original Bid documents of any Filipino-Franco tax treaty. It was mentioned only for the first time in Petitioner's letters of 12 April 1991 and 17 June 1991 (*ibid*.). Petitioner's argument that the Bid Form did not require the specification of the tax rate is a matter of interpretation as, in fact, SSI quoted a 0% tax rate; Cotecna, 10%, and SGS, 35%.

We agree with the CISS Subcommittee finding, therefore, that Petitioner did not impute a tax rate of either 17.65%, as stated in the Petition (p. 25), or 35%, as indicated in the supposed cover page of its Original Bid (Annex "L", *supra*). Although

Supreme Court E-Library

Petitioner did quote *gross* fees or fees inclusive of Philippine taxes, it could only have meant that its fees were inclusive of a "zero tax rate" based on its assumption that the CISS Inspector is exempt from all Philippine taxes. In effect, what Petitioner had submitted was a *Net* Bid which assumed that it was tax exempt. This is only too evident from Annex "C" of its Original Bid, where Petitioner made the following explanatory notes:

"5. The above offer is subject to the following conditions:

"xxx xxx xxx

"F. This BID is considering the actual rules and regulations on taxes in the Philippines."

For the evaluation of our BID it is important to take note of the following situations:

xxx xxx xxx

"C) PHILIPPINE TAXES

According to the BIR Ruling 537 dated 14th November 1988, the present Inspector is *exempted from all Philippine taxes of whatsoever nature*.

The new BID requires Service and Minimum Fees to be quoted inclusive of Philippine taxes;

Our BID is based on existing Philippine laws, rules and regulations, which allows the setting-up of a Bureau Veritas Corporate Branch Operation in the Philippines.

Any departure by the Government or the BIR from the above, resulting in substantially higher tax-burdens shall have as a consequence the necessity to increase the service and minimum fees proportionally (*Rollo*, p. 102, Italics supplied).

xxx xxx xxx"

Not having imputed a tax rate other than 0%, Petitioner had nothing to deduct from the fees it quoted in its Original Bid. Hence, the revised fees Petitioner submitted in its letter of 29 March 1991, where it purportedly removed the taxes it imputed to its fees, constitute a deviation from and a substantial

Supreme Court E-Library

modification and alteration of its Original Bid and not a result of the deduction of any imputed effective tax rate. Petitioner can not be allowed to vary the fees quoted in its Original Bid after all the Bids had been submitted, opened and disclosed to all bidders. Otherwise, Petitioner would gain undue advantage since it was already aware of the Bids of the others.

Again, therefore, grave abuse of discretion can not be laid at the doorsteps of public respondents when it refused to consider Petitioner's reduced fees after it had deducted its alleged imputed taxes simply because the amount of said alleged taxes, based on petitioner's assumption that it was tax-exempt, do not go higher than 0%. In other words, there was nothing to deduct. Neither can partiality or bad faith be attributed to public respondents when it considered deductions from the proposals of the other bidders considering that the tax rates were respectively specified and quantified by them.

In its Reply, Petitioner disputes the assertion that it relied on BIR Ruling 537, dated 14 November 1988, in making the assumption that it was exempt from all Philippine taxes. It alleges that the said ruling applies only to the present Inspector (SGS), premised on the particular agreement involved. According to Petitioner, the ruling does not extend to it or to any other Inspector. However, if Petitioner had, in fact, believed that said ruling was applicable only to the present Inspector, there would have been no point to citing the BIR Ruling in its explanatory note in its Bid. Certainly, Petitioner would not have made reference to said Ruling for an idle purpose.

Moreover, Petitioner's allegations that BIR Ruling 537 does not apply to it is also belied by its own statements in its Original Bid. After stating that, in accordance with said BIR ruling "the present Inspector is exempted from all Philippine taxes of whatsoever nature," it declared in no uncertain terms that any "*departure by the Government or the BIR from the above, resulting in substantially higher tax burdens shall have as a consequence the necessity to increase the service and minimum fees proportionally*" (Annex "L", *supra*). The express reference

Supreme Court E-Library

to the necessity of increasing the fees proportionally, in the event a departure from the policy of tax-exemption is made, supports the conclusion that, in quoting its fees, Petitioner was assuming that it was also tax exempt. On that assumption, it quoted its fees inclusive of a tax rate of 0%. Otherwise, there would have been no reason for Petitioner to have expressed that reservation.

If, as Petitioner claims, that was not the intent of its Bid, or that it never assumed that it was tax-exempt, then the ambiguity is of its own making and should not be interpreted in favor of the one causing the ambiguity. At best, it was an equivocal statement susceptible of different interpretations.

To uphold Petitioner's overall theory that it had, in fact, imputed in its bid a tax rate of 35%, reduced to 17.65%, and that accordingly, its revised fees, after deducting those taxes, should be evaluated, would be to rely on its word alone as Petitioner itself admits that the taxes it imputed to its Original Bid were not indicated or specified. Petitioner could also claim any arbitrary figure, with no way of verifying the same. That step would be to the prejudice of all other bidders who, in fact, had individually formalized their written objections to the consideration of Petitioner's reduced fees.

As we see it, the risk borne by all bidders was that if they imputed taxes in their bid and if no tax were imposed, they stood to profit; but if they did not impute taxes and these are imposed, they stood to lose. Petitioner then adopted the strategy of assuming that it was tax-exempt following the policy with the incumbent Inspector, but if the Government or the BIR departed therefrom it categorically declared that its fees would have to be increased. That made its Bid actually open-ended and indeterminate. This is in stark contrast to Respondent SGS' categorical Bid that if taxes are reduced a "downward adjustment of the fees would be in order." The advantage to the Government of one over the other is obvious.

Petitioner further faults public respondents with grave abuse of discretion in awarding and approving the bidded CISS contract

Supreme Court E-Library

to Respondent SGS instead of to Petitioner. It must be stressed, as held in the case of *A.C. Esguerra & Sons v. Aytona, et al.*, (L-18751, 28 April 1962, 4 SCRA 1245), that in an "invitation to bid, there is a condition imposed upon the bidders to the effect that the bidding shall be subject to the right of the government to reject any and all bids subject to its discretion. In the case at bar, the government has made its choice and unless an unfairness or injustice is shown, the losing bidders have no cause to complain nor right to dispute that choice. This is a well-settled doctrine in this jurisdiction and elsewhere."

The discretion to accept or reject a bid and award contracts is vested in the Government agencies entrusted with that function. The discretion given to the authorities on this matter is of such wide latitude that the Courts will not interfere therewith, unless it is apparent that it is used as a shield to a fraudulent award (*Jalandoni v. NARRA*, 108 Phil. 486 [1960]). This is especially true in the case at bar where the subject contract involves matters of technical nature dealing with the inspection of the quality, quantity, volume and prices of imports shipped to the Philippines on a global and regional basis. The inspection contract is designed to curb practices such as overvaluation, undervaluation and misdeclaration of shipments, technical smuggling, and dollar salting. The choice of who among the bidders is best qualified to perform this task should be left to the sound discretion of the proper Government authorities in the executive branch since they are in a better position than the Courts to make the determination owing to the experience and knowledge that they have acquired by virtue of their functions. The exercise of this discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation. This task can best be discharged by the Government agencies concerned, not by the Courts. The role of the Courts is to ascertain whether a branch or instrumentality of the Government has transgressed its constitutional boundaries. But the Courts will not interfere with executive or legislative discretion exercised within those boundaries. Otherwise, it strays into the realm of policy decision-making.

Supreme Court E-Library

It is only upon a clear showing of grave abuse of discretion that the Courts will set aside the award of a contract made by a government entity. Grave abuse of discretion implies a capricious, arbitrary and whimsical exercise of power (*Filinvest Credit Corp. v. Intermediate Appellate Court*, No. 65935, 30 September 1988, 166 SCRA 155). The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined by law, as to act at all in contemplation of law, where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility (*Litton Mills, Inc. v. Galleon Trader, Inc., et al.*, L-40867, 26 July 1988, 163 SCRA 489).

The facts in this case do not indicate any such grave abuse of discretion on the part of public respondents when they awarded the CISS contract to Respondent SGS. In the "Invitation to Prequality and Bid" (Annex "C," *supra*), the CISS Committee made an express reservation of the right of the Government to "*reject any or all bids or any part thereof or waive any defects contained thereon and accept an offer most advantageous to the Government*." It is a well-settled rule that where such reservation is made in an Invitation to Bid, the highest or lowest bidder, as the case may be, is not entitled to an award as a matter of right (*C & C Commercial Corp. v. Menor*, L-28360, 27 January 1983, 120 SCRA 112). Even the lowest Bid or any Bid may be rejected or, in the exercise of sound discretion, the award may be made to another than the lowest bidder (*A.C. Esguerra & Sons v. Aytona, supra*, citing 43 Am. Jur., 788).

It must also be pointed out that the decision to award the CISS contract to Respondent SGS was made after a thorough comparison and evaluation of the Bids by the CISS Subcommittee. It explained in its Memorandum (Annex "Q", *supra*) that "the main controlling criterion in awarding the contract is whether or not the bid secures for the Government the most advantage, one of the key considerations being whether the bid entails the LEAST GOVERNMENT PAYOUT, in this instance, to the inspection company in the form of fees." Based on this criterion, the fees quoted by Petitioner are higher than those of Respondent

Supreme Court E-Library

SGS. A comparison of the bids of Petitioner and Respondent SGS, uniformly set as NET of assumed Philippine taxes, are as follows:

Petitioner BV		*SGS*
Regular Fees:		
Global Coverage	0.85%	0.60%
Regional Coverage		
Region 1:	0.95%	0.55%
Region 2:	0.87%	0.80%
Region 3:	0.87%	0.68%
Minimum Fees:		
Global Coverage for all shipments	US$203	US$225.50
for shipments with invoice value of less than US$2,500 FOB	US$203	US$149.50
Regional Coverage		
Region 1 for all shipments	US$222	US$225.55
for shipments with an invoice value of less than US$2,500 FOB	US$222	US$149.50
Region 2 for all shipments	US$210	US$250
for shipments with an invoice value of less than US$2,500 FOB	US$210	US$149.50
Region 3 for all shipments	US$210	US$225.85
for shipments with an invoice value of less than US$2,500 FOB	US$210	US$149.50

(Annex "Q", *supra*, also pp. 267-268, *Rollo*)

Supreme Court E-Library

As stated by the CISS Subcommittee in its Memorandum (p. 161, *Rollo*), on a GLOBAL coverage basis, private respondent SGS submitted the lowest bid for Regular Fees at 0.60%, followed by CIL at 0.75%, with SSI and Petitioner submitting the highest bids both at 0.85%. On a Regional Coverage basis, SGS submitted the lowest bids for Regions 1 and 3; SSI submitted the lowest bid for Region 2; CIL, the second lowest bids for Regions 1 and 3 and the highest for Region 2; BV was third lowest or second highest for Regions 2 and 3 and highest in Region 1. Of course, Petitioner's fees under consideration are those indicated in its Original Bid, not its altered and revised fees.

On the basis of its comparison and evaluation of the Bids, the CISS Subcommittee recommended that the contract be awarded on a GLOBAL coverage basis to only one (1) Inspector, private respondent SGS, because the fee would amount to only ₱1,132,356,288.00, which would mean a savings of some ₱100,995,188.00 compared to a Regional coverage basis where the total fee would amount to ₱1,233,351,476.00 *per annum* (Annex "Q," *supra*). It also stated that the award to only one Inspector would be in consonance with congressional sentiment as expressed in House Resolution No. 1719 "to appoint only the most competent and qualified pre-inspection agent for the Philippine Government which shall render the most service for the least fee." The Court is not in a position to dispute those factual findings.

Moreover, public respondents also took into consideration the other advantages resulting from the award of the contract to private respondent SGS. The contract also offers expanded services to include eleven (11) training courses per annum; complete computerization of the Bureau of Customs; conduct of ESS/CISS Consultancy as well as specialty training seminars and the installation and development of a Customs library, all of which would pave the way towards technology transfer and/or eventual assumption of the CISS functions by the Bureau of Customs. SGS has also offered to provide an X-ray van that would be very useful in the inspection of containerized cargoes, especially consolidated shipments. Of course, Petitioner maintains

Supreme Court E-Library

that these concessions were the result of negotiation, not of public bidding and that it can also grant the same.

Premised on the foregoing considerations, there is basis for public respondent's conclusion that the contract with Respondent SGS for pre-inspection services involves the least Government payout and is the most advantageous to it. The Court is bereft of competence to state, as Petitioner suggests, that public respondents' computations should have been made differently, that being a matter more within the competence of the authorities concerned. Nor does the Court find reason to conclude that public respondents exercised their discretion in a whimsical or arbitrary manner or that it was motivated by bias or hostility against Petitioner, or that there was inequity and injustice in the evaluation of the Bids because it was its Original Bid that was evaluated whereas the imputed taxes on the other bids were removed. The great difference lies in the fact that taxes were quantified in the other bids but not so in Petitioner's bid. Specification of taxes was, indeed, not called for in the Bid Form. Nonetheless, of the four (4) bidders, only Petitioner did not so indicate.

In sum, the Court cannot, in the absence of sound basis therefor disturb the discretion that has been exercised by public respondents in determining, after making a comparison, study and evaluation of the Bids, that the contract with Respondent SGS involves the least Government payout and the most advantageous to the Government.

WHEREFORE, the instant petition is dismissed.

SO ORDERED.

Narvasa, C.J., Gutierrez, Jr., Cruz, Paras, Feliciano, Padilla, Bidin, Griño-Aquino, Medialdea, Regalado, Davide, Jr., Romero, and *Nocon, JJ.,* concur.