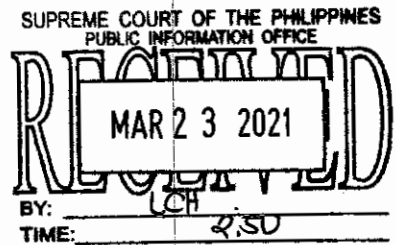




Republic of the Philippines  
Supreme Court  
Manila

THIRD DIVISION

NOTICE



Sirs/Mesdames:

Please take notice that the Court, Third Division, issued a Resolution dated **October 12, 2020**, which reads as follows:

“G.R. No. 195821 – (ASIAN AEROSPACE CORPORATION, *petitioner* v. OFFICE OF THE OMBUDSMAN, LYNN D. MORENO, ANDREW JOHN ROGER D’APICE, ET AL., *respondents*). – This refers to a Petition For *Certiorari*<sup>1</sup> filed by Asian Aerospace Corporation (*petitioner*) which challenged the following: (1) the Resolution<sup>2</sup> dated April 23, 2010 dismissing the complaint filed by the petitioner against Lynn D. Moreno (Moreno), Andrew John Roger D’Apice (D’Apice), Paul John Bisson (Bisson), John Allan Riggir (Riggir), and Ross Colin Schirmer (Schirmer), collectively, (*respondents*) and (2) the Order<sup>3</sup> dated September 13, 2010 denying petitioner’s motion for reconsideration of the said Resolution, both issued by the Office of the Ombudsman (OMB) in OMB-C-C-08-0542-K for violations of Section 3(e) & (g) of Republic Act (R.A.) No. 3019.

**The Facts**

Petitioner, a corporation duly organized and existing under the laws of the Philippines, represented by its Assistant Vice President Misael De Vera<sup>4</sup> filed a complaint against Moreno, Assistant Secretary and Chairman of the Bids and Awards Committee, Office of The President (OP BAC), D’Apice, Bisson, Riggir, Schirmer, supposed officers of Hawker Pacific Asia PTE LTD (Hawker) for violations of Section 3(e) and (g) of R.A. No. 3019.<sup>5</sup>

The OP BAC advertised an instruction to bidders for the procurement of services for the scheduled mandatory 2,500 hours inspection and overhaul

<sup>1</sup> Rollo, pp. 3-92.  
<sup>2</sup> Id. at 93-128.  
<sup>3</sup> Id. at 129-138.  
<sup>4</sup> Id. at 94.  
<sup>5</sup> Id. at 93-94.

of B-412EP Helicopter Model Tail No. 1896 (First Contract).<sup>6</sup> Petitioner was the sole bidder and its technical and financial proposals were declared 'passed.'<sup>7</sup> Resultantly, the OP BAC issued a Notice of Award dated October 23, 2007 to petitioner.<sup>8</sup> In December 2007, petitioner received a copy of the revised contract for its signature.<sup>9</sup>

According to petitioner, the said contract contained provisions which materially departed from the terms in the advertised Bid Contract Format which prompted petitioner to send a letter, dated January 8, 2008, to OP BAC which stated that it was still finalizing its comments/recommendations on the same. On January 18, 2008, a contract signed by petitioner which contained the revised contract stating its proposed changes was sent to OP BAC.<sup>10</sup>

On February 5, 2008, Moreno, in reply, sent a letter to petitioner stating the rejection of the latter's version of the contract. Petitioner claimed that Moreno instead presented a new revised contract which contained provisions materially departing from those contained in the advertised contract format. Thus, petitioner replied to Moreno's letter informing her that it could not agree to the revisions in the new revised contract as the same will result to substantial financial loss.<sup>11</sup>

Later, Resolution No. 13, Series of 2008 was issued by OP BAC disqualifying petitioner for its supposed refusal to enter into a contract and post the required performance security within the prescribed period, declaring failure of bidding for the First Contract, and rebidding the project/adopting any appropriate mode of procurement.<sup>12</sup> Pursuant to the resolution, the OP sent a letter to petitioner on March 17, 2008 to inform it of the cancellation of the Notice of Award due to its failure to enter into a contract and submit requirements to perfect the same within ten 10 days from receipt of the Notice of Award.<sup>13</sup>

An appeal<sup>14</sup> was filed by petitioner praying for the reinstatement of the award in its favor with Executive Secretary Eduardo Ermita (Secretary Ermita) which was later denied in a Letter,<sup>15</sup> dated April 25, 2008, on the basis of Resolution No. 14, Series 2008<sup>16</sup> of OP BAC.

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<sup>6</sup> Id. at 94.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id. at 95

<sup>11</sup> Id.

<sup>12</sup> Id. at 95-96.

<sup>13</sup> Id. at 96.

<sup>14</sup> Id. at 223-225.

<sup>15</sup> Id. at 226.

<sup>16</sup> Id. at 227.

On June 17, 2008, petitioner, through a letter, sought for reconsideration<sup>17</sup> of Resolution No. 14 and enclosed five copies of a signed and notarized contract, which according to it was in the format of, and containing the terms and conditions embodied in the advertised Bid Contract Format and the original copy of the Performance Bond. Secretary Ermita, in his Letter dated June 30, 2008, denied AAC's letter for reconsideration.<sup>18</sup>

Petitioner alleged that it later discovered that OP BAC awarded the First Contract and the "Contract for OP Project: Procurement of Services – 3,000 Hour Inspection of Bell 412 NR 1898 and CORRECTION OF DELAYED DISCREPANCIES" (Second Contract) in the amount of ₱5,985,239.25 to Hawker by direct contracting.<sup>19</sup> Petitioner further averred that even before or immediately after the issuance of Resolution No. 13 and the Letter of Cancellation of the Notice of Award to it, Moreno, with the intention of easing out petitioner from the First Contract, had already been requesting cost estimates for the repair of Bell Helicopters of the Presidential Airlift Wing (PAW) from the Singapore Office of Bell Helicopter, the original equipment manufacturer (OEM) of the helicopter to be serviced.<sup>20</sup>

Petitioner is of the opinion that the contracts awarded to Hawker should have been subjected to public bidding and not by direct contracting. Such alternative method of procurement is not in accordance with Section 50 of R.A. No. 9184 and its Implementing Rules and Regulations-A (IRR-A), as well as the pertinent provisions of Administrative Order No. 227 which require all government offices to procure locally made products and services.<sup>21</sup>

Additionally, petitioner claimed that the awards granted to Hawker by direct contracting of the First and Second Contracts are illegal as they deprived it and other bidders of the opportunity to participate in public bidding that should have been conducted, resulting to undue injury in the form of lost business opportunity and income.<sup>22</sup> It also said that it or other bidders could have submitted lower bids. Thus, the awards to Hawker through direct contracting are transactions manifestly and grossly disadvantageous to the government, in violation of Section 3(g) of R.A. No. 3019.<sup>23</sup>

On January 22, 2009, petitioner filed a Supplemental Affidavit Complaint<sup>24</sup> which alleged conspiracy between Moreno and the officers of

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<sup>17</sup> Id. at 228-236.

<sup>18</sup> Id. at 248-252.

<sup>19</sup> Id. at 97.

<sup>20</sup> Id. at 98.

<sup>21</sup> Id. at 99.

<sup>22</sup> Id.

<sup>23</sup> Id. at 100.

<sup>24</sup> Id. at 272-285.

Hawker, D'Apice, Bison, Riggir, and Schirmer in violation of Section 3(e) and (g) of R.A. No. 3019.<sup>25</sup>

Moreno, in her counter-affidavit, denied commission of any violation of Section 3(e) of R.A. No. 3019 and argued that the Notice of Award is simply a notification to the successful bidder that it was chosen as the implementor of the contract subject of the bidding.<sup>26</sup> She said that the Bid Contract Format is not yet the main or final contract. It is just the framework or working outline of the main contract.<sup>27</sup> Moreover, she alleged that the proposed amendments of OP BAC are not substantial and were only made for clarity and brevity to correct certain typographical errors and that it will not result in the withholding or diminution of benefits nor will it adversely affect the implementation of the project.<sup>28</sup>

She also claimed that the reason petitioner refused to sign the contract sent to it was that it wanted to impose additional costs on top of the ₱45,000,000.00 bid price which will cover rental of hangars, salaries of engineers/technical personnel, insurance, fuel to be used in test flights, and others which should have been included in the bid price.<sup>29</sup>

Moreno added that it was petitioner's refusal to sign the OP Contract and its insistence that the OP sign its own version of the contract, which substantially altered and imposed additional costs, which constrained the OP to cancel the Notice of Award to petitioner.<sup>30</sup> Moreno also pointed out that PAW emphasized the need to immediately procure and prioritize critical aircraft requirements because there will be only one Presidential Bell helicopter that would remain operational by the end of 2008. She said that it was PAW which recommended the adoption of the alternative mode of procurement of direct contracting pursuant to Section 50(c) of R.A. No. n9184 and its IRR-A.<sup>31</sup> She continued that the acts complained of by petitioner pertain to official acts and functions of the OP BAC, as a collegial body, and not her personal acts.<sup>32</sup> Thus, she opined that she cannot be held liable for violation of Section 3(g) of R.A. No. 3019.<sup>33</sup>

### The OMB Resolution

The OMB found no probable cause to prosecute Moreno and ruled that the charges against the private respondents must necessarily fail. It

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<sup>25</sup> Id. at 272-273.

<sup>26</sup> Id. 101.

<sup>27</sup> Id.

<sup>28</sup> Id. at 102.

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Id. at 103.

<sup>32</sup> Id.

<sup>33</sup> Id.

found that the elements for violation of Section 3(e) of R.A. No. 3019 were not present in the case.<sup>34</sup>

The OMB explained that Section 37 of R.A. No. 9184 mandates compliance by the winning bidder of all remaining documentary requirements, as well as to formally enter into contract with the procuring entity within 10 days from receipt of the Notice of Award.<sup>35</sup> It observed that it was almost three months from the issuance of the Notice of Award when petitioner submitted its own version of the contract.<sup>36</sup> Moreover, the continuous refusal of the petitioner to sign the contract sent by the OP and its insistence that the OP sign petitioner's version of the contract, which imposed additional costs, caused the issuance of Resolution No. 13 and constrained the OP to cancel the Notice of Award and disqualify the petitioner.<sup>37</sup>

The OMB ruled that the cancellation of the Notice of Award and the subsequent award of the First Contract to Hawker were not without justifiable reasons.<sup>38</sup> Hence, the OMB found that Moreno and the OP BAC did not act with evident bad faith, manifest impartiality, or gross inexcusable negligence.<sup>39</sup>

In addition, the OMB said that direct contracting is allowed under Section 50 of R.A. No. 9184 in cases of goods sold by exclusive dealers or manufacturers. Hawker, being the sole in-country customer service facility (CSF) in the Philippines authorized by Bell Helicopter Textron to conduct inspection, repair, overhaul, and other maintenance works, as well as to sell Bell parts, for Bell 412 Helicopters, it is, thus, classified as an exclusive dealer as contemplated under Section 50 (c) of R.A. No. 9184 and its IRR-A.<sup>40</sup>

The OMB likewise stated that the acts complained of by petitioner pertain to the official acts and functions of the OP BAC as a collegial body and not solely of Moreno.<sup>41</sup> The decisions of the OP BAC are not her personal decisions.<sup>42</sup> She did not cause undue injury to the government or to petitioner.<sup>43</sup>

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<sup>34</sup> Id. at 112-113.

<sup>35</sup> Id. at 113.

<sup>36</sup> Id.

<sup>37</sup> Id. at 113-116.

<sup>38</sup> Id. at 117-118.

<sup>39</sup> Id. at 118.

<sup>40</sup> Id. at 120-121.

<sup>41</sup> Id. at 122.

<sup>42</sup> Id.

<sup>43</sup> Id.

Ultimately, the complaint was dismissed. The dispositive portion of the Resolution states:

WHEREFORE, this complaint is hereby DISMISSED for lack of probable cause.

SO RESOLVED.<sup>44</sup>

### The OMB Order

The petitioner filed its motion for reconsideration and to suspend and third supplemental complaint before the OMB praying for the reconsideration of the assailed Resolution and the preventive suspension of Moreno. Petitioner accused Moreno of conspiracy with the other respondents of continuing with the illegal procurement of services for the repair, maintenance and/or supply parts for Bell 412 Helicopters of the OP by direct contracting, notwithstanding the final *certiorari* decision issued by the Regional Trial Court (RTC) of Manila, Branch 50 in SP No. 08-119962.<sup>45</sup>

The OMB ruled that there was no sufficient ground to disturb the findings in the assailed Resolution.<sup>46</sup> It took into consideration the argument of the respondents that the decision of the RTC in SP No. 08-119962 is not final and executory as a case is pending before the Court of Appeals (CA) involving the said decision. OMB held that the arguments raised by the petitioner in its motion were mere rehash of his earlier allegations which were already passed upon in the Resolution.<sup>47</sup>

In tackling the prayer of petitioner for the suspension of Moreno, the OMB stated that preventive suspension is merely a measure that is precisely designed in order not to hamper the normal course of an investigation through the use of influence and authority.<sup>48</sup> It ruled that [c]onsidering that the preliminary investigation of this case has long been concluded, the objective for which respondent Moreno may be preventively suspended, has ceased to exist.<sup>49</sup>

Anent the third supplemental complaint, the OMB held that the motion for the admission thereof, after the resolution of petitioner's complaint and upon filing of his motion for reconsideration, is an utter

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<sup>44</sup> Id. at 127.

<sup>45</sup> Id. at 131.

<sup>46</sup> Id. at 133.

<sup>47</sup> Id. at 134.

<sup>48</sup> Id. at 135.

<sup>49</sup> Id. at 136.

disregard of Administrative Order No. 07<sup>50</sup> as well as the Revised Rules of Court. Thus, the same was denied.

The dispositive portion of the Order reads:

WHEREFORE, the complainant's "Motion For Reconsideration And To Suspend And Third Supplemental Complaint" is hereby DENIED with finality for lack of merit.<sup>51</sup>

Hence, this petition.

### Issue

Is there a probable cause to prosecute the respondents of violations of Section 3 (e) and (g) of R.A. No. 3019?

### This Court's Ruling

Probable cause merely implies probability of guilt.<sup>52</sup>

A finding of probable cause needs only to rest on evidence showing that more likely than not a crime has been committed and was committed by the suspects. Probable cause need not be based on clear and convincing evidence of guilt, neither on evidence establishing guilt beyond reasonable doubt and definitely, not on evidence establishing absolute certainty of guilt.<sup>53</sup>

The petitioner accused respondent Moreno and private respondents of violations of Section 3(e) and (g) of R.A. No. 3019 which state:

**Sec. 3. *Corrupt practices of public officers.*** In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

x x x x

(e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross

<sup>50</sup> Rules of Procedure of the Office of the Ombudsman.

<sup>51</sup> Id. at 137.

<sup>52</sup> *Sen. Estrada v. Ombudsman*, 751 Phil. 821, 869 (2015).

<sup>53</sup> Id. at 868.

inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

x x x x

(g) Entering, on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby.

x x x x

The three essential elements for violation of Section 3(e) of R.A. No. 3019 are: (1) that the accused is a public officer discharging administrative, judicial or official functions; (2) that the accused acted with manifest partiality, evident bad faith or gross inexcusable negligence; and (3) that the accused caused undue injury to any party including the Government, or giving any private party unwarranted benefits, advantage or preference in the discharge of his functions.<sup>54</sup> While the elements for violation of Section 3(g) of R.A. No. 3019 are: (1) that the accused is a public officer; (2) that he entered into a contract or transaction on behalf of the government; and (3) that such contract or transaction is grossly and manifestly disadvantageous to the government.<sup>55</sup>

Admittedly, Moreno, is a public officer discharging her functions when she communicated with Hawker for the procurement of services for the repair, maintenance and/or supply parts for Bell 412 Helicopters. However, her actions are pursuant to Resolution No. 23 which recommended the adoption of direct contracting in favor of OEM and/or its authorized CSF in the Philippines.<sup>56</sup> The Resolution is a result of the recommendation of the PAW for the adoption of the alternative mode of procurement of Direct Contracting pursuant to Section 50(c) of R.A. No. 9184 and its IRR-A with emphasis for the need to immediately procure and prioritize critical aircraft requirements since only one Presidential Bell helicopter would remain operational by the end of 2008.<sup>57</sup>

Resolution No. 23 is not a result of the personal decision of respondent Moreno. It is undoubtedly a decision of the OP BAC, as a collegial body.<sup>58</sup>

Moreover, Resolution No. 23 is a consequence of the cancellation of the Notice of Award to petitioner. It is to be noted that Section 37<sup>59</sup> of R.A.

<sup>54</sup> *Garcia v. Sandiganbayan*, 730 Phil. 521, 534 (2014).

<sup>55</sup> *People v. Go*, 730 Phil. 362, 369 (2014).

<sup>56</sup> *Rollo*, p. 115.

<sup>57</sup> *Id.* at 103.

<sup>58</sup> *Id.*

<sup>59</sup> **Sec. 37. Notice and Execution of Award.** – Within a period not exceeding fifteen (15) calendar days from the determination and declaration by the BAC of the Lowest Calculated Responsive Bid or



No. 9184 requires that the winning bidder formally enter into contract with the Procuring Entity within 10 days from receipt of the Notice of Award. Unfortunately, the petitioner failed to comply. It was October on 23, 2007 when the notice was issued by the OP BAC. Almost three months thereafter, petitioner submitted its own version of the contract after its refusal to sign the contract sent by the OP. Its repeated refusal to enter into a contract and insistence that the OP sign its own version of the contract, which was repeatedly rejected by the OP for being grossly disadvantageous to the government for containing provisions imposing additional costs over and above the bid amount, caused the cancellation of the Notice of Award previously issued to petitioner

A Notice of Award is simply a notification to the successful bidder that it was chosen as the implementor of the contract subject of the bidding. It is not yet the contract. The procuring entity and the winning bidder still have to enter into and sign a formal contract as required under Section 37.3<sup>60</sup> of the IRR-A of R.A. No. 9184 after compliance with all documentary requirements,<sup>61</sup> which petitioner also failed to do.

Clearly, Moreno or the OP BAC did not act with evident bad faith, manifest impartiality or gross inexcusable negligence.<sup>62</sup>

Section 3(e) may be committed through three (3) different modes: "Partiality" is synonymous with "bias" which "excites a disposition to see and report matters as they are wished for rather than as they are." "Bad faith does not simply connote bad judgment or negligence; it imputes a dishonest purpose or some moral obliquity and conscious doing of a wrong; a breach of sworn duty through some motive or intent or ill will; it partakes of the nature of fraud." "Gross negligence has been so defined as negligence characterized by the want of even slight care, acting or omitting to act in a situation where there is a duty to act, not inadvertently but willfully and intentionally with a conscious indifference to consequences in so far as other persons may be affected. It is the omission of that care which even

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Highest Rated Responsive Bid, and the recommendation of the award, the Head of the Procuring Entity or his duly authorized representative shall approve or disapprove the said recommendation. In case of approval, the Head of the Procuring Entity or his duly authorized representative shall immediately issue the Notice of Award to the bidder with the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid.

Within ten (10) calendar days from receipt of the Notice of Award, the winning bidder shall formally enter into contract with the Procuring Entity. When further approval of higher authority is required, the approving authority for the contract shall be given a maximum of twenty (20) calendar days to approve or disapprove it.

x x x x

<sup>60</sup> 37.3. Contract Signing The winning bidder or its duly authorized representative shall comply with all the remaining documentary requirements, if any, prior to formally entering into contract with the procuring entity concerned within ten (10) calendar days from receipt by the winning bidder of the Notice of Award.

The Procuring Entity shall enter into contract with the winning bidder within the same ten (10) day period provided that all the documentary requirements are complied with.

<sup>61</sup> *Rollo*, p. 117.

<sup>62</sup> *Id.* at 117-118.

inattentive and thoughtless men never fail to take on their own property.” These definitions prove all too well that the three modes are distinct and different from each other. Proof of the existence of any of these modes in connection with the prohibited acts under Section 3(e) should suffice to warrant conviction.<sup>63</sup>

Here, there is not an iota of evidence of any manifest partiality, evident bad faith or gross inexcusable negligence on the part of Moreno. The First Contract was awarded to Hawker long after the Notice of Award to petitioner was cancelled.<sup>64</sup> Contrary to the allegation of petitioner that cost estimates were being requested by Moreno even before the cancellation of the Notice of Award, the OP BAC only inquired about cost estimates from the Singapore Office of Bell Helicopter Textron after the revocation of the Notice of Award to petitioner.<sup>65</sup> To note, Resolution No. 13 which recommended the cancellation of the Notice of Award was issued on March 6, 2008, while the letter informing petitioner of the said cancellation was dated March 17, 2008. The records of this case reveal that the letter of Moreno to Hawker was written in April 16, 2008.<sup>66</sup>

The petitioner’s claim that since the procurement covered by the First and Second Contracts were done through direct contracting, it and other bidders were deprived of the opportunity to submit bids which could have been lesser in contract costs than that of Hawker. According to petitioner, direct contracting is in violation of Administrative Order No. 227 (AO 227), Series of 2008 which, according to petitioner, requires all government offices to procure locally made products and supplies.<sup>67</sup>

Petitioner’s argument is misleading.

AO 227 directs all heads of departments, bureaus, offices and agencies of the national government, including local government units; government-owned and/or controlled corporations, government financial institutions, state universities and colleges and military and police units to give preference, in the procurement of materials and supplies, to those produced, made and manufactured in the Philippines. This does not apply in the procurement of services for the repair, maintenance and/or supply of parts for Bell 412 Helicopters.

The First Contract involves the scheduled mandatory 2,500 hours inspection and overhaul of Bell 412 Helicopter which entails the

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<sup>63</sup> *Giangan, et al. v. People*, 767 Phil. 738, 748 (2015) quoting *Fonacier v. Sandiganbayan*, 308 Phil. 660, 693-694 (1994).

<sup>64</sup> *Rollo*, p. 119.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 253.

<sup>67</sup> *Id.* at 99.

replacement of parts and components of the Bell helicopter. These parts and components are to be ordered or repaired by the manufacturer of Bell helicopters, that is, Bell Helicopter Textron or its CSF in the Philippines.<sup>68</sup>

Hawker is the sole in-country CSF of Bell Helicopter Textron. It is the only entity authorized by Bell Helicopter Textron to conduct inspection, repair, overhaul, and perform other maintenance works, as well as sell Bell parts for Bell 412 helicopters.<sup>69</sup> Meaning, Hawker is an exclusive dealer as contemplated under Section 50(c)<sup>70</sup> of R.A. No. 9184 and its IRR-A.

More importantly, direct contracting is sanctioned by Sections 48(b) and 50 of R.A. No. 9184 which state:

**Sec. 48. *Alternative Methods.*** – Subject to the prior approval of the Head of the Procuring Entity or his duly authorized representative, and whenever justified by the conditions provided in this Act, the Procuring Entity may, in order to promote economy and efficiency, resort to any of the following alternative methods of Procurement:

X X X X

(b) *Direct Contracting, otherwise known as Single Source Procurement* – a method of Procurement that does not require elaborate Bidding Documents because the supplier is simply asked to submit a price quotation or a pro-forma invoice together with the conditions of sale, which offer may be accepted immediately or after some negotiations;

X X X X

**Sec. 50. *Direct Contracting.*** – Direct Contracting may be resorted to only in any of the following conditions:

(a) Procurement of Goods of proprietary nature, which can be obtained only from the proprietary source, i.e. when patents, trade secrets and copyrights prohibit others from manufacturing the same item;

(b) When the Procurement of critical components from a specific manufacturer, supplier or distributor is a condition precedent to

<sup>68</sup> Id. at 120-121.

<sup>69</sup> Id. at 121.

<sup>70</sup> **Sec. 50. *Direct Contracting.*** – Direct Contracting may be resorted to only in any of the following conditions:

(a) Procurement of Goods of proprietary nature, which can be obtained only from the proprietary source, i.e. when patents, trade secrets and copyrights prohibit others from manufacturing the same item;

(b) When the Procurement of critical components from a specific manufacturer, supplier or distributor is a condition precedent to hold a contractor to guarantee its project performance, in accordance with the provisions of his contract; or,

(c) Those sold by an exclusive dealer or manufacturer, which does not have subdealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the Government. (Emphasis supplied.)

hold a contractor to guarantee its project performance, in accordance with the provisions of his contract; or,

(c) Those sold by an exclusive dealer or manufacturer, which does not have subdealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the Government.

While Hawker is the only CSF of Bell Helicopter Textron, petitioner is not authorized by Bell Helicopter Textron, the OEM, to perform maintenance, inspection, repair, component overhaul and/or alteration of any Bell model aircraft, including Bell 412 helicopters, or to sell Bell parts.<sup>71</sup> It is considered as an ordinary customer of Bell Helicopter Textron/Hawker. In fact, petitioner, in its previous contract with OP involving the mandatory inspection, repair, and overhaul of three Bell 412 Helicopters with Tail Nos. RP-2000, RP-1998, and RP-1946, subcontracted to Hawker the work involving the component overhaul of said helicopters.<sup>72</sup>

In effect, Moreno did not cause undue injury to the government or petitioner.<sup>73</sup>

Causing undue injury means actual injury or damage which must be established by evidence. The word "undue" means "more than necessary, not proper, or illegal"; and "injury" means "any wrong or damage done to another, either in his person, rights, reputation or property; the invasion of any legally protected interest of another." Actual damage, in the context of these definitions, is akin to that in civil law.<sup>74</sup>

A lost business opportunity does not fall within the purview of "undue injury" as contemplated in Section 3(e) of R.A. No. 3019,<sup>75</sup> especially so that the loss was caused by petitioner's own failure to comply with the requirements for the execution of a formal contract between it and the OP.

Anent its accusation against the respondents for violation of Section 3(g) of R.A. No. 3019, the same shall not prosper.

To reiterate, the elements of the violation are: (1) that the accused is a public officer; (2) that he entered into a contract or transaction on behalf of the government; and (3) that such contract or transaction is grossly and manifestly disadvantageous to the government.<sup>76</sup>

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<sup>71</sup> Id. at 124.

<sup>72</sup> Id.

<sup>73</sup> Id. at 122.

<sup>74</sup> *Giangan, et al. v. People*, supra note 63 at 746.

<sup>75</sup> *Rollo*, p. 122.

<sup>76</sup> *People v. Go*, supra, note 55 at 369.

Moreno did not enter into a contract or transaction on behalf of the government with Hawker. As correctly found by the OMB, she merely presided over the meetings, participated in the deliberations and signed the pertinent minutes and resolutions of OP BAC.<sup>77</sup> More importantly, the actions of OP BAC are merely recommendatory.<sup>78</sup> The final decision rests upon the Executive Secretary who is the Head of the procuring entity.<sup>79</sup>

Also, the award to Hawker of the first Contract apparently is more advantageous to the government as the offer of Hawker was only for the amount of P31,000,000.00 compared to the P45,000,000.00 bid of petitioner.<sup>80</sup>

Taking into consideration all the foregoing, no probable cause exists to prosecute Moreno. As private individuals may be prosecuted together with public officials only when there is proof of conspiracy. The charges against private respondents must also fail as no proof of the alleged conspiracy between Moreno and the private respondents were adduced to establish the same.

**WHEREFORE**, the Resolution dated April 23, 2010 and the Order dated September 13, 2010 of the Office of the Ombudsman are hereby **AFFIRMED *in toto***.

**SO ORDERED.”**

(**Leonen, J., on leave; Gesmundo, Acting Chairperson**)

By authority of the Court:

*MisPOCSatt*  
**MISAEAL DOMINGO C. BATTUNG III**  
*Division Clerk of Court*

*6/21/21*

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<sup>77</sup> *Rollo*, p. 123.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

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(OMB-C-C-08-0542-K)

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