

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 47
(21 September 2000)**

**Antonio C. Domdom, Jr.
v.
Asian Development Bank**

**Mark Fernando, President
Martti Koskenniemi
Thio Su Mien**

1. The Applicant applied to the Tribunal in respect of the termination of his appointment with the Bank as a Telecommunications Engineer. He was dismissed by the Bank for serious misconduct after disciplinary proceedings against him pursuant to Section 24 of the Staff Regulations which provides:

The President may impose disciplinary measures on staff members whose conduct is unsatisfactory. He may summarily dismiss a staff member for serious misconduct in accordance with the procedures to be established by the Bank.

Clauses 2.1(h) and (i) of the Administrative Order 2.04 ("Disciplinary Procedures"), as revised on 1 November 1993, set out "termination of appointment" and "summary dismissal for serious misconduct", respectively, as disciplinary measures which may be imposed on staff members.

2. The complaint of misconduct against the Applicant was that he had participated in a bid manipulation scheme in respect of the Bank's procurement of telecommunications equipment. The scheme involved Trilink Datacom and Computers Inc. ("Trilink"). It was also alleged that he had accepted cash and other benefits from Trilink.

3. The issue of bid manipulation arose in early 1998, when the Office of Administrative Services ("OAS") noted that cellular telephones had been procured by the Bank well above market prices. It then initiated an investigation into the matter.

4. The investigation led to charges being brought against the Applicant for participating in bid manipulation. The essence of the charges against the Applicant was that in several instances between June and December 1997 he had recommended that the same two companies, Trilink and Smartnet Communications ("Smartnet"), be invited to bid for telecommunications equipment, and had manipulated the bids and the procurement process in such a way as to ensure that Trilink was the lowest evaluated bidder. That allegation was made particularly in relation to purchase order PO 97-1913 in respect of 20 Motorola cellular phones, where the bid by Trilink (of US\$ 500 per unit) was accepted, being the lowest although it was substantially more than the prevailing market price. It was further alleged that in return Trilink had paid him about P80,000 in cash and had provided him free trucking services for moving his household goods.

5. An employee of Smartnet, whom the Tribunal will refer to as Mr. T., had been dealing with the Bank on behalf of Smartnet from about 1994 in connection with the provision of services to the Bank. In 1991 Mr. T. formed Trilink, a company of which he was a shareholder and President. The Applicant admittedly knew, in June 1997, that Mr. T. was President of Trilink.

6. On 15 June 1997 the Applicant initiated the procurement process in respect of the first of the five impugned transactions. He recommended two suppliers (Smartnet and Contel) to be invited to bid for the supply of telecommunications equipment. A representative of Trilink telephoned the Bank and asked to be listed as a bidder; that was allowed in the interest of competition; and the bid was successful.

7. Thereafter in respect of the other four impugned transactions the Applicant recommended that both Smartnet and Trilink be invited to bid.

8. In the case of the fifth impugned transaction, the Applicant recommended three suppliers – Smartnet, Trilink, and Semicon Integrated Electronics Corporation ("Semicon") – and also gave the name of the "contact persons", namely Mr. T. and another person whom the Tribunal will refer to as Mr. G., in the case of Trilink and Smartnet, respectively, but not in the case of Semicon. There were eleven dealers in Motorola cellular telephones, but only these three were invited to bid.

9. The Applicant accepted that it was Mr. T. who had "endorsed" Mr. G. as the new contact person for Smartnet. Mr. G. was then Mr. T.'s subordinate at Smartnet.

10. Thus, during the entirety of the relevant period – June to December 1997 – the Applicant knew that Mr. T. had an interest in both Smartnet and Trilink; that Mr. T. stood to profit from Trilink winning the bids, rather than Smartnet; and that bids were being submitted on behalf of Smartnet by a person who, besides being a subordinate of Mr. T., had also been recommended by him. It would best serve the interests of Mr. T. if Trilink's bid was high (in relation to the market price) but nevertheless lower than Smartnet's. When the Applicant recommended both suppliers, with the knowledge that Mr. T. could influence both bids, he was contravening the basic principle of maximizing competition in Bank procurement.

11. Mr. T. continued to be an employee of Smartnet until his resignation in January 1998.

12. The Applicant undoubtedly knew that the Bank's procurement procedure in respect of purchases of goods to the value of less than US\$ 25,000 virtually ensured that bids would not be invited from suppliers other than those recommended by him. The normal practice of the Bank's Procurement Section, in the case of such purchases, was to call for bids from the suppliers recommended by the user department, although it could add further suppliers, for example, if the number of bidders was less than three.

13. The circumstances in which bids were called for the fifth transaction are also relevant. The process was initiated with a requisition by the Applicant on 19 December 1997. That was in the legitimate expectation of concluding the transaction before the end of the year (as otherwise the budgetary provision would have lapsed). The Procurement Section faxed letters asking for bids on 22 December with a closing date of 24 December. It is not surprising that given the unusually short bidding period, especially during the Christmas season in the Philippines when business slackens, Semicon did not submit a bid; perhaps the fact that in regard to Semicon a contact person had not been mentioned contributed to that omission.

14. The inference from the foregoing that the Applicant might have known that the bids were being manipulated by Mr. T. was confirmed by direct evidence that there was in fact a scheme to manipulate bids. On 10 June 1998 Mr. G. admitted in a statement made to the Bank that Mr. T. asked him to prepare the quotation for the 20 Motorola cellular telephones at the price indicated by Mr. T., saying that the quotation would be just for comparison as Mr. T.'s company

would quote a lower price. He understood from Mr. T. that there had been a previous agreement between Mr. T. and the Applicant. Thereafter on 11 June 1998 Mr. T. confirmed to the Bank Mr. G.'s statement, claiming that he had compensated the Applicant by the payment of about P80,000 and assistance in other ways, such as moving his household furniture, providing manpower for setting up his new apartment, and so on.

15. Messrs. G. and T. gave evidence before the Committee of Inquiry ("COI"), created under Administrative Order ("A.O.") 2.04. They and the other witnesses who gave evidence against the Applicant were believed by the COI, which (after a close scrutiny of the various grounds urged by the Applicant) gave reasons for rejecting the Applicant's attack on their credibility.

16. As for payments to the Applicant, Mr. T. claimed that he had deposited sums of money in a bank account, but the COI held that there was no proof that these benefited the Applicant. The Applicant denied receipt of any payment, but admitted that he compensated Trilink for assistance in moving household goods by selling to Trilink some office tables which he had bought from a local Embassy. Even if the Tribunal were to accept the truth of that assertion, the Tribunal cannot but agree with the COI that it is disturbing that "if the staff member was minded to pay a market price, why did he choose to use the services of Trilink which is not in the business of providing trucking services?", and that "the use of Trilink would suggest a close relationship between the staff member and Trilink."

17. The COI concluded from its inquiry that the Applicant had participated in bid manipulation and that while it was not possible to ascertain the amount, the Applicant had received cash in return for assisting Trilink in its business with the Bank.

18. Following therefrom, the Bank terminated the Applicant's appointment on the ground of serious misconduct. The Applicant then filed an appeal with the Appeals Committee. According to A.O. No. 2.06 ("Administrative Review and Appeals Procedures"), Section 9.2 ("Competence of the Appeals Committee"), the Appeals Committee should review whether the Bank's Staff Regulations, Administrative Orders and policies and procedures had been correctly applied.

19. The Applicant had objected to a member of the Appeals Committee on the ground of bias alleging that that member was closely associated with a member of the COI. Although the Appeals Committee did not think that there would be any issue of bias, it took into account the concerns of the Applicant and appointed another person acceptable to the Applicant to the Appeals Committee.

20. The Appeals Committee concluded that the Bank had complied with its Staff Regulations, Administrative Orders, policies and procedures, and that the Applicant's claim that there was bias on the part of the COI, leading to a miscarriage of administrative due process culminating in the President's decision to dismiss the Applicant, was not substantiated.

21. The Applicant applied to the Tribunal for the "review and reconsideration of the recommendations and findings of the Committee of Inquiry and the Appeals Committee [as being] violative of administrative due process and contrary to the law and evidence."

22. The Applicant claims that there was lack of substantive due process:

Is there sufficient evidence to prove it? As gleaned from the COI report, this charge is anchored solely on unestablished facts, presumption, and biased evaluation of the COI

members vis-à-vis unreliable statements of Mr. [T.] whose credibility is admittedly questionable....

The COI did not extend to him the reasonable guarantee of fairness, objectivity, and impartiality in the reception and evaluation of evidence and in its findings and conclusions. It exhibited bias in almost all of its appreciation of the evidence....

23. The Applicant further asserts that "two facts betray the COI's failure to observe procedural due process":

- a. "the conviction of the Applicant as guilty of bid manipulation based solely on the testimony of [Mr. T.] as President of Trilink, whose credibility was admittedly suspect and who must have testified on an ill-will motive against Applicant as to pervert the truth imputing to Applicant an act of manipulation and in the absence of a credible explanation as to why [his supervisor] was not thoroughly investigated himself"; and
- b. "why the COI completely ignored the defense invoked by the Applicant that there was a 'dark motive' behind his investigation...."

24. The Applicant seeks the following remedies for breach of due process and his alleged illegal dismissal:

- a. reinstatement to his former position in the Bank, or related position level with back wages and without loss of seniority rights;
- b. compensation for the injury sustained and damage and prejudice suffered as a result of the filing of this case;
- c. other reliefs and remedies, which are just and equitable in the event of his exoneration by the Tribunal.

It is noted that the Applicant had not availed himself of his withdrawal benefits and separation pay when his appointment was terminated.

25. The power of the Tribunal to hear such applications is set out in Article II, para. 1, of the Statute which provides:

The Tribunal shall hear and pass judgment upon any application by which an individual member of the staff of the Bank alleges nonobservance of the contract of employment or terms of appointment of such staff member.

26. Outlining its power of review in disciplinary cases, the Tribunal in Zaidi, Decision No.17 [1996], II ADBAT Reports 89, 92, followed Carew, Decision No. 142, World Bank Reports 1995:

In [disciplinary] cases the Tribunal examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offence, and (v) whether the requirements of due process were observed.

In accordance with these principles, the Tribunal in the present case examined whether on the facts the Applicant had participated in the bid manipulation scheme; whether he had received cash or other benefits from Trilink; whether, if these facts were established, they would amount to serious misconduct within the meaning of Section 24 of the Staff Regulations so as to justify dismissal; and whether the requirements of due process were observed.

27. After assessing the facts on the pleadings, the report of the COI as well as the report of the Appeals Committee, the Tribunal is of the view that there was credible evidence that the Applicant had participated in the bid manipulation scheme and had received some benefits, and that such conduct constituted "serious misconduct" which entitled the Bank to dismiss him under the terms of his employment. The Tribunal considered the Applicant's allegation of bias on the part of the COI in its evaluation of the evidence adduced. That allegation was mainly founded on the weight given to the evidence of Mr. T. who the Applicant alleged was motivated by ill-feeling because the Applicant had put on hold the purchase of equipment from Trilink for non-compliance with technical requirements. This was notwithstanding the prior approval of his supervisor. Furthermore, despite Trilink's involvement in bid manipulation, it was still doing business with the Bank at the time of the COI decision, thus implying some collusion between them. As such, the Applicant claimed that the COI should have regarded Mr. T.'s credibility as "tainted." He further claimed that there was no explanation as to why the Applicant's supervisor was not investigated, and that the COI should not have ignored his defense that there was a "dark motive" behind the investigation. Accordingly, the Tribunal is of the view that the Applicant's allegation of bias is not substantiated. It was not unreasonable for the COI to accept the testimony of Mr. T. which was corroborated by Mr. G., and to reject the Applicant's allegation of complicity, bias or "dark motive" on the part of his supervisor since he did not adduce any evidence to show any "alliance" between his supervisor and Mr. T.

28. In conclusion, the Tribunal holds that the Bank had complied with its disciplinary procedure and that there was no bias or failure of either substantive or procedural due process in the disciplinary proceedings so as to vitiate the decision of the Bank to dismiss the Applicant for serious misconduct, and that the sanction imposed was not disproportionate to the offense.

Decision:

29. For these reasons, the Tribunal unanimously decides to dismiss the Application.