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the truel winner in the 4 December 1992 Sangguniang Kabataan Elections in Barangay Mabalor, Ibaan, Batangas. This decision is immediately executory.

No pronouncement as to costs.

SO ORDERED.

Narvasa, C.J., Feliciano, Padilla, Bidin, Regalado, Bellosillo, Melo, Quiason, Puno, Vitug, Kapunan, Mendoza, and *Francisco, JJ.*, concur.
Romero, J., is on official travel.

EN BANC

[G.R. No. 114222. April 6, 1995]

FRANCISCO S. TATAD, JOHN H. OSMEÑA and RODOLFO G. BIAZON, *petitioners, vs.* HON. JESUS B. GARCIA, JR., in his capacity as the Secretary of the Department of Transportation and Communications, and EDSA LRT CORPORATION, LTD., *respondents.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; TAXPAYER'S SUITS; PREVAILING DOCTRINE. — The prevailing doctrines in taxpayer's suits are to allow taxpayers to question contracts entered into by the national government or government-owned or controlled corporations allegedly in contravention of the law (Kilosbayan, Inc. *v.* Guingona, 232 SCRA 110 [1994]) and to disallow

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the same when only municipal contracts are involved (Bugnay Construction and Development Corporation *v.* Laron, 176 SCRA 240 [1989]). For as long as the ruling in *Kilosbayan* on *locus standi* is not reversed, we have no choice but to follow it and uphold the legal standing of petitioners as taxpayers to institute the present action.

2. **POLITICAL LAW; NATIONAL ECONOMY AND PATRIMONY; PUBLIC UTILITY; FACILITIES TO OPERATE A PUBLIC UTILITY DO NOT NEED A FRANCHISE.** – Private respondent EDSA LRT Corporation, Ltd. to whom the contract to construct the EDSA LRT III was awarded by public respondent Secretary of DOTC, is admittedly a foreign corporation "duly incorporated and existing under the laws of Hongkong." However, there is also no dispute that once the EDSA LRT III is constructed, private respondent, as lessor, will turn it over to DOTC, as lessee, for the latter to operate the system and pay rentals for said use. What private respondent owns are the rail tracks, rolling stocks like the coaches, rail stations, terminals and the power plant, not a public utility. While a franchise is needed to operate these facilities to serve the public, they do not by themselves constitute a public utility. What constitutes a public utility is not their ownership but their use to serve the public (Iloilo Ice & Cold Storage Co. *v.* Public Service Board, 44 Phil. 551, 557-558 [1923]). The Constitution, in no uncertain terms, requires a franchise for the operation of a public utility. However, it does not require a franchise before one can own the facilities needed to operate a public utility so long as it does not operate them to serve the public.

3. **ID.; ID.; ID.; ID.; OPERATION OF PUBLIC UTILITY AND OWNERSHIP OF FACILITIES, DISTINGUISHED.** — In law, there is a clear distinction between the "operation" of a public utility and the ownership of the facilities and equipment used to serve the public. Ownership is

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defined as a relation in law by virtue of which a thing pertaining to one person is completely subjected to his will in everything not prohibited by law or the concurrence with the rights of another (Tolentino, II Commentaries and Jurisprudence on the Civil Code of the Philippines 45 [1992]). The exercise of the rights encompassed in ownership is limited by law so that a property cannot be operated and used to serve the public as a public utility unless the operator has a franchise. The operation of a rail system as a public utility includes the transportation of passengers from one point to another point, their loading and unloading at designated places and the movement of the trains at pre-scheduled times. The right to operate a public utility may exist independently and separately from the ownership of the facilities thereof. One can own said facilities without operating them as a public utility, or conversely, one may operate a public utility without owning the facilities used to serve the public. The devotion of property to serve the public may be done by the owner or by the person in control thereof who may not necessarily be the owner thereof. This dichotomy between the operation of a public utility and the ownership of the facilities used to serve the public can be very well appreciated when we consider the transportation industry. Enfranchised airline and shipping companies may lease their aircraft and vessels instead of owning them themselves.

4. **ID.; ID.; ID.; ID.; REQUISITE FILIPINO NATIONALITY DETERMINED WHEN ENTITY APPLIES FOR FRANCHISE.** — Private respondent will not run the light rail vehicles and collect fees from the riding public. It will have no dealings with the public and the public will have no right to demand any services from it. Indeed, a mere owner and lessor of the facilities used by a public utility is not a public utility. Neither are owners of tank, refrigerator, wine, poultry and beer cars who supply cars under contract to railroad

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companies considered as public utilities. Even the mere formation of a public utility corporation does not *ipso facto* characterize the corporation as one operating a public utility. The moment for determining the requisite Filipino nationality is when the entity applies for a franchise, certificate or any other form of authorization for that purpose.

5. ID.; ID.; ID.; BUILD-OPERATE-AND-TRANSFER (BOT) SCHEME; BUILD-AND-TRANSFER (BT) SCHEME; DEFINED AND DISTINGUISHED. — The BOT scheme is expressly defined as one where the contractor undertakes the construction and financing of an infrastructure facility, and operates and maintains the same. The contractor operates the facility for a fixed period during which it may recover its expenses and investment in the project plus a reasonable rate of return thereon. After the expiration of the agreed term, the contractor transfers the ownership and operation of the project to the government. In the BT scheme, the contractor undertakes the construction and financing of the facility, but after completion, the ownership and operation thereof are turned over to the government. The government, in turn, shall pay the contractor its total investment on the project in addition to a reasonable rate of return. If payment is to be effected through amortization payments by the government infrastructure agency or local government unit concerned, this shall be made in accordance with a scheme proposed in the bid and incorporated in the contract (R.A. No. 6957, Sec. 6). Emphasis must be made that under the BOT scheme, the owner of the infrastructure facility must comply with the citizenship requirement of the Constitution on the operation of a public utility. No such a requirement is imposed in the BT scheme.

6. ID.; ID.; ID..; BUILD-LEASE-AND-TRANSFER (BLT) SCHEME AND RELATED AGREEMENTS; NOT BARRED IN THE *BOT* LAW (RA

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6975). — There is no mention in the BOT Law that the BOT and BT schemes bar any other arrangement for the payment by the government of the project cost. The law must not be read in such a way as to rule out or unduly restrict any variation within the context of the two schemes. Indeed, no statute can be enacted to anticipate and provide all the fine points and details for the multifarious and complex situations that may be encountered in enforcing the law. The BLT scheme in the challenged agreements is but a variation of the BT scheme under the law. As a matter of fact, the burden on the government in raising funds to pay for the project is made lighter by allowing it to amortize payments out of the income from the operation of the LRT System. In form and substance, the challenged agreements provide that rentals are to be paid on a monthly basis according to a schedule of rates through and under the terms of a confirmed Irrevocable Revolving Letter of Credit. At the end of 25 years and when full payment shall have been made to and received by private respondent, it shall transfer to DOTC, free from any lien or encumbrances, all its title to, rights and interest in, the project for only U.S. $1.00 (Revised and Restated Agreement). A lease is a contract where one of the parties binds himself to give to another the enjoyment or use of a thing for certain price and for a period which may be definite or indefinite but not longer than 99 years (Civil Code of the Philippines, Art. 1643). There is no transfer of ownership at the end of the lease period. But if the parties stipulate that title to the leased premises shall be transferred to the lessee at the end of the lease period upon the payment of an agreed sum, the lease becomes a lease-purchase agreement. Furthermore, it is of no significance that the rents shall be paid in United States currency, not Philippine pesos. The EDSA LRT III Project is a high priority project certified by Congress and the National Economic and Development Authority as falling under the Investment Priorities Plan of

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Government. It is, therefore, outside the application of the Uniform Currency Act (R.A. No. 529).

7. ID.; ID.; ID.; AWARD OF CONSTRUCTION MAY BE MADE BY NEGOTIATION. — The fact that the contract for the constuction of the EDSA LRT III was awarded through negotiation and before congressional approval on January 22 and 23, 1992 of the List of National Projects to be undertaken by the private sector pursuant to the BOT Law does not suffice to invalidate the award. Subsequent congressional approval of the list including "rail-based projects packaged with commercial development opportunities" under which the EDSA LRT III project falls, amounts to a ratification of the prior award of the EDSA LRT III contract under the BOT Law. Indeed, where there is a lack of qualified bidders or contractors, the award of government infrastructure contracts may be made by negotiation. Presidential Decree No. 1594 is the general law on government infrastructure contracts while the BOT Law governs particular arrangements or schemes aimed at encouraging private sector participation in government infrastructure projects. The two laws are not inconsistent with each other but are in *pari materia* and should be read together accordingly.

8. ID.; ID.; RA 7718; QUALIFIED APPLICANT MAY ENTER INTO ANY SCHEME INCLUDING A BLT ARRANGEMENT. — Republic Act No. 7718 recognizes and defines a BLT scheme in Section 2 thereof. Section 5-A of the law, expressly allows direct negotiation of contracts. From the law itself, once an applicant has prequalified, it can enter into any of the schemes enumerated in Section 2, RA 7718, including a BLT arrangement, enumerated and defined therein (Sec. 3). Republic Act No. 7718 is a curative statute. It is intended to provide financial incentives and "a climate of minimun government regulations and procedures and specific government

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undertakings in support of the private sector" (Sec. 1). A curative statute makes valid that which before enactment of the statute was invalid. Thus, whatever doubts and alleged procedural lapses private respondent and DOTC may have engendered and committed in entering into the questioned contracts, these have now been cured by R.A. No. 7718.

9. ID.; ID.; ID.; AGREEMENTS BETWEEN PRIVATE RESPONDENT AND DOTC, PRESUMED WELL-TAKEN AND TO THE ADVANTAGE OF BOTH PARTIES; GOVERNMENT OFFICIALS CONCERNED, PRESUMED TO HAVE PERFORMED THEIR FUNCTIONS REGULARLY. -- The determination by the proper administrative agencies and officials who have acquired expertise, specialized skills and knowledge in the performance of their functions should be accorded respect, absent any showing of grave abuse of diecretion. Government officials are presumed to perform their functions with regularity and strong evidence is necessary to rebut this presumption. Petitioners have not presented evidence on the reasonable rentals to be paid by the parties to each other. The matter of valuation is an esoteric field which is better left to the experts and which this Court is not eager to undertake. That the grantee of a government contract will profit therefrom and to that extent the government is deprived of the profits if it engages in the business itself, is not worthy of being raised as an issue. In all cases where a party enters into a contract with the government, he does so, not out of charity and not to lose money, but to gain pecuniarily. Definitely, the agreements in question have been entered into by DOTC in the exercise of its governmental function. DOTC is the primary policy, planning, programming, regulating and administrative entity of the Executive branch of government in the promotion, development and regulation of dependable and coordinated networks of transportation and communications systems as well as in the fast, safe,

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efficient and reliable postal, transportation and communications services (Administrative Code of 1987, Book IV, Title XV, Sec. 2). It is the Executive department, DOTC in particular, that has the power, authority and technical expertise to determine whether or not a specific transportation or communications project is necessary, viable and beneficial to the people. The discretion to award a contract is vested in the government agencies entrusted with that function.

MENDOZA, *J., concurring:*

1. **REMEDIAL LAW; CIVIL PROCEDURE; PARTIES; MEMBERS OF CONGRESS, NO LEGAL STANDING TO SUE IF THEY ALLEGE NO INFRINGEMENT OF PREROGATIVES AS LEGISLATORS.** — *J.* Mendoza holds that petitioners do not have standing to sue. He joins to dismiss the petition in this case. Petitioners do not have the right to sue, whether as legislators, taxpayers or citizens. As members of Congress, because they allege no infringement of prerogatives as legislators. As taxpayers because petitioners allege neither an unconstitutional exercise of the taxing or spending powers of Congress (Art. VI, 24-25 and 29) nor an illegal disbursement of public money. As this Court pointed out in *Bugnay Const. and Dev. Corp. v. Laron*, 176 SCRA 240, 251-2 (1989) a party suing as taxpayer "must specifically prove that he has sufficient interest in preventing the illegal expenditure of money raised by taxation and that he will sustain a direct injury as a result of the enforcement of the questioned statute or contract. It is not sufficient that he has merely a general interest common to all members of the public." In that case, it was held that a contract, whereby a local government leased property to a private party with the understanding that the latter would build a market building and at the end of the lease would transfer the building to the lessor, did

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not involve a disbursement of public funds so as to give a taxpayer standing to question the legality of the contract. He sees no substantial difference, as far as the standing of taxpayers to question public contracts is concerned, between the contract there and the build-lease-transfer (BLT) contract being questioned by petitioners in this case. Nor do petitioners have standing to bring this suit as citizens. In the cases in which citizens were authorized to sue, this Court found standing because it thought the constitutional claims pressed for decision to be of "transcendental importance," as in fact it subsequently granted relief to petitioners by invalidating the challenged statutes or governmental actions. But in the case at bar, the Court precisely finds the opposite by finding petitioners' substantive contentions to be without merit. To the extent therefore that a party's standing is affected by a determination of the substantive merit of the case or a preliminary estimate thereof, petitioners in the case at bar must be held to be without standing. This is in line with our ruling in *Lawyers League for a Better Philippines v. Aquino* (G.R. Nos. 73748, 73972, 73990, May 22, 1986) and *In re Bermudez* (145 SCRA 160, 1986) where we dismissed citizens' actions on the ground that petitioners had no pesonality to sue and their petitions did not state a cause of action. The holding that petitioners did not have standing followed from the finding that they did not have a cause of action. In order that citizens' actions may be allowed a party must show that he personally has suffered some actual or threatened injury as a result of the allegedly illegal conduct of the government; the injury is fairly traceable to the challenged action; and the injury is likely to be redressed by a favorable action. Todays's holding that a citizen, *qua* citizen, has standing to question a government contract unduly expands the scope of public actions and sweeps away the case and controversy requirement so carefully embodied in Art. VIII, §5 in defining the jurisdiction of this Court. The result is to convert

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the Court into an office of ombudsman for the ventilation of generalilzed grievances.

FELICIANO, *J.*, *dissenting:*

1. POLITICAL LAW; NATIONAL ECONOMY AND PATRIMONY; PUBLIC UTILITY (EDSA LRT III); PD 1594 ON BIDDING AND RELATED PROVISIONS; NOT APPLICABLE TO RA 6957 AND RA 7718. — Presidential Decree No. 1594 dated 11 June 1978 entitled: "Prescribing Policies, Guidelines, Rules and Regulations for Government Infrastructure Contracts." More specifically, the majority opinion invokes paragragh 1 of Section 4 of this Degree which refers to Bidding. I understand the unspoken theory in the majority opinion to be that above Section 4 and presumably the rest of Presidential Decree No. 1594 continue to exist and to run parallel to the provisions of Republic Act No. 6957, whether in its original form or as amended by Republic Act No. 7718. A principal difficulty with this approach is that Presidential Decree No. 1594 purports to apply to *all* "government contracts for infrastructure *and other* construction projects." But Republic Act No. 6957 as amended by Republic Act No. 7718, relates *only* to "infrastructure projects" which are *financed, constructed, operated and maintained "by the private sector*" "through the *build/operate-and-transfer* or *build-and-transfer scheme*" under Republic Act No. 6597 and under a *series of other comparable schemes* under Republic Act No. 7718. In other words, Republic Act No. 6957 and Republic Act No. 7718 must be held, in my view, to be *special statutes* applicable to a more limited field of "infrastructure projects" than the wide-ranging scope of application of the *general statute*, i.e., Presidential Decree No. 1594. Thus, the high relevance of the point made by Mr. Justice Davide that Republic Act No. 6957 *in specific connection with BOT- and BLT-type of contracts* imposed an

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unqualified requirement of public bidding set out in Section 5 thereof. It should also be pointed out that under Presidential Decree No. 1594, projects may be undertaken "by administration or force account or by negotiated contract *only*" (1) "in exceptional cases where time is of the essence"; or (2) "where there is lack of bidders or contractors"; or (3) "where there is a conclusive evidence that greater economy and efficiency would be achieved through these arrangements, and in accordance with provision[s] of laws and acts of the matter." It must, upon the one hand, be noted that the special law Republic Act No. 6957 made absolutely *no mention of negotiated contracts* being permitted to displace the requirement of public bidding. Upon the other hand, Section 5-a, inserted in Republic Act No. 6957 by the amending statute Republic Act No. 7718, does *not* purport to authorize direct negotiation of contracts *except in four (4) situations* where there is a lack of pre-qualified contractors or complying bidders. Thus, even under the amended special statute, entering into contracts by negotiation is *not* permissible in *the other two (2) categories of cases referred to in Section 4 of Presidential Decree No. 1594*, i.e., "in exceptional cases where time is of the essence" and "when there is conclusive evidence that greater economy and efficiency would be achieved through these arrangements, etc." The result I reach is that *insofar as BOT, etc. — types of contracts* are concerned, the applicable public bidding requirement is that set out in Republic Act No. 6957 and, *with respect to such type of contracts opened for pre-qualification and bidding after the date of effectivity of Republic Act No. 7718*, the provisions of Republic Act No. 7718. The assailed contract was entered into before Republic Act No. 7718 was enacted. The difficulties of applying the provisions of Presidential Decree No. 1594 to the Edsa LRT-type of contracts are aggravated when one considers the detailed "Implementing Rules and Regulations as amended April 1988" issued

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under that Presidential Decree. There is no reference at all in these Presidential Decree No. 1594 Implementing Rules and Regulations to absence of pre-qualified applicants and bidders as justifying negotiation of contracts as distinguished from requiring public bidding or a second public bidding. Note also the following provision of the same Implementing Rules and Regulations: "IB 1 *Prequalification.* The *following may become contractors for government projects*: 1. *Filipino* a. Citizens (single proprietorship) b. Partnership or *corporation duly organized under the laws of the Philippines, and at least seventy five percent (75%) of the capital stock of which belongs to Filipino citizens.* 2. Contractors forming themselves into a joint venture, i.e., a group of two or more contractors that intend to be jointly and severally responsible for a particular contract, shall for purposes of bidding/tendering comply with LOI 630, and, aside from being currently and properly accredited by the Philippine Contractors Accreditation Board, shall comply with the provisions of R.A. 4566, provided that *joint ventures in which Filipino ownership is less than seventy five percent (75%) may be prequalified where the structures to be built require the* application of *techniques and/or technologies* which are *not adequately possessed by a Filipino entity as defined above.* The record of this case is entirely silent on the extent of Philippine equity in the Edsa LRT Corporation; there is no suggestion that this corporation is organized under Philippine law and is at least seventy-five (75%) percent owned by Philippine citizens.

2. ID.; ID.; ID.; PUBLIC BIDDING, AN IMPORTANT REQUIREMENT. -- Public bidding is the normal method by which a government keeps contractors honest and is able to assure itself that it would be getting the best possible value for its money in any construction or similar project. It is not for nothing that multilateral financial organizations like

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the World Bank and the Asian Development Bank uniformly require projects financed by them to be implemented and carried out by public bidding. Public bidding is much too important a requirement casually to loosen by a latitudinarian exercise in statutory construction.

DAVIDE, JR., *J., dissenting opinion:*

1. POLITICAL LAW; NATIONAL ECONOMY AND PATRIMONY; PUBLIC UTILITY (EDSA LRT III); RA 6957 (BOT LAW); BUILD-LEASE-AND-TRANSFER (BLT) SCHEME, NOT INCLUDED THEREIN. – Respondents admit that the assailed contract was entered into under R.A. 6957. This law, fittingly entitled "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and For Other Purposes," recognizes only two (2) kinds of contractual arrangements between the private sector and government infrastructure agencies: (a) the Build-Operate-and-Transfer (BOT) scheme and (b) the Build-and-Transfer (BT) scheme. This conclusion finds support in Section 2 thereof which defines only the BOT and BT schemes, in Section 3 which explicitly provides for said schemes and in Section 5 which requires public bidding of projects under both schemes. All prior acts and negotiations leading to the perfection of the challenged contract were clearly intended and pursued for such schemes. A Build-Lease-and-Transfer (BLT) scheme is not authorized under the said law, and none of the aforesaid prior acts and negotiations were designed for such unauthorized scheme. Hence, the DOTC is without any power or authority to enter into the BLT contract in question. If it is intended to include a BLT scheme in RA 6957, then it should have so stated, for contracts of lease are not unknown in our jurisdiction, and Congress has enacted several laws relating to leases. That the BLT scheme was never intended as a permissible variation "within

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the context" of the BOT and BT schemes is conclusively established by the passage of R.A. No. 7718 which amends: a) Section 2 by adding to the original BOT and BT schemes the following schemes: (1) Build-own-and operate (BOO) (2) Build-Lease-and-transfer (BLT) (3) Build-transfer-and-operate (BTO) (4) Contract-add-and-operate (CAO) (5) Develop-operate-and-transfer (DOT) (6) Rehabilitate-operate-and-transfer (ROT) (7) Rehabilitate-own-and-operate (ROO) b) Section 3 of R.A. No. 6957 by deleting therefrom the phrase "through the build-operate-and-transfer or build-and-transfer scheme."

2. **ID.; ID.; ID.; PUBLIC BIDDING THEREIN, *MANDATORY*; RA 7718 FOREGOING THE SAME DOES NOT PROVIDE FOR RETROACTIVE APPLICATION.** – Public bidding is mandatory in R.A. No. 6957 under Section 5 thereof. The requirement of public bidding is not an idle ceremony. It has been aptly said that in our jurisdiction "public bidding is the policy and medium adhered to in Government procurement and construction contracts under existing laws and regulations. It is the accepted method for arriving at a fair and reasonable price and ensures that overpricing, favoritism and other anomalous practices are eliminated or minimized. And any Government contract entered into without the required bidding is null and void and cannot adversely affect the rights of third parties." (Bartolome C. Fernandez, Jr., A TREATISE ON GOVERNMENT CONTRACTS UNDER PHILIPPINE LAW 25 [rev. ed. 1991], citing Caltex *vs.* Delgado Bros., 96 Phil. 368 [1954]). The Office of the President, through then Executive Secretary Franklin Drilon correctly disapproved the contract because no public bidding in strict compliance with Section 5 of R.A. No. 6957 was conducted. Secretary Drilon further bluntly stated that the provision of the Implementing Rules of said law authorizing negotiated contracts was of doubtful legality. Indeed, it is null and void

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because the law itself does not recognize or allow negotiated contracts. The mandatory requirement of public bidding cannot be legally dispensed with simply because only one was qualified to bid during the prequalification proceedings. Section 5 mandates that the BOT or BT contract should be awarded "to the lowest complying bidder," which logically means that there must at least be two (2) bidders. If this minimum requirement is not met, then the proposed bidding should be deferred and a new prequalification proceeding be scheduled. Even those who were earlier disqualified may by then have qualified because they may have, in the meantime, exerted efforts to meet all the qualifications. This view of the majority would open the floodgates to the rigging of prequalification proceedings or to unholy conspiracies among prospective bidders, which would even include dishonest government officials. They could just agree, for a certain consideration, that only one of them would qualify in order that the latter would automatically corner the contract and obtain the award. That Section 5 admits of no exception and that no bidding could be validly had with only one bidder is likewise conclusively shown by the amendments introduced by R.A. No. 7718. Per Section 7 thereof, a new section denominated as Section 5-A was introduced in R.A. No. 6957 to allow direct negotiation of contracts. Can this amendment be given retroactive effect to the challenged contract so that it may now be considered a permissible negotiated contract? I submit that it cannot be. R.A. No. 7718 does not provide that it should be given retroactive effect to pre-existing contracts. Section 18 thereof says that it "shall take effect fifteen (15) days after its publication in at least two (2) newspapers of general circulation." If it were the intention of Congress to give said act retroactive effect then it would have so expressly provided. Article 4 of the Civil Code provides that "[l]aws shall have no retroactive effect, unless the contrary is provided." The presumption is that all

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laws operate prospectively, unless the contrary clearly appears or is clearly, plainly, and unequivocally expressed or necessarily implied. In every case of doubt, the doubt will be resolved against the retroactive application of laws. (Ruben E. Agpalo, STATUTORY CONSTRUCTION 225 [2d ed. 1990]). As to amendatory acts, or acts which change an existing statute, Sutherland states: In accordance with the rule applicable to original acts, it is presumed that provisions added by the amendment affecting substantive rights are intended to operate prospectively. Provisions added by the amendment that affect substantive rights will not be construed to apply to transactions and events completed prior to its enactment unless the legislature has expressed its intent to that effect or such intent is clearly implied by the language of the amendment or by the circumstances surrounding its enactment. (1 Frank E. Horack, Jr., SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION 434-436 [1943 ed.]).

APPEARANCES OF COUNSEL

Brillantes (Nachura) Navarro Jumamil Arcilla & Bello Law Offices for petitioners.

The Solicitor General for respondents.

D E C I S I O N

QUIASON, *J.*:

This is a petition under Rule 65 of the Revised Rules of Court to prohibit respondents from further implementing and enforcing the "Revised and Restated Agreement to Build, Lease and Transfer a Light Rail Transit System for EDSA" dated April 22, 1992, and the "Supplemental Agreement to the 22 April 1992 Revised and Restated Agreement To Build, Lease and Transfer a Light Rail Transit System for EDSA" dated May 6, 1993.

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Petitioners Francisco S. Tatad, John H. Osmeña and Rodolfo G. Biazon are members of the Philippine Senate and are suing in their capacities as Senators and as taxpayers. Respondent Jesus B. Garcia, Jr. is the incumbent Secretary of the Department of Transportation and Communications (DOTC), while private respondent EDSA LRT Corporation, Ltd. is a private corporation organized under the laws of Hongkong.

I

In 1989, DOTC planned to construct a light railway transit line along EDSA, a major thoroughfare in Metropolitan Manila, which shall traverse the cities of Pasay, Quezon, Mandaluyong and Makati. The plan, referred to as EDSA Light Rail Transit III (EDSA LRT III), was intended to provide a mass transit system along EDSA and alleviate the congestion and growing transportation problem in the metropolis.

On March 3, 1990, a letter of intent was sent by the Eli Levin Enterprises, Inc., represented by Elijahu Levin, to DOTC Secretary Oscar Orbos, proposing to construct the EDSA LRT III on a Build-Operate-Transfer (BOT) basis.

On March 15, 1990, Secretary Orbos invited Levin to send a technical team to discuss the project with DOTC.

On July 9, 1990, Republic Act No. 6957 entitled "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and For Other Purposes," was signed by President Corazon C. Aquino. Referred to as the Build-Operate-Transfer (BOT) Law, it took effect on October 9, 1990.

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Republic Act No. 6957 provides for two schemes for the financing, construction and operation of government projects through private initiative and investment: Build-Operate-Transfer (BOT) or Build-Transfer (BT).

In accordance with the provisions of R.A. No. 6957 and to set the EDSA LRT III project underway, DOTC, on January 22, 1991 and March 14, 1991, issued Department Orders Nos. 91-494 and 91-496, respectively creating the Prequalification Bids and Awards Committee (PBAC) and the Technical Committee.

After its constitution, the PBAC issued guidelines for the prequalification of contractors for the financing and implementation of the project. The notice, advertising the prequalification of bidders, was published in three newspapers of general circulation once a week for three consecutive weeks starting February 21, 1991.

The deadline set for submission of prequalification documents was March 21, 1991, later extended to April 1, 1991. Five groups responded to the invitation: namely, ABB Trazione of Italy, Hopewell Holdings, Ltd. of Hongkong, Mansteel International of Mandaue, Cebu, Mitsui & Co., Ltd. of Japan, and EDSA LRT Consortium, composed of ten foreign and domestic corporations: namely, Kaiser Engineers International, Inc., ACER Consultants (Far East) Ltd., Freeman Fox, Tradeinvest/CKD Tatra of the Czech and Slovak Federal Republics, TCGI Engineering, All Asia Capital and Leasing Corporation, The Salim Group of Jakarta, E.L. Enterprises, Inc., A.M. Oreta & Co., Inc., Capitol Industrial Construction Group, Inc. and F.F. Cruz & Co., Inc.

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On the last day for submission of prequalification documents, the prequalification criteria proposed by the Technical Committee were adopted by the PBAC. The criteria, totalling 100 percent, are as follows: (a) Legal aspects — 10 percent; (b) Management/Organizational capability — 30 percent; (c) Financial capability — 30 percent; and (d) Technical capability — 30 percent (*Rollo*, p. 122).

On April 3, 1991, the Committee, charged under the BOT Law with the formulation of the Implementing Rules and Regulations thereof, approved the same.

After evaluating the prequalification bids, the PBAC issued a Resolution on May 9, 1991 declaring that of the five applicants, only the EDSA LRT Consortium "met the requirements of garnering at least 21 points per criteria [sic], except for Legal Aspects, and obtaining an over-all passing mark of at least 82 points" (*Rollo*, p. 146). The Legal Aspects referred to provided that the BOT/BT contractor-applicant meet the requirements specified in the Constitution and other pertinent laws (*Rollo*, p. 114).

Subsequently, Secretary Orbos was appointed Executive Secretary to the President of the Philippines and was replaced by Secretary Pete Nicomedes Prado. The latter sent to President Aquino two letters dated May 31, 1991 and June 14, 1991, respectively recommending the award of the EDSA LRT III project to the sole complying bidder, the EDSA LRT Consortium, and requesting for authority to negotiate with the said firm for the contract pursuant to paragraph 14(b) of the Implementing Rules and Regulations of the BOT Law (*Rollo*, pp. 298-302).

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In July 1991, Executive Secretary Orbos, acting on instructions of the President, issued a directive to the DOTC to proceed with the negotiations. On July 16, 1991, the EDSA LRT Consortium submitted its bid proposal to DOTC.

Finding this proposal to be in compliance with the bid requirements, DOTC and respondent EDSA LRT Corporation, Ltd., in substitution of the EDSA LRT Consortium, entered into an "Agreement to Build, Lease and Transfer a Light Rail Transit System for EDSA" under the terms of the BOT Law (*Rollo*, pp. 147-177).

Secretary Prado, thereafter, requested presidential approval of the contract.

In a letter dated March 13, 1992, Executive Secretary Franklin Drilon, who replaced Executive Secretary Orbos, informed Secretary Prado that the President could not grant the requested approval for the following reasons: (1) that DOTC failed to conduct actual public bidding in compliance with Section 5 of the BOT Law; (2) that the law authorized public bidding as the only mode to award BOT projects, and the prequalification proceedings was not the public bidding contemplated under the law; (3) that Item 14 of the Implementing Rules and Regulations of the BOT Law which authorized negotiated award of contract in addition to public bidding was of doubtful legality; and (4) that congressional approval of the list of priority projects under the BOT or BT Scheme provided in the law had not yet been granted at the time the contract was awarded (*Rollo*, pp. 178-179).

In view of the comments of Executive Secretary Drilon, the DOTC and private respondents

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re-negotiated the agreement. On April 22, 1992, the parties entered into a "Revised and Restated Agreement to Build, Lease and Transfer a Light Rail Transit System for EDSA" (*Rollo*, pp. 47-78) inasmuch as "the parties [are] cognizant of the fact the DOTC has full authority to sign the Agreement without need of approval by the President pursuant to the provisions of Executive Order No. 380 and that certain events [had] supervened since November 7, 1991 which necessitate[d] the revision of the Agreement" (*Rollo*, p. 51). On May 6, 1992, DOTC, represented by Secretary Jesus Garcia, *vice* Secretary Prado, and private respondent entered into a "Supplemental Agreement to the 22 April 1992 Revised and Restated Agreement to Build, Lease and Transfer a Light Rail Transit System for EDSA" so as to "clarify their respective rights and responsibilities" and to "submit [the] Supplemental Agreement to the President of the Philippines for his approval" (*Rollo*, pp. 79-80).

Secretary Garcia submitted the two Agreements to President Fidel V. Ramos for his consideration and approval. In a Memorandum to Secretary Garcia on May 6, 1993, President Ramos approved the said Agreements (*Rollo*, p. 194).

According to the agreements, the EDSA-LRT III will use light rail vehicles from the Czech and Slovak Federal Republics and will have a maximum carrying capacity of 450,000 passengers a day, or 150 million a year to be achieved through 54 such vehicles operating simultaneously. The EDSA LRT III will run at grade, or street level, on the mid-section of EDSA for a distance of 17.8 kilometers from F.B. Harrison, Pasay City to North Avenue, Quezon City. The system will have its own power facility (Revised and Restated Agreement, Sec. 2.3

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(ii); *Rollo*, p. 55). It will also have thirteen (13) passenger stations and one depot in the 16-hectare government property at North Avenue (Supplemental Agreement, Sec. 11; *Rollo*, pp. 91-92).

Private respondent shall undertake and finance the entire project required for a complete operational light rail transit system (Revised and Restated Agreement, Sec. 4.1; *Rollo*, p. 58). Target completion date is 1,080 days or approximately three years from the implementation date of the contract inclusive of mobilization, site works, initial and final testing of the system (Supplemental Agreement, Sec. 5; *Rollo*, p. 83). Upon full or partial completion and viability thereof, private respondent shall deliver the use and possession of the completed portion to DOTC which shall operate the same (Supplemental Agreement, Sec. 5; Revised and Restated Agreement, Sec. 5.1; *Rollo*, pp. 61-62, 84). DOTC shall pay private respondent rentals on a monthly basis through an Irrevocable Letter of Credit. The rentals shall be determined by an independent and internationally accredited inspection firm to be appointed by the parties (Supplemental Agreement, Sec. 6; *Rollo*, pp. 85-86). As agreed upon, private respondent's capital shall be recovered from the rentals to be paid by the DOTC which, in turn, shall come from the earnings of the EDSA LRT III (Revised and Restated Agreement, Sec. 1, p. 5; *Rollo*, p. 54). After 25 years and DOTC shall have completed payment of the rentals, ownership of the project shall be transferred to the latter for a consideration of only U.S.$1.00 (Revised and Restated Agreement, Sec. 11.1; *Rollo*, p. 67).

On May 5, 1994, R.A. No. 7718, an "Act Amending Certain Sections of Republic Act No. 6957, Entitled 'An Act Authorizing the Financing,

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Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes'" was signed into law by the President. The law was published in two newspapers of general circulation on May 12, 1994, and took effect 15 days thereafter or on May 28, 1994. The law expressly recognizes a BLT scheme and allows direct negotiation of BLT contracts.

II

In their petition, petitioners argued that:

"(1) THE AGREEMENT OF APRIL 22, 1992, AS AMENDED BY THE SUPPLEMENTAL AGREEMENT OF MAY 6, 1993, INSOFAR AS IT GRANTS EDSA LRT CORPORATION, LTD., A FOREIGN CORPORATION, THE OWNERSHIP OF EDSA LRT III, A PUBLIC UTILITY, VIOLATES THE CONSTITUTION AND, HENCE, IS UNCONSTITUTIONAL;

"(2) THE BUILD-LEASE-TRANSFER SCHEME PROVIDED IN THE AGREEMENTS IS NOT DEFINED NOR RECOGNIZED IN R.A. NO. 6957 OR ITS IMPLEMENTING RULES AND REGULATIONS AND, HENCE, IS ILLEGAL;

"(3) THE AWARD OF THE CONTRACT ON A NEGOTIATED BASIS VIOLATES R.A. NO. 6957 AND, HENCE, IS UNLAWFUL;

"(4) THE AWARD OF THE CONTRACT IN FAVOR OF RESPONDENT EDSA LRT CORPORATION, LTD. VIOLATES THE REQUIREMENTS PROVIDED IN THE IMPLEMENTING RULES AND REGULATIONS OF THE BOT LAW AND, HENCE, IS ILLEGAL;

"(5) THE AGREEMENTS VIOLATE EXECUTIVE ORDER NO. 380 FOR THEIR FAILURE TO BEAR

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PRESIDENTIAL APPROVAL AND, HENCE, ARE ILLEGAL AND INEFFECTIVE; AND

"(6) THE AGREEMENTS ARE GROSSLY DISADVANTAGEOUS TO THE GOVERNMENT" (*Rollo*, pp. 15-16).

Secretary Garcia and private respondent filed their comments separately and claimed that:

(1) Petitioners are not the real parties-in-interest and have no legal standing to institute the present petition;

(2) The writ of prohibition is not the proper remedy and the petition requires ascertainment of facts;

(3) The scheme adopted in the Agreements is actually a build-transfer scheme allowed by the BOT Law;

(4) The nationality requirement for public utilities mandated by the Constitution does not apply to private respondent;

(5) The Agreements executed by and between respondents have been approved by President Ramos and are not disadvantageous to the government;

(6) The award of the contract to private respondent through negotiation and not public bidding is allowed by the BOT Law; and

(7) Granting that the BOT Law requires public bidding, this has been amended by R.A. No. 7718 passed by the Legislature on May 12, 1994, which provides for direct negotiation as a mode of award of infrastructure projects.

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III

Respondents claimed that petitioners had no legal standing to initiate the instant action. Petitioners, however, countered that the action was filed by them in their capacity as Senators and as taxpayers.

The prevailing doctrines in taxpayer's suits are to allow taxpayers to question contracts entered into by the national government or government-owned or controlled corporations allegedly in contravention of the law (Kilosbayan, Inc. *v.* Guingona, 232 SCRA 110 [1994]) and to disallow the same when only municipal contracts are involved (Bugnay Construction and Development Corporation *v.* Laron, 176 SCRA 240 [1989]).

For as long as the ruling in *Kilosbayan* on *locus standi* is not reversed, we have no choice but to follow it and uphold the legal standing of petitioners as taxpayers to institute the present action.

IV

In the main, petitioners asserted that the Revised and Restated Agreement of April 22, 1992 and the Supplemental Agreement of May 6, 1993 are unconstitutional and invalid for the following reasons:

(1) the EDSA LRT III is a public utility, and the ownership and operation thereof is limited by the Constitution to Filipino citizens and domestic corporations, not foreign corporations like private respondent;

(2) the Build-Lease-Transfer (BLT) scheme provided in the agreements is not the BOT or BT scheme under the law;

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(3) the contract to construct the EDSA LRT III was awarded to private respondent not through public bidding which is the only mode of awarding infrastructure projects under the BOT law; and

(4) the agreements are grossly disadvantageous to the government.

1. Private respondent EDSA LRT Corporation, Ltd. to whom the contract to construct the EDSA LRT III was awarded by public respondent, is admittedly a foreign corporation "duly incorporated and existing under the laws of Hongkong" (*Rollo*, pp. 50, 79). There is also no dispute that once the EDSA LRT III is constructed, private respondent, as lessor, will turn it over to DOTC, as lessee, for the latter to operate the system and pay rentals for said use.

The question posed by petitioners is:

"Can respondent EDSA LRT Corporation, Ltd., a foreign corporation own EDSA LRT III, a public utility?" (*Rollo*, p. 17).

The phrasing of the question is erroneous; it is loaded. What private respondent owns are the rail tracks, rolling stocks like the coaches, rail stations, terminals and the power plant, not a public utility. While a franchise is needed to operate these facilities to serve the public, they do not by themselves constitute a public utility. What constitutes a public utility is not their ownership but their use to serve the public (Iloilo Ice & Cold Storage Co. *v.* Public Service Board, 44 Phil. 551, 557-558 [1923]).

The Constitution, in no uncertain terms, requires a franchise for the operation of a public utility. However, it does not require a franchise before

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one can own the facilities needed to operate a public utility so long as it does not operate them to serve the public.

Section 11 of Article XII of the Constitution provides:

"No franchise, certificate or any other form of authorization for the *operation of a public utility* shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens, nor shall such franchise, certificate or authorization be exclusive in character or for a longer period than fifty years x x x" (Italics supplied).

In law, there is a clear distinction between the "operation" of a public utility and the ownership of the facilities and equipment used to serve the public.

Ownership is defined as a relation in law by virtue of which a thing pertaining to one person is completely subjected to his will in everything not prohibited by law or the concurrence with the rights of another (Tolentino, II Commentaries and Jurisprudence on the Civil Code of the Philippines 45 [1992]).

The exercise of the rights encompassed in ownership is limited by law so that a property cannot be operated and used to serve the public as a public utility unless the operator has a franchise. The operation of a rail system as a public utility includes the transportation of passengers from one point to another point, their loading and unloading at designated places and the movement of the trains at pre-scheduled times (*cf.* Arizona Eastern R.R.

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Co. *v.* J.A. Matthews, 20 Ariz 282, 180 P. 159, 7 A.L.R. 1149 [1919]; United States Fire Ins. Co. *v.* Northern P.R. Co., 30 Wash 2d. 722, 193 P. 2d 868, 2 A.L.R. 2d 1065 [1948]).

The right to operate a public utility may exist independently and separately from the ownership of the facilities thereof. One can own said facilities without operating them as a public utility, or conversely, one may operate a public utility without owning the facilities used to serve the public. The devotion of property to serve the public may be done by the owner or by the person in control thereof who may not necessarily be the owner thereof.

This dichotomy between the operation of a public utility and the ownership of the facilities used to serve the public can be very well appreciated when we consider the transportation industry. Enfranchised airline and shipping companies may lease their aircraft and vessels instead of owning them themselves.

While private respondent is the owner of the facilities necessary to operate the EDSA LRT III, it admits that it is not enfranchised to operate a public utility. (Revised and Restated Agreement, Sec. 3.2; *Rollo*, p. 57). In view of this incapacity, private respondent and DOTC agreed that on completion date, private respondent will immediately deliver possession of the LRT system by way of lease for 25 years, during which period DOTC shall operate the same as a common carrier and private respondent shall provide technical maintenance and repair services to DOTC (Revised and Restated Agreement, Secs. 3.2, 5.1 and 5.2; *Rollo*, pp. 57-58, 61-62). Technical maintenance consists of providing (1) repair and maintenance facilities for

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the depot and rail lines, services for routine clearing and security; and (2) producing and distributing maintenance manuals and drawings for the entire system (Revised and Restated Agreement, Annex F).

Private respondent shall also train DOTC personnel for familiarization with the operation, use, maintenance and repair of the rolling stock, power plant, substations, electrical, signalling, communications and all other equipment as supplied in the agreement (Revised and Restated Agreement, Sec. 10; *Rollo*, pp. 66-67). Training consists of theoretical and live training of DOTC operational personnel which includes actual driving of light rail vehicles under simulated operating conditions, control of operations, dealing with emergencies, collection, counting and securing cash from the fare collection system (Revised and Restated Agreement, Annex E, Secs. 2-3). Personnel of DOTC will work under the direction and control of private respondent only during training (Revised and Restated Agreement, Annex E, Sec. 3.1). The training objectives, however, shall be such that upon completion of the EDSA LRT III and upon opening of normal revenue operation, DOTC shall have in their employ personnel capable of undertaking training of all new and replacement personnel (Revised and Restated Agreement, Annex E, Sec. 5.1). In other words, by the end of the three-year construction period and upon commencement of normal revenue operation, DOTC shall be able to operate the EDSA LRT III on its own and train all new personnel by itself.

Fees for private respondent's services shall be included in the rent, which likewise includes the project cost, cost of replacement of plant equipment and spare parts, investment and financing cost, plus

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a reasonable rate of return thereon (Revised and Restated Agreement, Sec. 1; *Rollo*, p. 54).

Since DOTC shall operate the EDSA LRT III, it shall assume all the obligations and liabilities of a common carrier. For this purpose, DOTC shall indemnify and hold harmless private respondent from any losses, damages, injuries or death which may be claimed in the operation or implementation of the system, except losses, damages, injury or death due to defects in the EDSA LRT III on account of the defective condition of equipment or facilities or the defective maintenance of such equipment or facilities (Revised and Restated Agreement, Secs. 12.1 and 12.2; *Rollo*, p. 68).

In sum, private respondent will not run the light rail vehicles and collect fees from the riding public. It will have no dealings with the public and the public will have no right to demand any services from it.

It is well to point out that the role of private respondent as lessor during the lease period must be distinguished from the role of the Philippine Gaming Management Corporation (PGMC) in the case of *Kilosbayan, Inc. v. Guingona*, 232 SCRA 110 (1994). Therein, the Contract of Lease between PGMC and the Philippine Charity Sweepstakes Office (PCSO) was actually a collaboration or joint venture agreement prescribed under the charter of the PCSO. In the Contract of Lease, PGMC, the lessor obligated itself to build, at its own expense, all the facilities necessary to operate and maintain a nationwide on-line lottery system from whom PCSO was to lease the facilities and operate the same. Upon due examination of the contract, the Court found that PGMC's participation was not confined to the

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construction and setting up of the on-line lottery system. It spilled over to the actual operation thereof, becoming indispensable to the pursuit, conduct, administration and control of the highly technical and sophisticated lottery system. In effect, the PCSO leased out its franchise to PGMC which actually operated and managed the same.

Indeed, a mere owner and lessor of the facilities used by a public utility is not a public utility (Providence and W.R. Co. *v.* United States, 46 F. 2d 149, 152 [1930]; Chippewa Power Co. *v.* Railroad Commission of Wisconsin, 205 N.W. 900, 903, 188 Wis. 246 [1925]; Ellis *v.* Interstate Commerce Commission, Ill. 35 S. Ct. 645, 646, 237 U.S. 434, 59 L. Ed. 1036 [1914]). Neither are owners of tank, refrigerator, wine, poultry and beer cars who supply cars under contract to railroad companies considered as public utilities (Crystal Car Line *v.* State Tax Commission, 174 P. 2d 984, 987 [1946]).

Even the mere formation of a public utility corporation does not *ipso facto* characterize the corporation as one operating a public utility. The moment for determining the requisite Filipino nationality is when the entity applies for a franchise, certificate or any other form of authorization for that purpose (People v. Quasha, 93 Phil. 333 (1953]).

2. Petitioners further assert that the BLT scheme under the Agreements in question is not recognized in the BOT Law and its implementing Rules and Regulations.

Section 2 of the BOT Law defines the BOT and BT schemes as follows:

"(a) Build-operate-and-transfer scheme — A contractual arrangement whereby the contractor

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undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The contractor operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges sufficient to enable the contractor to recover its operating and maintenance expenses and its investment in the project plus a reasonable rate of return thereon. The contractor transfers the facility to the government agency or local government unit concerned at the end of the fixed term which shall not exceed fifty (50) years. For the construction stage, the contractor may obtain financing from foreign and/or domestic sources and/or engage the services of a foreign and/or Filipino constructor [sic]: Provided, *That the ownership structure of the contractor of an infrastructure facility whose operation requires a public utility franchise must be in accordance with the Constitution*: Provided, however, That in the case of corporate investors in the build-operate-and-transfer corporation, the citizenship of each stockholder in the corporate investors shall be the basis for the computation of Filipino equity in the said corporation: Provided, further, That, in the case of foreign constructors [sic], Filipino labor shall be employed or hired in the different phases of the construction where Filipino skills are available: Provided, furthermore, that the financing of a foreign or foreign-controlled contractor from Philippine government financing institutions shall not exceed twenty percent (20%) of the total cost of the infrastructure facility or project: Provided, finally, That financing from foreign sources shall not require a guarantee by the Government or by government-owned or controlled corporations. The build-operate-and-transfer scheme shall include a supply-and-operate situation which is a contractual arrangement whereby the supplier of equipment and machinery for a given infrastructure facility, if the interest of the Government so requires, operates the facility providing in the process technology transfer and training to Filipino nationals.

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(b) Build-and-transfer scheme — A contractual arrangement whereby the contractor undertakes the construction including financing, of a given infrastructure facility, and its turnover after completion to the government agency or local government unit concerned which shall pay the contractor its total investment expended on the project, plus a reasonable rate of return thereon. This arrangement may be employed in the construction of any infrastructure project including critical facilities which for security or strategic reasons, must be operated directly by the government" (Italics supplied).

The BOT scheme is expressly defined as one where the contractor undertakes the construction and financing of an infrastructure facility, and operates and maintains the same. The contractor operates the facility for a fixed period during which it may recover its expenses and investment in the project plus a reasonable rate of return thereon. After the expiration of the agreed term, the contractor transfers the ownership and operation of the project to the government.

In the BT scheme, the contractor undertakes the construction and financing of the facility, but after completion, the ownership and operation thereof are turned over to the government. The government, in turn, shall pay the contractor its total investment on the project in addition to a reasonable rate of return. If payment is to be effected through amortization payments by the government infrastructure agency or local government unit concerned, this shall be made in accordance with a scheme proposed in the bid and incorporated in the contract (R.A. No. 6957, Sec. 6).

Emphasis must be made that under the BOT scheme, the owner of the infrastructure facility must

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comply with the citizenship requirement of the Constitution on the operation of a public utility. No such a requirement is imposed in the BT scheme.

There is no mention in the BOT Law that the BOT and BT schemes bar any other arrangement for the payment by the government of the project cost. The law must not be read in such a way as to rule out or unduly restrict any variation within the context of the two schemes. Indeed, no statute can be enacted to anticipate and provide all the fine points and details for the multifarious and complex situations that may be encountered in enforcing the law (Director of Forestry *v.* Muñoz, 23 SCRA 1183 [1968]; People *v.* Exconde, 101 Phil. 1125 [1957]; United States *v.* Tupasi Molina, 29 Phil. 119 [1914]).

The BLT scheme in the challenged agreements is but a variation of the BT scheme under the law.

As a matter of fact, the burden on the government in raising funds to pay for the project is made lighter by allowing it to amortize payments out of the income from the operation of the LRT System.

In form and substance, the challenged agreements provide that rentals are to be paid on a monthly basis according to a schedule of rates through and under the terms of a confirmed Irrevocable Revolving Letter of Credit (Supplemental Agreement, Sec. 6; *Rollo*, p. 85). At the end of 25 years and when full payment shall have been made to and received by private respondent, it shall transfer to DOTC, free from any lien or encumbrances, all its title to, rights and interest in, the project for only U.S. $1.00 (Revised and Restated Agreement, Sec. 11.1; Supplemental Agreement, Sec. 7; *Rollo*, pp. 67, 87).

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A lease is a contract where one of the parties binds himself to give to another the enjoyment or use of a thing for a certain price and for a period which may be definite or indefinite but not longer than 99 years (Civil Code of the Philippines, Art. 1643). There is no transfer of ownership at the end of the lease period. But if the parties stipulate that title to the leased premises shall be transferred to the lessee at the end of the lease period upon the payment of an agreed sum, the lease becomes a lease-purchase agreement.

Furthermore, it is of no significance that the rents shall be paid in United States currency, not Philippine pesos. The EDSA LRT III Project is a high priority project certified by Congress and the National Economic and Development Authority as falling under the Investment Priorities Plan of Government. (*Rollo*, pp. 310-311) It is, therefore, outside the application of the Uniform Currency Act (R.A. No. 529), which reads as follows:

"Sec. 1. – Every provision contained in, or made with respect to, any domestic obligation to wit, any obligation contracted in the Philippines which provisions purports to give the obligee the right to require payment in gold or in a particular kind of coin or currency other than Philippine currency or in an amount of money of the Philippines measured thereby, be as it is hereby declared against public policy, and null, void, and of no effect, and no such provision shall contained in, or made with respect to, any obligation hereafter incurred. The above prohibition shall not apply to (a) x x x; (b) transactions affecting high-priority economic projects for agricultural, industrial and power development as may be determined by the National Economic Council which are financed by or through foreign funds; x x x."

3. The fact that the contract for the construction of the EDSA LRT III was awarded

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through negotiation and before congressional approval on January 22 and 23, 1992 of the List of National Projects to be undertaken by the private sector pursuant to the BOT Law (*Rollo,* pp. 309-312) does not suffice to invalidate the award.

Subsequent congressional approval of the list including "rail-based projects packaged with commercial development opportunities" (*Rollo,* p. 310) under which the EDSA LRT III project falls, amounts to a ratification of the prior award of the EDSA LRT III contract under the BOT Law.

Petitioners insist that the prequalification process which led to the negotiated award of the contract appears to have been rigged from the very beginning to do away with the usual open international public bidding where qualified internationally known applicants could fairly participate.

The records show that only one applicant passed the prequalification process. Since only one was left, to conduct a public bidding in accordance with Section 5 of the BOT Law for that lone participant will be an absurd and pointless exercise. (*cf.* Deloso *v.* Sandiganbayan, 217 SCRA 49, 61 [1993]).

Contrary to the comments of then Executive Secretary Drilon, Section 5 of the BOT Law in relation to Presidential Decree No. 1594 allows the negotiated award of government infrastructure projects. Presidential Decree No. 1594, "Prescribing Policies, Guidelines, Rules and Regulations for Government Infrastructure Contracts," allows the negotiated award of government projects in exeptional cases. Section 4 of the said law reads as follows:

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"*Bidding.* — Construction projects shall generally be undertaken by contract after competitive public bidding. *Projects may be undertaken by administration or force account or by negotiated contract only in exeptional cases where time is of the essence, or where there is lack of qualified bidders or contractors, or where there is conclusive evidence that greater economy and efficiency would be achieved through this arrangement,* and in accordance with provision of laws and acts on the matter, subject to the approval of the Minister of Public Works and Transportation and Communications, the Minister of Public Highways, or the Minister of Energy, as the case may be, if the project cost is less than P1 Million, and the President of the Philippines, upon recommendation of the Minister, if the project cost is P1 Million or more (Italics supplied).

x x x x x x x x x"

Indeed, where there is a lack of qualified bidders or contractors, the award of government infrastructure contracts may be made by negotiation. Presidential Decree No. 1594 is the general law on government infrastructure contracts while the BOT Law governs particular arrangements or schemes aimed at encouraging private sector participation in government infrastructure projects. The two laws are not inconsistent with each other but are in *pari materia* and should be read together accordingly.

In the instant case, if the prequalification process was actually tainted by foul play, one wonders why none of the competing firms ever brought the matter before the PBAC, or intervened in this case before us (*cf.* Malayan Integrated Industries Corp *v.* Court of Appeals, 213 SCRA 640 [1992]; Bureau Veritas *v.* Office of the President, 205 SCRA 705 [1992]). The challenged agreements

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have been approved by President Ramos himself. Although then Executive Secretary Drilon may have disapproved the "Agreement to Build, Lease and Transfer a Light Rail Transit System for EDSA," there is nothing in our laws that prohibits parties to a contract from renegotiating and modifying in good faith the terms and conditions thereof so as to meet legal, statutory and constitutional requirements. Under the circumstances, to require the parties to go back to step one of the prequalification process would just be an idle ceremony. Useless bureaucratic "red tape" should be eschewed because it discourages private sector participation, the "main engine" for national growth and development (R.A. No. 6957, Sec. 1), and renders the BOT Law nugatory.

Republic Act No. 7718 recognizes and defines a BLT scheme in Section 2 thereof as:

"(e) Build-lease-and-transfer - A contractual arrangement whereby a project proponent is authorized to finance and construct an infrastructure or development facility and upon its completion turns it over to the government agency or local government unit concerned on a lease arrangement for a fixed period after which ownership of the facility is automatically transferred to the government agency or local government unit concerned."

Section 5-A of the law, which expressly allows direct negotiation of contracts, provides:

"Direct Negotiation of Contracts. — Direct negotiation shall be resorted to when there is only one complying bidder left as defined hereunder.

"(a) If, after advertisement, only one contractor applies for prequalification and it meets the prequalification requirements, after which it is required

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to submit a bid proposal which is subsequently found by the agency/local government unit (LGU) to be complying.

"(b) If, after advertisement, more than one contractor applied for prequalification but only one meets the prequalification requirements, after which it submits bid/proposal which is found by the agency/ local government unit (LGU) to be complying.

"(c) If, after prequalification of more than one contractor, only one submits a bid which is found by the agency/LGU to be complying.

"(d) If, after prequalification, more than one contractor submit bids but only one is found by the agency/LGU to be complying. Provided, That, any of the disqualified prospective bidder [sic] may appeal the decision of the implementing agency/LGUs prequalification bids and awards committee within fifteen (15) working days to the head of the agency, in case of national projects or to the Department of the Interior and Local Government, in case of local projects from the date the disqualification was made known to the disqualified bidder: Provided, furthermore, That the implementing agency/LGUs concerned should act on the appeal within forty-five (45) working days from receipt thereof."

Petitioners' claim that the BLT scheme and direct negotiation of contracts are not contemplated by the BOT Law has now been rendered moot and academic by R.A. No. 7718. Section 3 of this law authorizes all government infrastructure agencies, government-owned and controlled corporations and local government units to enter into contract with any duly prequalified proponent for the financing, construction, operation and maintenance of any financially viable infrastructure or development facility through a BOT, BT, BLT, BOO (Build-own-and-

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operate), BTO (Build-transfer-and-operate), CAO (Contract-add-operate), DOT (Develop-operate-and-transfer), ROT (Rehabilitate-operate-and-transfer), and ROO (Rehabilitate-own-operate) (R.A. No. 7718, Sec. 2 [b-j]).

From the law itself, once an applicant has prequalified, it can enter into any of the schemes enumerated in Section 2 thereof, including a BLT arrangement, enumerated and defined therein (Sec. 3).

Republic Act No. 7718 is a curative statute. It is intended to provide financial incentives and "a climate of minimum government regulations and procedures and specific government undertakings in support of the private sector" (Sec. 1). A curative statute makes valid that which before enactment of the statute was invalid. Thus, whatever doubts and alleged procedural lapses private respondent and DOTC may have engendered and committed in entering into the questioned contracts, these have now been cured by R.A. No. 7718. (*cf.* Development Bank of the Philippines *v.* Court of Appeals, 96 SCRA 342 [1980]; Santos *v.* Duata, 14 SCRA 1041 [1965]; Adong *v.* Cheong Seng Gee, 43 Phil. 43 [1922]).

4. Lastly, petitioners claim that the agreements are grossly disadvantageous to the government because the rental rates are excessive and private respondent's development rights over the 13 stations and the depot will rob DOTC of the best terms during the most productive years of the project.

It must be noted that as part of the EDSA LRT III project, private respondent has been granted, for a period of 25 years, exclusive rights over the

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depot and the air space above the station for development into commercial premises for lease, sublease, transfer, or advertising (Supplemental Agreement, Sec. 11; *Rollo,* pp. 91-92). For and in consideration of these development rights, private respondent shall pay DOTC in Philippine currency guaranteed revenues generated therefrom in the amounts set forth in the Supplemental Agreement (Sec. 11; *Rollo*, p. 93). In the event that DOTC shall be unable to collect the guaranteed revenues, DOTC shall be allowed to deduct any shortfalls from the monthly rent due private respondent for the construction of the EDSA LRT III. (Supplemental Agreement, Sec. 11; *Rollo*, p.p. 93-94). All rights, titles, interests and income over all contracts on the commercial spaces shall revert to DOTC upon expiration of the 25-year period (Supplemental Agreement, Sec. 11; *Rollo,* pp. 91-92).

The terms of the agreements were arrived at after a painstaking study by DOTC. The determination by the proper administrative agencies and officials who have acquired expertise, specialized skills and knowledge in the performance of their functions should be accorded respect, absent any showing of grave abuse of discretion (Felipe Ysmael, Jr. & Co. *v.* Deputy Executive Secretary, 190 SCRA 673 [1990]; Board of Medical Education *v.* Alfonso, 176 SCRA 304 [1989]).

Government officials are presumed to perform their functions with regularity and strong evidence is necessary to rebut this presumption. Petitioners have not presented evidence on the reasonable rentals to be paid by the parties to each other. The matter of valuation is an esoteric field which is better left to the experts and which this Court is not eager to undertake.

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That the grantee of a government contract will profit therefrom and to that extent the government is deprived of the profits if it engages in the business itself, is not worthy of being raised as an issue. In all cases where a party enters into a contract with the government, he does so, not out of charity and not to lose money, but to gain pecuniarily.

5. Definitely, the agreements in question have been entered into by DOTC in the exercise of its governmental function. DOTC is the primary policy, planning, programming, regulating and administrative entity of the Executive branch of government in the promotion, development and regulation of dependable and coordinated networks of transportation and communications systems as well as in the fast, safe, efficient and reliable postal, transportation and communications services (Administrative Code of 1987, Book IV, Title XV, Sec. 2). It is the Executive department, DOTC in particular, that has the power, authority and technical expertise to determine whether or not a specific transportation or communications project is necessary, viable and beneficial to the people. The discretion to award a contract is vested in the government agencies entrusted with that function (Bureau Veritas *v.* Office of the President, 205 SCRA 705 [1992]).

WHEREFORE, the petition is DISMISSED.

SO ORDERED.

Bellosillo and *Kapunan, JJ.*, concur.

Narvasa, C.J., Bidin, Melo, Puno, Vitug, and *Francisco, JJ.*, joined Justice Mendoza's concurring opinion.

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Feliciano and *Davide, Jr., JJ.,* see dissenting opinion.

Padilla and *Regalado, JJ.,* in the result.

Romero, J., on leave.

Mendoza, see concurring opinion.

MENDOZA, *J., concurring:*

I concur in all but Part III of the majority opinion. Because I hold that petitioners do not have standing to sue, I join to dismiss the petition in this case. I write only to set forth what I understand the grounds for our decisions on the doctrine of standing are and, why in accordance with these decisions, petitioners do not have the right to sue, whether as legislators, taxpayers or citizens. As members of Congress, because they allege no infringement of prerogatives as legislators.[1] As taxpayers because petitioners allege neither an unconstitutional exercise of the taxing or spending powers of Congress (Art. VI, 24-25 and 29)[2] nor an illegal disbursement of public money.[3] As this Court pointed out in *Bugnay Const. and Dev. Corp. v. Laron*,[4] a party suing as taxpayer "must specifically prove that he has sufficient interest in preventing the illegal expenditure of money raised by taxation and that he will sustain a direct injury as a result of the enforcement of the questioned statute or contract. It is not sufficient that he has merely a general interest common to all members of the public." In that case, it was held that a contract,

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[1] Philconsa *v.* Enriquez, 235 SCRA 508 (1994), Gonzales *v.* Macaraig, 191 SCRA 452 (1990); Tolentino *v.* Comelec, 41 SCRA 702 (1971).

[2] Flast *v.* Cohen, 392 U.S. 83, 20 L. Ed. 2d 947 (1968), *cited* in Igot *v.* Comelec, 95 SCRA 392 (1980).

[3] Pascual *v.* Secretary of Public Works, 110 Phil. 331 (1960); Sanidad *v.* Comelec, 73 SCRA 333 (1976).

[4] 176 SCRA 240, 251-2 (1989).

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whereby a local government leased property to a private party with the understanding that the latter would build a market building and at the end of the lease would transfer the building to the lessor, did not involve a disbursement of public funds so as to give a taxpayer standing to question the legality of the contract. I see no substantial difference, as far as the standing of taxpayers to question public contracts is concerned, between the contract there and the build-lease-transfer (BLT) contract being questioned by petitioners in this case.

Nor do petitioners have standing to bring this suit as citizens. In the cases[5] in which citizens were authorized to sue, this Court found standing because it thought the constitutional claims pressed for decision to be of "transcendental importance," as in fact it subsequently granted relief to petitioners by invalidating the challenged statutes or governmental actions. Thus in the Lotto case[6] relied upon by the majority for upholding petitioners' standing, this Court took into account the "paramount public interest" involved which "immeasurably affect[ed] the social, economic, and moral well-being of the people . . . and the counter-productive and retrogressive effects of the envisioned on-line lottery system."[7] Accordingly, the Court invalidated the contract for the operation of lottery.

But in the case at bar, the Court precisely finds the opposite by finding petitioners' substantive contentions to be without merit. To the extent therefore that a party's standing is affected by a

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[5] Emergency Powers Cases [Araneta *v.* Dinglasan], 84 Phil. 368 (1949), Iloilo Palay and Corn Planters Ass'n. *v.* Feliciano, 121 Phil. 358 (1965); Philconsa *v.* Gimenez, 122 Phil. 894 (1965); CLU *v.* Executive Secretary, 194 SCRA 317 (1991).

[6] Kilosbayan, Inc. *v.* Guingona, 232 SCRA 110 (1994).

[7] *Id.*, at 139.

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determination of the substantive merit of the case or a preliminary estimate thereof, petitioners in the case at bar must be held to be without standing. This is in line with our ruling in *Lawyers League for a Better Philippines v. Aquino*[8] and *In re Bermudez*[9] where we dismissed citizens' actions on the ground that petitioners had no personality to sue and their petitions did not state a cause of action. The holding that petitioners did not have standing followed from the finding that they did not have a cause of action.

In order that citizens' actions may be allowed a party must show that he personally has suffered some actual or threatened injury as a result of the allegedly illegal conduct of the government; the injury is fairly traceable to the challenged action; and the injury is likely to be redressed by a favorable action.[10] As the U.S. Supreme Court has held:

Typically, . . . the standing inquiry requires careful judicial examination of a complaint's allegation to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative? These questions and any others relevant to the standing inquiry

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[8] G.R. Nos. 73748, 73972, 73990, May 22, 1986. (Questioning the legitimacy of the Provisional Government of President Aquino).

[9] 145 SCRA 160 (1986). (Questioning whether President Aquino and Vice President Laurel were the "President and Vice-President elected in the February 7, 1986 election" within the meaning of Art. XVIII, 5 of the Constitution).

[10] Valley Forge College *v.* Americans United, 454 U.S. 464, 70 L. Ed. 2d 700 (1982); Bugnay Const. and Dev. Corp. *v.* Laron, *supra*, note 4.

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must be answered by reference to the Art. III notion that federal courts may exercise power only "in the last resort, and as a necessity," Chicago & Grand Trunk R. Co. *v.* Wellman, 143 US 339, 345, 36 L Ed 176, 12 S Ct 400 (1892), and only when adjudication is "consistent with a system of separated powers and the [dispute is one] traditionally thought to be capable of resolution through the judicial process," Flast *v.* Cohen, 392 US 83, 97, 20 L. Ed 2d, 88 S Ct 1942 (1968). See Valley Forge, 454 US, at 472-473, 70 L Ed 2d 700, 102 S Ct 752.[11]

Today's holding that a citizen, *qua* citizen, has standing to question a government contract unduly expands the scope of public actions and sweeps away the case and controversy requirement so carefully embodied in Art. VIII, Sec. 5 in defining the jurisdiction of this Court. The result is to convert the Court into an office of Ombudsman for the ventilation of generalized grievances. Consistent with the view that this case has no merit I submit with respect that petitioners, as representatives of the public interest, have no standing.

FELICIANO, *J.*, *dissenting:*

After considerable study and effort, and with much reluctance, I find I must dissent in the instant case. I agree with many of the things set out in the majority opinion written by my distinguished brother in the Court Quiason, *J.* At the end of the day, however, I find myself unable to join *in the result* reached by the majority.

I join in the dissenting opinion written by Mr. Justice Davide, Jr. which is appropriately drawn on

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[11] Allen *v.* Wright, 468 U.S. 737, 752, 82 l. ed. 2d 556, 170 (1984).

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fairly narrow grounds. At the same time. I wish to address briefly one of the points made by Mr. Justice Quiason in the majority opinion in his effort to meet the difficulties posed by Davide, Jr., *J.*

I refer to the invocation of the provisions of Presidential Decree No. 1594 dated 11 June 1978 entitled: "Prescribing Policies, Guidelines, Rules and Regulations for Government Infrastructure Contracts." More specifically, the majority opinion invokes paragraph 1 of Section 4 of this Decree which read as follows.

"Sec. 4. *Bidding.* — Construction projects shall generally be undertaken by contract after competitive public bidding. Projects may be undertaken by administration or force account or by negotiated contract only in exceptional cases where time is of the essence, or where there is lack of qualified bidders or contractors, or where there is a conclusive evidence that greater economy and efficiency would be achieved through this arrangement, and in accordance with provisions of laws and acts on the matter, subject to the approval of the Ministry of Public Works, Transportation and Communications, the Minister of Public Highways, or the Minister of Energy, as the case may be, if the project cost is less than P1 Million, and of the President of the Philippines, upon the recommendation of the Minister, if the project cost is P1 Million or more.

x x x x x x x x x"

I understand the unspoken theory in the majority opinion to be that above Section 4 and presumably the rest of Presidential Decree No. 1594 continue to exist and to run parallel to the provisions of Republic Act No. 6957, whether in its original form or as amended by Republic Act No. 7718.

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A principal difficulty with this approach is that Presidential Decree No. 1594 purports to apply to *all* "government contracts for infrastructure *and other* construction projects." But Republic Act No. 6957 as amended by Republic Act No. 7718, relates *only* to "infrastructure projects" which are *financed, constructed, operated and maintained "by the private sector"* "through the *build/operate-and-transfer* or *build-and-transfer scheme*" under Republic Act No. 6597 and under a *series of other comparable schemes* under Republic Act No. 7718. In other words, Republic Act No. 6957 and Republic Act No. 7718 must be held, in my view, to be *special statutes* applicable to a more limited field of "infrastructure projects" than the wide-ranging scope of application of the *general statute*, i.e., Presidential Decree No. 1594. Thus, the high relevance of the point made by Mr. Justice Davide that Republic Act No. 6957 *in specific connection with BOT- and BLT-type of contracts* imposed an *unqualified* requirement of public bidding set out in Section 5 thereof.

It should also be pointed out that under Presidential Decree No. 1594, projects may be undertaken "by administration or force account or by negotiated contract *only*"

(1) "in exceptional cases where time is of the essence"; or

(2) "where there is lack of bidders or contractors"; or

(3) "where there is a conclusive evidence that greater economy and efficiency would be achieved through these arrangements, and in accordance with provision[s] of laws and acts on the matter."

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It must, upon the one hand, be noted that the special law Republic Act No. 6957 made absolutely *no mention of negotiated contracts* being permitted to displace the requirement of public bidding. Upon the other hand, Section 5-a, inserted in Republic Act No. 6957 by the amending statute Republic Act No. 7718, does *not* purport to authorize direct negotiation of contracts *except in four (4) situations* where there is a lack of pre-qualified contractors or complying bidders. Thus, even under the amended special statute, entering into contracts by negotiation is *not* permissible in *the other two (2) categories of cases referred to in Section 4 of Presidential Decree No. 1594*, i.e., "in exceptional cases where time is of the essence" and "when there is conclusive evidence that greater economy and efficiency would be achieved through these arrangements, etc."

The result I reach is that *insofar as BOT, etc.-types of contracts* are concerned, the applicable public bidding requirement is that set out in Republic Act No. 6957 and, *with respect to such type of contracts opened for pre-qualification and bidding after the date of effectivity of Republic Act No. 7718*, the provisions of Republic Act No. 7718. The assailed contract was entered into before Republic Act No. 7718 was enacted.

The difficulties of applying the provisions of Presidential Decree No. 1594 to the Edsa LRT-type of contracts are aggravated when one considers the detailed "Implementing Rules and Regulations as amended April 1988" issued under that Presidential Decree.[1] For instance:

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[1] Text in 84 Official Gazette, No. 23, pp. 33-37, *et seq.* (6 June 1988).

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"IB [2.5.2] 2.4.2 *By Negotiated Contract*

x x x x x x x x x'

a. In times of emergencies arising from natural calamities where immediate action is necessary to prevent imminent loss of life and/or property.

b. Failure to award the contract *after competitive public bidding* for valid cause or causes [such as where the prices obtained through public bidding are all above the AAE and the bidders refuse to reduce their prices to the AAE].

In these cases, bidding may be undertaken through sealed canvass of at least three (3) qualified contractors. Authority to negotiate contracts for projects under these exceptional cases shall be subject to prior approval by heads of agencies within their limits of approving authority.

c. Where the subject project is adjacent or contiguous to an on-going project and it could be economically prosecuted by the same contractor provided that he has no negative slippage and has demonstrated a satisfactory performance." (Italics supplied)

Note that there is no reference at all in these Presidential Decree No. 1594 Implementing Rules and Regulations to absence of pre-qualified applicants and bidders as justifying negotiation of contracts as distinguished from requiring public bidding or a second public bidding.

Note also the following provision of the same Implementing Rules and Regulations:

"IB 1 *Prequalification.*

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The *following may become contractors for government projects*:

1. *Filipino*

a. Citizens (single proprietorship)

b. Partnership or *corporation duly organized under the laws of the Philippines, and at least seventy five percent (75%) of the capital stock of which belongs to Filipino citizens.*

2. Contractors forming themselves into a joint venture, i.e., a group of two or more contractors that intend to be jointly and severally responsible for a particular contract, shall for purposes of bidding/ tendering comply with LOI 630, and, aside from being currently and properly accredited by the Philippine Contractors Accreditation Board, shall comply with the provisions of R.A. 4566, provided that *joint ventures in which Filipino ownership is less than seventy five percent (75%) may be prequalified where the structures to be built require the* application of *techniques and/or technologies* which are *not adequately possessed by a Filipino entity as defined above.*

[The foregoing shall not negate any existing and future commitments with respect to the bidding and aware of contracts financed partly or wholly with funds from international lending institutions like the Asian Development Bank and the World Bank as well as from bilateral and other similar sources.]" (Italics supplied)

The record of this case is entirely silent on the extent of Philippine equity in the Edsa LRT Corporation; there is no suggestion that this corporation is organized under Philippine law and is at least seventy-five (75%) percent owned by Philippine citizens.

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Public bidding is the normal method by which a government keeps contractors honest and is able to assure itself that it would be getting the best possible value for its money in any construction or similar project. It is not for nothing that multilateral financial organizations like the World Bank and the Asian Development Bank uniformly require projects financed by them to be implemented and carried out by public bidding. Public bidding is much too important a requirement casually to loosen by a latitudinarian exercise in statutory construction.

The instant Petition should be granted and the challenged contract and its supplement should be nullified and set aside. A true public bidding, complete with a new prequalification proceeding, should be required for the Edsa LRT Project.

DAVIDE, JR., *J.*, *dissenting opinion:*

After wading through the record of the vicissitudes of the challenged contract and evaluating the issues raised and the arguments adduced by the parties, I find myself unable to join the majority in the well-written *ponencia* of Mr. Justice Camilo P. Quiason.

I most respectfully submit that the challenged contract is void for at least two reasons: (a) it is an ultra-vires act of the Department of Transportation and Communications (DOTC) since under R.A. 6957 the DOTC has no authority to enter into a Build-Lease-and-Transfer (BLT) contract; and (b) even assuming *arguendo* that it has, the contract was entered into without complying with the mandatory requirement of public bidding.

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Respondents admit that the assailed contract was entered into under R.A. 6957. This law, fittingly entitled "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and For Other Purposes," recognizes only two (2) kinds of contractual arrangements between the private sector and government infrastructure agencies: (a) the Build-Operate-and-Transfer (BOT) scheme and (b) the Build-and-Transfer (BT) scheme. This conclusion finds support in Section 2 thereof which defines only the BOT and BT schemes, in Section 3 which explicitly provides for said schemes thus:

> SEC. 3. *Private Initiative in Infrastructure.* — All government infrastructure agencies, including government-owned and controlled corporations and local government units, are hereby authorized to enter into contract with any duly prequalified private contractor for the financing, construction, operation and maintenance of any financially viable infrastructure facilities *through the build-operate-and-transfer or build-and-transfer scheme*, subject to the terms and conditions hereinafter set forth. (Italics supplied).

and in Section 5 which requires public bidding of projects under both schemes.

All prior acts and negotiations leading to the perfection of the challenged contract were clearly intended and pursued for such schemes.

A Build-Lease-and-Transfer (BLT) scheme is not authorized under the said law, and none of the aforesaid prior acts and negotiations were designed for such unauthorized scheme. Hence, the DOTC is without any power or authority to enter into the BLT contract in question.

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The majority opinion maintains, however, that since "[t]here is no mention in the BOT Law and that the BOT and the BT schemes bar any other arrangement for the payment by the government of the project cost," then "[t]he law must not be read in such a way as to rule out or unduly restrict any variation within the context of the two schemes." This interpretation would be correct if the law itself provides room for flexibility. We find no such provision in R.A. No. 6957. If it intended to include a BLT scheme, then it should have so stated, for contracts of lease are not unknown in our jurisdiction, and Congress has enacted several laws relating to leases. That the BLT scheme was never intended as a permissible variation "within the context" of the BOT and BT schemes is conclusively established by the passage of R.A. No. 7718 which amends:

a) Section 2 by adding to the original BOT and BT schemes the following schemes:

(1) Build-own-and operate (BOO)

(2) Build-Lease-and-transfer (BLT)

(3) Build-transfer-and-operate (BTO)

(4) Contract-add-and-operate (CAO)

(5) Develop-operate-and-transfer (DOT)

(6) Rehabilitate-operate-and-transfer (ROT)

(7) Rehabilitate-own-and-operate (ROO)

b) Section 3 of R.A. No. 6957 by deleting therefrom the phrase "through the build-operate-and-transfer or built-and-transfer scheme."

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Public bidding is mandatory in R.A. No. 6957. Section 5 thereof reads as follows:

SEC. 5. *Public Bidding of Projects.* — Upon approval of the projects mentioned in Section 4 of this Act, the concerned head of the infrastructure agency or local government unit shall forthwith cause to be published, once every week for three (3) consecutive weeks, in at least two (2) newspapers of general circulation and in at least one (1) local newspaper which is circulated in the region, province, city or municipality in which the project is to be constructed a notice inviting all duly prequalified infrastructure contractors to participate in the public bidding for the projects so approved. In the case of a build-operate-and-transfer arrangement, the contract shall be awarded to the lowest complying bidder based on the present value of its proposed tolls, fees, rentals, and charges over a fixed term for the facility to be constructed, operated, and maintained according to the prescribed minimum design and performance standards, plans, and specifications. For this purpose, the winning contractor shall be automatically granted by the infrastructure agency or local government unit the franchise to operate and maintain the facility, including the collection of tolls, fees, rentals, and charges in accordance with Section 6 hereof.

In the case of a built-and-transfer arrangement, the contract shall be awarded to the lowest complying bidder based on the present value of its proposed, schedule of amortization payments for the facility to be constructed according to the prescribed minimum design and performance standards, plans and specifications: *Provided, however,* That a Filipino constructor who submits an equally advantageous bid shall be given preference.

A copy of each build-operate-and-transfer or build-and-transfer contract shall forthwith be submitted to Congress for its information.

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The requirement of public bidding is not an idle ceremony. It has been aptly said that in our jurisdiction "public bidding is the policy and medium adhered to in Government procurement and construction contracts under existing laws and regulations. It is the accepted method for arriving at a fair and reasonable price and ensures that overpricing, favoritism and other anomalous practices are eliminated or minimized. And any Government contract entered into without the required bidding is null and void and cannot adversely affect the rights of third parties." (Bartolome C. Fernandez, Jr., A TREATISE ON GOVERNMENT CONTRACTS UNDER PHILIPPINE LAW 25 [rev. ed. 1991], citing Caltex *vs.* Delgado Bros., 96 Phil. 368 [1954]).

The Office of the President, through then Executive Secretary Franklin Drilon correctly disapproved the contract because no public bidding in strict compliance with Section 5 of R.A. No. 6957 was conducted. Secretary Drilon further bluntly stated that the provision of the Implementing Rules of said law authorizing negotiated contracts was of doubtful legality. Indeed, it is null and void because the law itself does not recognize or allow negotiated contracts.

However, the majority opinion posits the view that since only private respondent EDSA LRT was prequalified, then a public bidding would be "an absurd and pointless exercise." I submit that the mandatory requirement of public bidding connot be legally dispensed with simply because only one was qualified to bid during the prequalification proceedings. Section 5 mandates that the BOT or BT contract should be awarded "to the lowest complying bidder," which logically means that there

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must at least be two (2) bidders. If this minimum requirement is not met, then the proposed bidding should be deferred and a new prequalification proceeding be scheduled. Even those who were earlier disqualified may by then have qualified because they may have, in the meantime, exerted efforts to meet all the qualifications.

This view of the majority would open the floodgates to the rigging of prequalification proceedings or to unholy conspiracies among prospective bidders, which would even include dishonest government officials. They could just agree, for a certain consideration, that only one of them would qualify in order that the latter would automatically corner the contract and obtain the award.

That Section 5 admits of no exception and that no bidding could be validly had with only one bidder is likewise conclusively shown by the amendments introduced by R.A. No. 7718. Per Section 7 thereof, a new section denominated as Section 5-A was introduced in R.A. No. 6957 to allow direct negotiation of contracts. This new section reads:

SEC. 5-A. *Direct Negotiation of Contracts.* — Direct negotiation shall be resorted to when there is only one complying bidder left as defined hereunder.

(a) If, after advertisement, only one contractor applies for prequalification requirements, after which it is required to submit a bid/proposal which is subsequently found by the agency/local government unit (LGU) to be complying.

(b) If, after advertisement, more than one contractor applied for prequalification but only one

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meets the prequalification requirements, after which it submits bid/proposal which is found by the agency/ local government unit (LGU) to be complying.

(c) If, after prequalification of more than one contractor, only one submits a bid which is found by the agency/LGU to be complying.

(d) If, after prequalification, more than one contractor submit bids but only one is found by the agency/LGU to be complying: *Provided,* That, any of the disqualified prospective bidder may appeal the decision of the implementing agency/LGUs prequalification bids and awards committee within fifteen (15) working days to the head of the agency, in case of national projects or to the Department of the Interior and Local Government, in case of local projects from the date the disqualification was made known to the disqualified bidder: *Provided*, furthermore, That the implementing agency/LGUs concerned should act on the appeal within forty-five (45) working days from receipt thereof.

Can this amendment be given retroactive effect to the challenged contract so that it may now be considered a permissible negotiated contract? I submit that it cannot be. R.A. No. 7718 does not provide that it should be given retroactive effect to pre-existing contracts. Section 18 thereof says that it "shall take effect fifteen (15) days after its publication in at least two (2) newspapers of general circulation." If it were the intention of Congress to give said act retroactive effect then it would have so expressly provided. Article 4 of the Civil Code provides that "[l]aws shall have no retroactive effect, unless the contrary is provided."

The presumption is that all laws operate prospectively, unless the contrary clearly appears or is clearly, plainly, and unequivocally expressed

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or necessarily implied. In every case of doubt, the doubt will be resolved agaisnt the retroactive application of laws. (Ruben E. Agpalo, STATUTORY CONSTRUCTION 225 [2D ed. 1990]). As to amendatory acts, or acts which change an existing statute, Sutherland states:

> In accordance with the rule applicable to original acts, it is presumed that provisions added by the amendment that affecting substantive rights will not e construed to apply to transactions and events completed prior to its enactment unless the legislature has expressed its intent to that effect or such intent is clearly implied by the language of the amendment or by the circumstances surrounding its enactment. (1 Frank E. Horack, Jr., SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION 434-436 [1943 ed.]).

I vote then to grant the instant petition and to declare void the challenged contract and its supplement.

SECOND DIVISION

[G.R. No. 115504. April 8, 1995]

ANTONIO DANAO y ROXAS, *petitioner, vs.* COURT OF APPEALS and PEOPLE OF THE PHILIPPINES, *respondents.*

SYLLABUS

CRIMINAL LAW; RETROACTIVE EFFECT OF PENAL LAWS; APPLICATION IN CASE OF VIOLATION OF DANGEROUS DRUGS ACT;