Supreme Court E-Library

WHEREFORE, the CA's decision dated June 28, 2013 in CA-G.R. CEB-CR H.C. No. 01209, finding accused-appellant, Manuel Macal *y* Bolasco, guilty beyond reasonable doubt of the crime of Parricide, is hereby **AFFIRMED** with **MODIFICATIONS.** Accused-appellant is sentenced to suffer the penalty of *reclusion perpetua* and to pay the heirs of the victim, Auria Ytac Macal, the amounts of ₱75,000.00 as civil indemnity, ₱75,000.00 as moral damages, ₱30,000.00 as exemplary damages, and ₱25,000.00 as temperate damages. In addition, all the monetary awards shall earn an interest at the legal rate of 6% *per annum* from the date of finality of this Decision until fully paid.

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Perlas-Bernabe, JJ.,* concur.

THIRD DIVISION

[G.R. No. 211737. January 13, 2016]

SERGIO R. OSMEÑA III, *petitioner, vs.* **DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS SECRETARY JOSEPH EMILIO A. ABAYA, MACTAN-CEBU INTERNATIONAL AIRPORT AUTHORITY (MCIAA), THE PRE-QUALIFICATION, BIDS AND AWARDS COMMITTEE (PBAC) FOR THE MACTAN-CEBU INTERNATIONAL AIRPORT PROJECT THROUGH ITS CHAIRMAN, UNDERSECRETARY JOSE PERPETUO M. LOTILLA, GMR INFRASTRUCTURE, LTD. and MEGAWIDE CONSTRUCTION CORPORATION,** *respondents.*

Supreme Court E-Library

[G.R. No. 214756. January 13, 2016]

BUSINESS FOR PROGRESS MOVEMENT as represented by MEDARDO C. DEACOSTA, JR., *petitioner, vs.* **DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS, GMR-MEGAWIDE CEBU AIRPORT CORPORATION,** *respondents.*

SYLLABUS

1. **POLITICAL LAW; JUDICIAL DEPARTMENT; JUDICIAL REVIEW; LEGAL STANDING; REQUISITES; LEGAL STANDING REFERS TO A PERSONAL AND SUBSTANTIAL INTEREST IN A CASE SUCH THAT THE PARTY HAS SUSTAINED OR WILL SUSTAIN DIRECT INJURY BECAUSE OF THE CHALLENGED GOVERNMENTAL ACT.—** Legal standing or *locus standi* refers to a personal and substantial interest in a case such that the party has sustained or will sustain direct injury because of the challenged governmental act. The requirement of standing, which necessarily sharpens the presentation of issues, relates to the constitutional mandate that this Court settle only actual cases or controversies. Thus, generally, a party will be allowed to litigate only when (1) he can show that he has personally suffered some actual or threatened injury because of the allegedly illegal conduct of the government; (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable action.

2. **ID.; ID.; ID.; ID.; THE RULES THEREON MAY BE RELAXED WHEN THE ISSUES INVOLVED IS OF TRANSCENDENTAL IMPORTANCE TO THE PUBLIC; MATTER OF TRANSCENDENTAL IMPORTANCE, HOW DETERMINED.—** In any case, *locus standi* being a mere procedural technicality, the Court has, in the exercise of its discretion, relaxed the rules on standing when the issues involved is of "transcendental importance" to the public. The Court, through Associate Justice Florentino P. Feliciano (retired and now deceased), provided the following instructive guides as determinants in determining whether a matter is of transcendental importance: (1) the character of the funds or

Supreme Court E-Library

other assets involved in the case; (2) the presence of a clear case of disregard of a constitutional or statutory prohibition by the public respondent agency or instrumentality of the government; and (3) the lack of any other party with a more direct and specific interest in the questions being raised.

3. **REMEDIAL LAW; COURTS; HIERARCHY OF COURTS; IN PETITIONS FOR *CERTIORARI*, PROHIBITION, *MANDAMUS*, *QUO WARRANTO*, AND *HABEAS CORPUS*, DIRECT RESORT TO THE SUPREME COURT WILL NOT BE ENTERTAINED UNLESS THE REDRESS DESIRED CANNOT BE OBTAINED IN THE APPROPRIATE COURTS, AND EXCEPTIONAL AND COMPELLING CIRCUMSTANCES JUSTIFY THE DIRECT INVOCATION OF ITS JURISDICTION.—** While this Court has original jurisdiction over petitions for certiorari, prohibition, *mandamus*, *quo warranto*, and *habeas corpus*, such jurisdiction is shared with the Court of Appeals and the Regional Trial Courts. x x x The Court thus declared in *Heirs of Bertuldo Hinog v. Melicor,* that it will not entertain direct resort to it unless the redress desired cannot be obtained in the appropriate courts, and exceptional and compelling circumstances, such as cases of national interest and of serious implications, justify the availment of the extraordinary remedy of writ of certiorari, calling for the exercise of its primary jurisdiction. After a thorough study and evaluation of the issues involved, the Court is of the view that exceptional circumstances exist in this case to warrant the relaxation of the rule.

4. **ID.; ACTIONS; MOOT AND ACADEMIC CASE; IN CASES WHERE THE SUPERVENING EVENTS HAD MADE THE CASES MOOT, THE SUPREME COURT MAY RESOLVE THE LEGAL OR CONSTITUTIONAL ISSUES RAISED TO FORMULATE CONTROLLING PRINCIPLES TO GUIDE THE BENCH AND THE BAR, AND THE PUBLIC.—** Respondents' contention that the case was mooted by the Notice of Award and turnover of operations of the MCIA to GMCAC likewise deserves scant consideration. For even in cases where the supervening events had made the cases moot, the Court did not hesitate to resolve the legal or constitutional issues raised to formulate controlling principles to guide the bench and the bar, and the public. Hence, the subsequent issuance of

Supreme Court E-Library

Notice of Award, execution of the Concession Agreement and turn-over to GMCAC of the operation and maintenance of MCIA, did not remove the issue of GMCAC's qualifications from the ambit of judicial review.

5. **POLITICAL LAW; ADMINISTRATIVE LAW; BUILD-OPERATE-AND-TRANSFER LAW; PUBLIC BIDDINGS; EVALUATION OF BIDS; STAGES.—** For public biddings of PPP contracts under the BOT Law and Implementing Rules and Regulations (IRR), the evaluation of bids is undertaken in two stages. The first-stage evaluation involves the assessment of the technical, operational, environmental and financing viability of the proposal as contained in the bidder's first envelopes vis-à-vis the prescribed requirements and criteria/ minimum standards and basic parameters prescribed in the bidding documents. The second stage evaluation shall involve the assessment and comparison of the financial proposals of the bidders. Within three days from completion of the financial evaluation, the PBAC submits its recommendation to the head of the Implementing Agency (IA) or Local Government Unit (LGU). Upon approval of the recommendation, the head of the IA or LGU will issue a notice of award to a winning proponent. Subject to compliance with the post-award requirements in the notice of award, the PPP contract shall be executed and signed by the winning bidder and the head of the IA or LGU.

6. **ID.; ID.; GOVERNMENT CONTRACTS; PUBLIC BIDDING; THE COURTS WILL NOT INTERFERE WITH THE BROAD DISCRETION OF THE GOVERNMENT IN CHOOSING WHO AMONG THE BIDDERS CAN OFFER THE MOST ADVANTAGEOUS TERMS, EXCEPT WHEN IN THE EXERCISE OF ITS AUTHORITY, IT GRAVELY ABUSES OR EXCEEDS ITS JURISDICTION, OR COMMITS INJUSTICE OR FRAUDULENT ACTS.—** It is well-settled in our jurisprudence that the government is granted broad discretion in choosing who among the bidders can offer the most advantageous terms and courts will not interfere therewith or direct the committee on bids to do a particular act or to enjoin such act within its prerogatives, except when in the exercise of its authority, it gravely abuses or exceeds its jurisdiction, or otherwise commits injustice,

Supreme Court E-Library

unfairness, arbitrariness or fraudulent acts. We have recognized that the exercise of that discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation. This task can best be discharged by the concerned government agencies, not by the courts. x x x Under the ITPB, the PBAC reserves the right to waive any minor defects in the Qualification Documents, and accept the offer it deems most advantageous to the government. Verily, a reservation of the government of its right to reject any bid, generally vests in the authorities a wide discretion as to who is the best and most advantageous bidder. The exercise of such discretion involves inquiry, investigation, comparison, deliberation and decision, which are quasi-judicial functions, and when honestly exercised, may not be reviewed by the court.

7. REMEDIAL LAW; CIVIL PROCEDURE; SPECIAL CIVIL ACTIONS; INJUNCTION; WILL NOT ISSUE TO PROTECT A RIGHT NOT *IN ESSE* AND WHICH MAY NEVER ARISE OR TO RESTRAIN AN ACT WHICH DOES NOT GIVE RISE TO A CAUSE OF ACTION.— For the writ of injunction to issue, the existence of a clear and positive right especially calling for judicial protection must be shown; injunction is not to protect contingent or future rights; nor is it a remedy to enforce an abstract right. An injunction will not issue to a protect a right not *in esse* and which may never arise or to restrain an act which does not give rise to a cause of action. There must exist an actual right. Petitioners failed to establish such actual right that needs to be protected by injunctive relief. There being no violation of any law, regulation or the bidding rules, nor any arbitrariness or unfairness committed by public respondents, the presumption of regularity of the bidding for the MCIA Project must stand.

APPEARANCES OF COUNSEL

Michelle D. Trinidad for petitioner Business for Progress Movement.

Office of the Solicitor General for public respondents.

Angara Abello Concepcion Regala & Cruz for respondent Megawide Construction Corp. & GMR Megawide Cebu Airport Corp.

Supreme Court E-Library

Quasha Ancheta Pena and *Nolasco* co-counsel for respondent Megawide Construction Corp. & GMR Megawide Cebu Airport Corp.

Bernas Law Office for petitioner Sen. Sergio Osmeña III.

Poblador Bautista & Reyes for respondent GMR Infrastructure, Ltd.

D E C I S I O N

VILLARAMA, JR., *J.*:

Before us are the consolidated petitions for certiorari and injunction to restrain public respondents from awarding the Mactan-Cebu International Airport (MCIA) Project to private respondents GMR Infrastructure Limited (GMR) and Megawide Construction Corporation (MCC). Petitioners subsequently prayed for invalidation of the award after private respondents won the public bidding.

The Facts

The MCIA Project consists of the construction of a new passenger terminal with all associated infrastructure facilities; construction of apron for the new passenger terminal; rehabilitation and expansion of the existing terminal along with all associated infrastructure and facilities; installation of all the required equipment and other associated facilities; installation of the required information technology and other equipment commensurate with the operations; and operation and maintenance of both passenger terminals during the concession period.[1] The project is being implemented by the Department of Transportation and Communications (DOTC) under the provisions of Republic Act (R.A.) No. 6957 as amended by R.A. No. 7718, otherwise known as the "Build-Operate-and-Transfer (BOT) Law."

On December 21, 2012, the Pre-qualification, Bids and Awards Committee (PBAC) caused the publication of the invitation to pre-qualify and bid for the MCIA Project.[2] PBAC sets as

[1] *Rollo* (G.R. No. 211737), Vol. I, p. 786.

[2] *Id*. at 54.

Supreme Court E-Library

criteria the following: (1) legal qualification; (2) technical qualification; and (3) financial capability requirements.[3] On December 27, 2012, the DOTC and Mactan-Cebu International Airport Authority (MCIAA) issued the Instructions to Prospective Bidders (ITPB).[4]

On February 13, 2013, the PBAC conducted a Pre-Qualification Conference. In its Resolution[5] dated May 14, 2013, the PBAC recommended the pre-qualification of the following prospective bidders:

1. AAA Airport Partners;
2. Filinvest-CAI Consortium;
3. First Philippine Airports;
4. GMR Infrastructure & Megawide Consortium;
5. MPIC-JGS Airport Consortium;
6. Premier Airport Group; and
7. San Miguel & Incheon Airport Consortium.

After the submission and approval of the technical proposals submitted by the pre-qualified bidders, the PBAC proceeded with accepting their financial proposals. The financial bids were ranked in terms of "premium" to the government such that "[a]ll bids received by the DOTC were 'premium' offers, meaning the money would go directly to the government and would come on top of the cost to develop the airport."[6] The seven bids, from highest to lowest, are:

1	GMR-Megawide Consortium	Php 14,404,570,002.00
2	Filinvest-Changi Airport Consortium	Php 13,999,999,999.99
3	Premier Airport Group	Php 12,500,088,888.88
4	MPIC-JGS Airport Holdings, Inc.	Php 11,230,000.000.00
5	AAA Airport Partners	Php 11,088,888,889.00

[3] *Rollo* (G.R. No. 211737), Vol. IV, pp. 2209-2212.

[4] *Rollo* (G.R. No. 211737), Vol. II, pp. 783-853.

[5] *Rollo* (G.R. No. 211737), Vol. III, pp. 1972-1976.

[6] Page 3 of Consolidated Comment filed by DOTC and MCIAA, *id.* at 1897.

Supreme Court E-Library

6	San Miguel & Incheon Airport	Php 9,050,000,000.00
7	First Philippine Airports	Php 4,700,000,000.00[7]

On April 3, 2014, PBAC issued a Resolution[8] recommending GMR-Megawide Consortium as the winning bidder for the MCIA Project. The resolution reads in part:

WHEREAS, the GMR Infrastructure & Megawide Consortium, formed by Megawide Construction Corporation ("Megawide") and GMR Infrastructure Limited ("GMR") qualified under the Technical and Financial Qualification requirements, through the following entities:

Development Experience	
* Delhi International Airport (P) Limited (DIAL)	Affiliate of GMR Infrastructure Limited
* GMR Hyderabad International Airport Limited (GHIAL)	Affiliate of GMR Infrastructure Limited
Operation and Maintenance	
* Delhi International Airport (P) Limited (DIAL)	Affiliate of GMR Infrastructure Limited
* GMR Hyderabad International Airport Limited (GHIAL)	Affiliate of GMR Infrastructure Limited
Financial Qualification	
* Megawide Construction Corp.	Consortium Member

x x x x x x x x x

WHEREAS, upon completion of verification of the information, representations and statements made in its Qualification Documents, Bid Letter, Technical Proposal and Financial Proposal and recommendation of the TWG [Technical Working Group] under its report dated 2 April 2014, (i) the PBAC has not found any deficiency in the Financial Proposal, (ii) nor has any misrepresentation been found in the information, representations and statements made by the GMR Infrastructure & Megawide Consortium in its Qualification Documents, Technical Proposal, Financial Proposal, and (iii) nor has the Consortium been found to have engaged in any Corrupt

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[7] *Id*.

[8] *Rollo* (G.R. No. 211737), Vol. IV, pp. 2279-2300.

Supreme Court E-Library

Practice, Fraud, Collusion, Coercion, Undesirable and Restrictive Practice, Conflict of Interest, or violated the Lock-up Rules. A copy of the TWG Report dated 2 April 2014 is attached as Annex "DD";

NOW THEREFORE, upon review and deliberation, pursuant to and in accordance with the provisions, constraints and limitations under the BOT Law, BOT Law IRR, and the rules under the ITPB and ITB, the PBAC hereby resolves to recommend to the Honorable Secretary of the DOTC and the Board of the MCIAA: (i) to designate GMR Infrastructure & Megawide Consortium as the Winning Bidder for the Project, and (ii) to consequently issue the Notice of Award to GMR Infrastructure & Megawide Consortium.[9]

On the same day, Senator Sergio R. Osmeña III (petitioner Osmeña III) filed in this Court a petition for certiorari and prohibition with application for temporary restraining order and/or writ of preliminary injunction (G.R. No. 211737) praying that this Court (a) immediately issue an order restraining the public respondents from further acting on the bid of private respondents; (b) issue an order enjoining public respondents, their agents, representatives or assigns from issuing a Notice of Award and executing a Concession Agreement for the MCIA Project for private respondents; and (c) give due course to his petition, and after due proceedings to render judgment declaring private respondents as unqualified bidder and making the injunction permanent.

On April 4, 2014, DOTC and MCIAA issued the Notice of Award[10] to GMR-Megawide Consortium. Pursuant to Section 8.1 of the Instruction to Bidders (ITB), private respondents were directed to submit the required documents and pay the Bid Amount to MCIAA.

On April 7, 2014, petitioner Osmeña III filed a Supplemental Petition reiterating his prayer for injunctive reliefs and for this Court to further restrain the implementation of the Notice of Award and render judgment declaring the same as null and void.

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[9] *Id*. at 2283, 2298-2299.

[10] *Id*. at 2302-2304.

Supreme Court E-Library

Private respondents GMR and MCC, and public respondents DOTC, MCIAA and PBAC filed their respective Comments.

Meanwhile, private respondents complied with the post-award requirements, including the payment of the Php 14.4 Billion bid amount to MCIAA. On April 22, 2014, the Concession Agreement was executed between DOTC and MCIAA, and GMR-Megawide Consortium.

On October 31, 2014, a petition for injunction was filed by Business for Progress Movement (BPM), represented by Medardo C. Deacosta, Jr. (G.R. No. 214756). Petitioner BPM sought to restrain the turn-over of the operation and maintenance of the MCIA to GMR-Megawide Consortium. With the simultaneous imposition of increased terminal fees, BPM claims that it stands to suffer great and irreparable damage and injury once GMR-Megawide Consortium takes over the operation and management of the MCIA.

On November 1, 2014, DOTC turned over to GMR-Megawide Consortium the operation and maintenance of the MCIA.

Petitioners' Arguments

G.R. No. 211737

The following grounds are set forth in the petition:

I

THE PBAC ILLEGALLY QUALIFIED THE GMR-MEGAWIDE CONSORTIUM DESPITE ITS PATENT VIOLATION OF THE CONFLICT OF INTEREST RULE.

II

THE PBAC ILLEGALLY REFUSED TO DISQUALIFY THE GMR-MEGAWIDE CONSORTIUM IN THE FACE OF UNREFUTED EVIDENCE OF GMR'S POOR FINANCIAL HEALTH AND TRACK RECORD IN ITS INTERNATIONAL AIRPORT OPERATIONS.

III

PUBLIC RESPONDENTS ILLEGALLY FAILED TO AND LATER REFUSED TO DISQUALIFY PRIVATE RESPONDENTS FOR

Supreme Court E-Library

VIOLATING THE CONFLICT OF INTEREST RULE AND THEIR OTHER INCAPACITIES EVEN IF IT WAS THEIR MINISTERIAL DUTY TO DO SO.

IV

THE PUBLIC RESPONDENTS ILLEGALLY ACCORDED PRIVATE RESPONDENTS AN UNDUE ADVANTAGE AND/OR ACTED WITH UNDUE BIAS IN FAVOR OF PRIVATE RESPONDENTS.

Petitioner Osmeña III argues that PBAC should have disqualified GMR-Megawide Consortium because it violated the *conflict of interest* rule when it failed to disclose that Mr. Tan Shri Bashir Ahmad bin Abdul Majid was a director of two subsidiaries of the GMR-Megawide Consortium, and is also the Managing Director of Malaysia Airport Holdings Berhad (MAHB), which joined the bidding for MCIA Project as member of the First Philippine Airports Consortium. He asserts that this rule is *mala prohibita*; hence, it does not matter whether the violation was intentional or not, and the penalty of disqualification should be imposed. GMR-Megawide's violation disadvantaged the other bidders as they were restricted from entering into similar arrangements, and thus deprived them of an even playing field or a fair and competitive bidding.

Another ground of disqualification raised by petitioner Osmeña III concerns the financial and technical capabilities of GMR as his investigation and online research showed that GMR was in dire financial health and has been offloading several assets and its stake in various infrastructure projects to meet its financial obligations. He likewise discovered GMR's unsavory record involving the Delhi International Airport Pvt. Ltd. (DIAL), which is the concessionaire for GMR's Indira Gandhi International Airport at Delhi. According to the Auditor General of India, (i) 27% of the project cost for Delhi Airport was not funded by DIAL but charged to the travelling public; (ii) outsourcing of contracts to GMR joint venture companies was not on arms-length basis in violation of contract; and (iii) DIAL violated the master plan and incurred delay in the completion of the project. The Male International Airport (MIA) case also proves

Supreme Court E-Library

GMR's lack of technical qualification to undertake the MCIA Project. GMR Male International Airport Pvt. Ltd. (GMIAL), an indirect subsidiary of GMR, through its direct subsidiary GMR Infrastructure (Mauritius) Limited, entered into a Concession Agreement dated June 28, 2010 with the Maldives Airport Company Ltd. (MACL) and the Maldives Government Ministry of Finance and Treasury for the Rehabilitation, Expansion, Modernization, Operation and Maintenance of Male International Airport for a period of 25 years. However, on November 27, 2012, the Maldives Government and MACL declared the Concession Agreement void *ab initio* and gave GMIAL seven days to vacate the MIA, which prompted GMIAL to initiate arbitration proceedings. GMIAL sought a declaration that it was entitled to adjust the fees payable to MACL by virtue of the invalidity of portions of the Concession Agreement, while MACL sought the declaration of the Concession Agreement as void *ab initio*. GMIAL had applied for an injunction before the courts of Singapore to restrain the Maldives Government from interfering with the performance of the Concession Agreement pending arbitration proceedings. On appeal, the Singapore Court of Appeal set aside the preliminary injunction issued by a High Court judge of Singapore. Thus, effective December 8, 2012, the Maldives Government and MACL took control of the MIA.

Following a privilege speech he delivered at the Senate, petitioner Osmeña III said that the Senate Committee on Public Services, in fact, conducted two hearings on the matter where all the respondents were represented. It was alleged that during these hearings, it was established that: (a) PBAC did not compare the submissions of the various members of consortia or bidders in order to determine the existence of conflict of interest; (b) public respondents did not look into cross-directorships or conflict of interest violations of GMR even if the rules compel an inspection based on the submission of private respondents, and even refused to impose the penalty of disqualification when the violation was pointed out; (c) GMR admitted that MAHB is GMR's partner in several of its airport operations and that the Managing Director of MAHB is indeed a member of at least two subsidiaries of GMR; and (d) granting there was doubt

Supreme Court E-Library

in the existence of a violation of the conflict of interest rule, public respondents did not take the precaution of asking for the opinion of the Department of Justice (DOJ).

Citing the case of *Agan v. PIATCO*,[11] petitioner Osmeña III claims the parallelisms between said case and the present controversy are too uncanny to ignore, and as in *Agan*, the Court should exercise its solemn constitutional duty to nullify the award of the MCIA Project to private respondents and avert serious damage to a project that the Province of Cebu looks forward to. GMR also confirmed its operating losses during the Senate hearings, and its present financial situation indicates that GMR Infra may not be earning enough money to meet its interest payments on time. As to the Airport Development Fund being levied by DIAL, the Supreme Court of India found that the levy made by DIAL during the period March 1, 2009 to April 23, 2010, prior to the notice from Airport Economic Regulatory Authority (AERA) permitting DIAL to subsequently continue the levy, was made contrary to law.

Petitioner Osmeña III further avers that during the hearing conducted by the House of Representatives on the MCIA Project on March 12, 2014, it was revealed that MCC failed to complete its school building project despite two extensions granted to it. This is relevant because under the Procurement Law (R.A. No. 9184), if a bidder is more than 15% delayed in any of its infrastructure projects, it cannot be awarded a new contract. While the MCIA Project is under the BOT Law, the underlying principle still holds for the simple reason that what is involved is a public contract. The foregoing negative findings affecting both partners in the GMR-Megawide Consortium should have compelled the PBAC, at the very least, to disqualify said consortium during the post-qualification as they were unable to demonstrate viable commercial operations.

G.R. No. 214756

Petitioner BPM also expressed doubts on the financial capacity of the winning bidder, GMR-Megawide Consortium, to undertake

[11] 450 Phil. 744 (2003).

Supreme Court E-Library

the construction, development, operation and maintenance of the MCIA in view of several news reports about GMR Infrastructure's state of being "debt-ridden," as it had to raise funds through sale, equity issue and divest a few road and power plants in order to pay its corporate loans. It was also reported that GMR asked the US private equity firm KKR & Co. LP to provide about $175 Million in a debt and equity deal. Apparently, the cancellation by the Maldives Government of GMR's contract for modernizing the MIA had greatly affected GMR's revenues coming from its airport business.

With GMR's lack of financial capacity, BPM contends that the GMR-Megawide Consortium had come up with a scheme of imposing increased terminal fees to cover the operating costs and expansion of the MCIA. From a news report published in the *Business Mirror* on October 13, 2014, BPM learned that the MCIA board approved on October 10, 2014 higher passenger service charge (PSC) rates, commonly known as terminal fees, "to help fund the expansion and cover increasing operating costs as well as comply with the 25-year concession agreement between MCIAA and private airport operator GMR-Megawide Cebu Airport Corp. (GMCAC)," and that effective November 1, a domestic passenger would have to pay Php220, Php20 more than the current Php200 fee, while an international passenger would have to shell out Php750, or Php200 more than the current Php550; the domestic PSC rate will increase further to Php300 effective January 1, 2016.[12]

Petitioner maintains that all the requisites for the issuance of a writ of preliminary injunction are present in this case. Petitioner as taxpayer has a clear and unmistakable right to be protected as the imposition of the terminal fees in the increased amount as well as the turn-over of the MCIA to private respondents despite the fact that the latter has no financial capacity will be prejudicial to petitioners. There is also an urgent and paramount necessity for the issuance of the writ considering

[12] "MACTAN-Cebu airport upgrade set," posted on October 13, 2014, <http://www.bworldonline.com/content.php?section=TopStory&title=mactan-cebu-airport-upgrade-set&id=96020> (visited last January 4, 2016).

the scheduled turn-over on November 1, 2014, and petitioner has no other plain, speedy and adequate remedy in the course of law except this petition, for which purpose it is ready, able and willing to post the necessary bond in the amount that this Court may determine. BMP claims that there appears a clear and present danger that the instant petition will be rendered nugatory and ineffectual, and that the highest interest of justice will not be served if the act complained of – that is, the immediate turn-over of the operations of the MCIA to private respondents, would not be enjoined.

In its Consolidated Reply, BPM argues that the petition has not been mooted by the actual turnover of MCIA's operation to private respondents since the terminal fees will continue to increase in 2016 to defray the cost of the project. GMR's financial incapacity, as confirmed by online articles on GMR's moves to bring down its debt burden and finance its projects, will thus continue to cause grave and irreparable damage to BPM. Direct injury is being suffered by BPM members who are taxpayers frequently travelling to Cebu and Mactan from the increased terminal fees.

Respondents' Arguments

G.R. No. 211737

Megawide Construction Corp.

On procedural grounds, MCC contends that the petition should be dismissed for fatal defects or infirmities. First, the petition raises several factual questions which this Court is not required to entertain, particularly in a petition for certiorari and prohibition. Second, the petition for certiorari under Rule 65 of the Rules of Court is improper and cannot be pursued against the public respondents, more so against GMR and MCC, which do not exercise quasi-judicial or ministerial functions *vis-à-vis* the bidding process for the MCIA Project. And third, petitioner has no *locus standi* to file the petition, and neither has he shown any justification for this Court to disregard his lack of personality to maintain this suit.

Supreme Court E-Library

MCC argues that the petition lacks merit considering that: (a) the petition assails matters which require to be left to the sole determination of the executive department, particularly the PBAC and DOTC, and thus is beyond judicial cognizance; (b) petitioner's prayer to enjoin the public respondents from issuing a Notice of Award or executing a Concession Agreement – both of which have already occurred – is already moot and thus is not a proper subject of controversy; (c) even assuming that this Court can take cognizance of the petition, petitioner failed to allege, much less establish a violation of law but rather, merely relies on DOTC and MCIAA issuances – the ITPB and ITB – both of which the PBAC has faithfully applied in this instance, in accordance with its intent and interpretation, thus negating any grave abuse of discretion; (d) contrary to petitioner's own interpretation of PBAC's ITPB and ITB, which interpretation finds no basis therein and in law, there is no conflict of interest; and (e) contrary to petitioner's allegations, GMR-Megawide Consortium is financially and technically capable of undertaking the MCIA Project, and developing, maintaining, and operating the renovated MCIA.

Opposing the application for a writ of preliminary injunction, MCC asserts that petitioner failed to show (1) a clear, unmistakable legal right that demands protection nor a *prima facie* entitlement to the relief demanded in the petition, and hence no injunctive relief must issue; and (2) that he, or even the other bidders, the public and the State, will suffer grave and irreparable injury from the continuation of the Award, the execution of the Concession Agreement, and/or the MCIA Project. On the contrary, grave and irreparable injury will result should the bidding process be enjoined and, consequently, the project be delayed. MCC contends that under previous and existing laws, the policy has been that a national government infrastructure project may not be enjoined save for exceptional circumstances, in order to avoid unnecessary costs and, more importantly, delay in the enjoyment of benefits from such project. In this case, the government agencies have regularly performed their duty and the winning Consortium is eager to comply with their orders. All the queries raised by the other bidders have been addressed

Supreme Court E-Library

by private respondents and what remains to be done is the work that ought to be the result from the bidding procedure. The MCIA Project, among the present administration's Public-Private Partnership (PPP) projects should not be delayed any further on the basis of unsubstantiated allegations.

GMR Infrastructure Ltd.

GMR points out similar defects in the petition such as the failure to attach certified true copy of the assailed order, judgment or resolution since petitioner only attached the transcripts of stenographic notes taken during the Senate hearings which are mere recording of the proceedings therein; lack of requisite standing of petitioner who has not raised any constitutional issue nor alleged any violation of application of a law, but merely points to a supposed unequal enforcement of PBAC's instructions to the bidders; non-submission of his income tax return, having sued as a taxpayer; no other Filipino, local or foreign bidder, joined his petition despite his self-serving claim that the petition involves issues of transcendental importance; and lack of any allegation whatsoever that respondents usurped legislative powers.

On the merits of the case, GMR emphasizes that the assailed acts involve policy decisions that are not subject to judicial review. The situation in *Agan v. PIATCO* is also not the same herein because the public respondents did not disregard any legal requirement when they determined that GMR-Megawide was the most qualified to undertake the MCIA Project. Assuming that the assailed acts can be reviewed by this Court, petitioner nevertheless chose an improper remedy as his petition raises several questions of fact while relying merely on online/internet sources. This notwithstanding, GMR addressed the concerns regarding its financial capability in its letter to PBAC dated December 20, 2013 and also during the Senate hearings attended by its representatives. Notably, GMR-Megawide already paid the upfront premium to the government in the amount of Php14,404,570,002.99 which shows the consortium has the financial strength and capacity to deliver the Project.

On the conflict of interest issue, GMR explains that this was already clarified by public respondents during the Senate hearings.

Supreme Court E-Library

It points out that having a "common director" is obviously not the same as a director of one Consortium member being "also directly involved in any capacity related to the Bidding Process" for another Bidder. Citing the verified petition of Osmeña III, GMR avers that petitioner could not truthfully allege having information and personal knowledge that Mr. Bashir was also directly involved in the Bidding Process for the GMR-Megawide Consortium, because he was not. To remove all doubts and as required by PBAC, GMR submitted sworn certifications to that effect. GMR maintains that the conflict of interest rule and the examples/instances cited therein do not apply automatically, but are always subject to discretion and evaluation by the PBAC, and more importantly, there has to be a finding by the DOTC/MCIAA that a conflict of interest exists before any Bidder is disqualified.

On petitioner's claim that respondents violated the Equal Protection Clause, GMR argues that concededly there is no statute or law here that infringed the constitutional principle. What clearly emerges is petitioner's grievance that the Conflict of Interest provision in the bidding rules was supposedly not followed, and on that premise private respondents should be disqualified and the award in their favor set aside. These consequences are not only harsh but unwarranted. For assuming the said rule may be considered as "statute" that public respondents had breached, such breach is not a violation of the Equal Protection Clause that will give rise to a constitutional issue. Citing jurisprudence, GMR asserts that "an erroneous or mistaken performance of a statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws." Public respondents' acts in this regard do not amount to violation of the Equal Protection Clause, as the facts do not show there was "intentional or purposeful discrimination" when they determined that no conflict of interest exists for GMR-Megawide Consortium.

GMR further contends that petitioner is not entitled to a writ of preliminary injunction, as petitioner Osmeña III has no clear and unmistakable right, not being a bidder himself and having

Supreme Court E-Library

failed to establish any grave abuse of discretion committed by the public respondents in the performance of their duty. The alleged grave and irreparable injury, what petitioner feared as "bad precedent" in public bidding, is not irreparable but imaginary. On the contrary, it is the government and the public who will suffer irreparable injury if an injunction is issued that will further delay the project for the expansion and development of an international airport in the Province of Cebu.

G.R. No. 214756

GMR and Megawide (GMR-Megawide Cebu Airport Corp.)

The consortium now called the GMR-Megawide Cebu Airport Corp. (GMCAC), reiterates its previous arguments, given the similar procedural infirmities of the present petition, and those addressing the issue of its alleged lack of financial capacity. The consortium's financial capability has already been evaluated by the PBAC — including the controversies or issues raised by the other bidders — which finally determined that GMR-Megawide Consortium is the most qualified to undertake the MCIA Project.

GMCAC asserts that BMP's prayer to enjoin the turn-over of MCIA's operation and maintenance to GMCAC and the imposition of the increased PSC rates have already occurred. Hence, this issue is already moot and academic, and not the proper subject of this petition for injunction. More, there is no grave and irreparable injury that will be inflicted upon the State and the general public should the turn-over of the MCIA and increased PSC rates be implemented as these are part of the MCIA Project and in pursuance of the Concession Agreement. Since the alleged financial incapacity of GMR was unfounded, based merely on news reports and online materials, in contrast to official documents submitted to and evaluated by the PBAC, petitioner's fear that it will be prejudiced by GMR's financial incapacity is likewise baseless.

Supreme Court E-Library

G.R. Nos. 211737 & 214756

DOTC, MCIAA and PBAC

Public respondents argue that a direct resort to this Court is premature and improper under the doctrine of hierarchy of courts. Having failed to establish special and important reasons to support petitioners' invocation of this Court's original jurisdiction, the petitions should be dismissed. It is likewise asserted that the mere claim that the case is of transcendental importance or that it has an economic impact would not present a special and important ground that would justify the exercise of this Court's original jurisdiction and ignoring the hierarchy of courts.

There is also no showing that Medardo Deacosta, Jr. was authorized to file the petition in behalf of petitioner BPM. The certification of non-forum shopping submitted by Deacosta did not include proof of his authority to sign the said certificate for BPM.

Both petitioners have no legal standing to institute the present petitions. The petition in G.R. No. 211737 does not identify any specific constitutional question or issue, the principal requirement for legal standing in public suits. The invocation of violation of the equal protection clause does not qualify as a constitutional question or issue. Neither has petitioner Osmeña III sufficiently shown that the funds to be expended are derived from taxation and that he will be directly injured by the award of the MCIA Project to GMCAC, and eventually, by the implementation thereof. Further, there is no allegation of disregard of specific constitutional or statutory prohibition, nor of direct injury to be sustained by petitioner.

G.R. No. 214756 should also be dismissed on the same ground as BPM failed to show how the increase in terminal fees will constitute an illegal disbursement of public funds. Besides, the petition has become moot and academic with the turn-over of the MCIA to GMCAC on November 1, 2014. Hence, there is nothing more to enjoin and there is no more justiciable controversy to be resolved. Even assuming that this case has not become

Supreme Court E-Library

moot, injunction is clearly not proper as the requisites for the issuance of the writ have not been satisfied.

On the merits of the case, public respondents contend that petitioner Osmeña's reliance on *Agan v. PIATCO* is improper as the ruling therein is not on all fours with the present case. This Court ruled in *Agan* that "the crucial issues submitted for resolution are of first impression and they entail the proper legal interpretation of key provisions of the Constitution, the BOT Law and its Implementing Rules and Regulations"[13] and hence, the specific provisions of law violated by PIATCO were identified. In stark contrast, the present case does not present constitutional issues. Moreover, this Court in *Agan* ruled that the PBAC erroneously evaluated PIATCO's financial ability to fund the subject project when it speculated on PIATCO's future financial ability on the basis of the documents it submitted. Here, however, the proper procedure was observed in evaluating the qualifications of all the bidders.

Public respondents maintain that they exercised due diligence and strictly complied with the rules in evaluating the submitted bids. In concluding that GMR-Megawide Consortium did not violate Conflict of Interest Rule, they applied the clear words of the ITPB, ITB and Special Bid Bulletins. The interpretation of the rule is lodged in the DOTC being the government agency tasked to implement the MCIA Project. No advantage was given to GMR-Megawide Consortium or to First Philippine Airports Consortium which had in fact given the lowest bid in terms of premium.

As to GMR-Megawide Consortium's qualifications for the MCIA Project, public respondents assert that they exercised due diligence and acted within jurisdiction when the PBAC determined that GMR-Megawide Consortium is the most qualified in terms of technical experience and financial capability. It was stressed that under the ITPB, the detailed evaluation of the compliance by the Prospective Bidder with the Legal, Technical and Financial Qualification Requirements shall be based solely upon the qualification documents submitted.

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[13] *Supra* note 11, at 805.

Supreme Court E-Library

As to the issues concerning GMR's dispute with the Maldives Government over the Male International Airport, as well as the alleged violations of DIAL, the concessionaire for the Indira Gandhi International Airport, these have already been threshed out and addressed by GMR during the post-qualification stage. On the other hand, petitioner's reference to online articles that pertain to MCC deserves no consideration. Said materials are hearsay and unofficial and do not warrant the disqualification of a Bidder. As between those online articles and the official submissions – certifications, qualifications, documents and financial statements submitted by the bidders, respondent PBAC is mandated by law to give preference and weight to the latter in determining the track record or technical qualifications of a prospective bidder. Indeed, PBAC would do injustice against a prospective bidder if, notwithstanding that it passed all the qualifications provided by law and the applicable rules, it will be disqualified merely on the basis of hearsay evidence. While PBAC has the right to seek clarifications and make inquiries regarding information supplied by the prospective bidders in the qualification documents, it cannot be expected to consider every possible allegation as it would just delay the entire bidding process. Having exercised its function within the parameters of the law, relevant rules and regulations and the ITPB, the PBAC cannot be faulted if it finds that GMR passed all the qualifications requirements provided by the rules and the ITPB. Hence, there is no merit in petitioner Osmeña's argument that public respondents "illegally refused to disqualify" the GMR-Megawide Consortium.

Issues

From the foregoing, the core issues to be resolved in the present controversy are: (1) whether GMR-Megawide Consortium is a qualified bidder; (2) whether the increased terminal fees imposed by the winning bidder, GMCAC, is legal; (3) whether petitioners are entitled to injunctive relief.

Our Ruling

The petitions are without merit.

Supreme Court E-Library

Preliminaries

A. Legal Standing

Legal standing or *locus standi* refers to a personal and substantial interest in a case such that the party has sustained or will sustain direct injury because of the challenged governmental act.[14] The requirement of standing, which necessarily sharpens the presentation of issues, relates to the constitutional mandate that this Court settle only actual cases or controversies.[15] Thus, generally, a party will be allowed to litigate only when (1) he can show that he has personally suffered some actual or threatened injury because of the allegedly illegal conduct of the government; (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable action.[16]

In *David v. Macapagal-Arroyo*,[17] we explained the rules on *locus standi,* as follows:

> *Locus standi* is defined as "a right of appearance in a court of justice on a given question." In private suits, standing is governed by the "real-parties-in interest rule" as contained in Section 2, Rule 3 of the 1997 Rules of Civil Procedure, as amended. It provides that "*every action must be prosecuted or defended in the name of the real party in interest.*" Accordingly, the "real-party-in interest" *is "the party who stands to be benefited or injured by the judgment in the suit or the party entitled to the avails of the suit.*" Succinctly put, the plaintiff's standing is based on his own right to the relief sought.

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[14] *Tolentino v. Commission on Elections,* 465 Phil. 385, 402 (2004), citing *Joya v. Presidential Commission on Good Government,* G.R. No. 96541, August 24, 1993, 225 SCRA 568, 576.

[15] *Id*., citing *Kilosbayan v. Morato,* 316 Phil. 652 (1995) and Article VIII, Sections 1 and 5(2), 1987 CONSTITUTION.

[16] *Id*., citing *Telecommunications and Broadcast Attorneys of the Philippines, Inc. v. Commission on Elections,* 352 Phil. 153, 168 (1998).

[17] 522 Phil. 705 (2006).

Supreme Court E-Library

The difficulty of determining *locus standi* arises in *public suits*. Here, **the plaintiff who asserts a "public right" in assailing an allegedly illegal official action, does so as a representative of the general public**. He may be a person who is affected no differently from any other person. He could be suing as a "stranger," or in the category of a "citizen," or "taxpayer." In either case, he has to adequately show that he is entitled to seek judicial protection. In other words, **he has to make out a sufficient interest in the vindication of the public order and the securing of relief as a "citizen" or "taxpayer."**

Case law in most jurisdictions now allows both "citizen" and "taxpayer" standing in public actions. The distinction was first laid down in *Beauchamp v. Silk*, where it was held that the plaintiff in a taxpayer's suit is in a different category from the plaintiff in a citizen's suit. *In the former, the plaintiff is affected by the expenditure of public funds, while in the latter, he is but the mere instrument of the public concern*. As held by the New York Supreme Court in *People ex rel Case v. Collins*: "*In matter of mere public right, however ... the people are the real parties.... It is at least the right, if not the duty, of every citizen to interfere and see that a public offence be properly pursued and punished, and that a public grievance be remedied.*" With respect to taxpayer's suits, *Terr v. Jordan* held that "*the right of a citizen and a taxpayer to maintain an action in courts to restrain the unlawful use of public funds to his injury cannot be denied.*"

However, to prevent just about any person from seeking judicial interference in any official policy or act with which he disagreed with, and thus hinders the activities of governmental agencies engaged in public service, the United State Supreme Court laid down the more stringent *"direct injury" test* in *Ex Parte Levitt*, later reaffirmed in *Tileston v. Ullman*. The same Court ruled that **for a private individual to invoke the judicial power to determine the validity of an executive or legislative action, *he must show that he has sustained a direct injury as a result of that action, and it is not sufficient that he has a general interest common to all members of the public.***

This Court adopted the ***"direct injury" test*** in our jurisdiction. In *People v. Vera*, it held that the person who impugns the validity of a statute must have "***a personal and substantial interest in the case such that he has sustained, or will sustain direct injury as a result***." The *Vera* doctrine was upheld in a litany of cases, such

Supreme Court E-Library

as, *Custodio v. President of the Senate*, *Manila Race Horse Trainers' Association v. De la Fuente*, *Pascual v. Secretary of Public Works* and *Anti-Chinese League of the Philippines v. Felix.*[18] (Italics in the original; emphasis and underscoring supplied)

The nature of personal interest in public suits was summarized as follows:

For a party to have *locus standi*, one must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

Because constitutional cases are often public actions in which the relief sought is likely to affect other persons, a preliminary question frequently arises as to this interest in the constitutional question raised.

When suing as a *citizen*, the person complaining must allege that he has been or is about to be denied some right or privilege to which he is lawfully entitled or that **he is about to be subjected to some burdens or penalties by reason of the statute or act complained of**. When the issue concerns a public right, it is sufficient that the petitioner is a citizen and has an interest in the execution of the laws.

For a *taxpayer*, one is allowed to sue where there is an assertion that public funds are illegally disbursed or deflected to an illegal purpose, or that there is a wastage of public funds through the enforcement of an invalid or unconstitutional law. The Court retains discretion whether or not to allow a taxpayer's suit.

In the case of a *legislator or member of Congress*, an act of the Executive that injures the institution of Congress causes a derivative but nonetheless substantial injury that can be questioned by legislators. A member of the House of Representatives has standing to maintain inviolate the prerogatives, powers and privileges vested by the Constitution in his office.

An *organization* may be granted standing to assert the rights of its members, but the mere invocation by the *Integrated Bar of*

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[18] *Id*. at 755-757.

Supreme Court E-Library

the Philippines or any member of the legal profession of the duty to preserve the rule of law does not suffice to clothe it with standing.

As regards a *local government unit* (LGU), it can seek relief in order to protect or vindicate an interest of its own, and of the other LGUs.[19] (Emphasis supplied; citations omitted)

Here, BPM alleges a direct personal injury for its members who as frequent travelers to Cebu and Mactan will be burdened by the increased terminal fees imposed by the private respondents upon taking over the operation and management of MCIA. On the other hand, petitioner Osmeña III claims to be suing as a legislator, taxpayer and citizen asserting a public right in the stringent application of the bidding rules on the qualifications of private respondents for the MCIA Project.

In any case, *locus standi* being a mere procedural technicality,[20] the Court has, in the exercise of its discretion, relaxed the rules on standing when the issues involved is of "transcendental importance" to the public.[21] The Court, through Associate Justice Florentino P. Feliciano (retired and now deceased), provided the following instructive guides as determinants in determining whether a matter is of transcendental importance: (1) the character of the funds or other assets involved in the case; (2) the presence of a clear case of disregard of a constitutional or statutory prohibition by the public respondent agency or instrumentality of the government; and (3) the lack of any other party with a more direct and specific interest in the questions being raised.[22]

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[19] *Province of North Cotabato v. Government of Republic of the Phils. Peace Panel on Ancestral Domain (GRP),* 589 Phil. 387, 486-487 (2008).

[20] *De Castro v. Judicial and Bar Council,* 629 Phil. 629, 678 (2010).

[21] *David v. Macapagal-Arroyo, supra* note 17, at 757; *Francisco, Jr. v. The House of Representatives*, 460 Phil. 830, 899 (2003), citing *Kilosbayan, Inc. v. Morato,* 320 Phil. 171 (1995).

[22] *Chamber of Real Estate and Builders' Associations, Inc. (CREBA) v. Energy Regulatory Commission*, 638 Phil. 542, 556-557 (2010), citing *Senate of the Philippines v. Ermita*, 522 Phil. 1, 31 (2006); and *Francisco, Jr. v. The House of Representatives*, *id.*, citing *Kilosbayan, Incorporated v. Guingona, Jr.*, G.R. No. 113375, May 5, 1994, 232 SCRA 110.

Supreme Court E-Library

In not a few cases, the Court, in keeping with its duty under the Constitution to determine whether the other branches of government have kept themselves within the limits of the Constitution and the laws and have not abused the discretion given them, has brushed aside technical rules of procedure.[23]

In *Agan v. PIATCO*, also involving a controversy in the qualifications of the winning bidder for the construction and operation of the country's premier international airport, the Court resolved to grant standing to the petitioners in view of "the serious legal questions involved and their impact on public interest."[24] Although the factual milieu in this case is not similar and no constitutional issue was raised by petitioners, we hold that the same rationale in *Agan* justifies the relaxation of the rules on standing.

B. *Hierarchy of Courts*

While this Court has original jurisdiction over petitions for certiorari, prohibition, *mandamus*, *quo warranto*, and *habeas corpus*, such jurisdiction is shared with the Court of Appeals and the Regional Trial Courts. It is judicial policy that —

> x x x **a direct invocation of the Supreme Court's jurisdiction is allowed only when there are special and important reasons therefor, clearly and especially set out in the petition.** Reasons of practicality, dictated by an increasingly overcrowded docket and the need to prioritize in favor of matters within our exclusive jurisdiction, justify the existence of this rule otherwise known as the "**principle of hierarchy of courts**." More generally stated, the principle requires that recourse must first be made to the lower-ranked court exercising concurrent jurisdiction with a higher court.[25] (Italics omitted; emphasis supplied)

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[23] *Province of North Cotabato v. Government of Republic of the Phils. Peace Panel on Ancestral Domain (GRP), supra* note 19, at 488, citing *Tatad v. Secretary of the Department of Energy*, 346 Phil. 321, 359 (1997).

[24] *Supra* note 11, at 804.

[25] *Bagabuyo v. Commission on Elections,* 593 Phil. 678, 689 (2008).

Supreme Court E-Library

The Court thus declared in *Heirs of Bertuldo Hinog v. Melicor,*[26] that it will not entertain direct resort to it unless the redress desired cannot be obtained in the appropriate courts, and exceptional and compelling circumstances, such as cases of national interest and of serious implications, justify the availment of the extraordinary remedy of writ of certiorari, calling for the exercise of its primary jurisdiction.[27]

After a thorough study and evaluation of the issues involved, the Court is of the view that exceptional circumstances exist in this case to warrant the relaxation of the rule. The Court can resolve the factual issues from the available evidence on record.

Mactan-Cebu International Airport is the second busiest airport in the country after the Ninoy Aquino International Airport, handling millions of passengers and thousands of aircraft movements every year. Opened in the mid-1960s, it is owned by the DOTC and managed by the MCIAA.[28] The multi-billion expansion and development project for MCIA is being implemented through the PPP program. The Government's PPP program has two objectives: (1) increase private investment in infrastructure through solicited mode; and (2) follow good governance practices in preparing, bidding and implementing the PPP projects.[29] There is no dispute then that this case is of paramount national interest for it raises serious questions on the *evaluation* of bids by the public respondents.

C. *Mootness*

Respondents' contention that the case was mooted by the Notice of Award and turnover of operations of the MCIA to

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[26] 495 Phil. 422, 433 (2005).

[27] *Holy Spirit Homeowners Association, Inc. v. Defensor,* 529 Phil. 573, 586 (2006).

[28] "*Mactan-Cebu International Airport, Philippines*," <http://www.airport-technology.com/projects/mactan-cebu-international-airport/> (visited last January 4, 2016).

[29] "*Strengthening Public-Private Partnerships in the Philippines*," *Performance Overview,* March 2012 (Asian Development Bank Project Document), <http://www.adb.org/projects/documents/strengthening-public-private-partnerships-philippines> (visited last January 4, 2016).

Supreme Court E-Library

GMCAC likewise deserves scant consideration. For even in cases where the supervening events had made the cases moot, the Court did not hesitate to resolve the legal or constitutional issues raised to formulate controlling principles to guide the bench and the bar, and the public.[30] Hence, the subsequent issuance of Notice of Award, execution of the Concession Agreement and turn-over to GMCAC of the operation and maintenance of MCIA, did not remove the issue of GMCAC's qualifications from the ambit of judicial review.

Substantive Issues

No Grave Abuse of Discretion in PBAC's Determination that GMR-Megawide Consortium was a Qualified Bidder

For public biddings of PPP contracts under the BOT Law and Implementing Rules and Regulations (IRR), the evaluation of bids is undertaken in two stages. The first-stage evaluation involves the assessment of the technical, operational, environmental and financing viability of the proposal as contained in the bidder's first envelopes vis-à-vis the prescribed requirements and criteria/minimum standards and basic parameters prescribed in the bidding documents. The second stage evaluation shall involve the assessment and comparison of the financial proposals of the bidders. Within three days from completion of the financial evaluation, the PBAC submits its recommendation to the head of the Implementing Agency (IA) or Local Government Unit (LGU). Upon approval of the recommendation, the head of the IA or LGU will issue a notice of award to a winning proponent. Subject to compliance with the post-award requirements in the notice of award, the PPP contract shall be executed and signed by the winning bidder and the head of the IA or LGU.[31]

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[30] *Chavez v. Public Estates Authority*, 433 Phil. 506, 522 (2002), citing *Salonga v. Paño,* G.R. No. 59524, February 18, 1985, 134 SCRA 438; *Gonzales v. Marcos,* 160 Phil. 637 (1975); *Aquino v. Enrile,* 158-A Phil. 1 (1974); and *De la Camara v. Enage,* 148-B Phil. 502 (1971).

[31] Revised BOT Law Implementing Rules and Regulations (2012), Sections 8.1, 8.2, 11.1, 11.2 and 11.3.

Supreme Court E-Library

During the post-qualification evaluation and prior to the final award to GMR-Megawide Consortium as the Highest Bidder, the latter's disqualification was sought by the Second Highest Bidder, Filinvest Development Corporation (FDC), on the following grounds: (a) GMR's questionable record in airport construction and development; (2) GMR's financial incapacity; and (3) violation of the Conflict of Interest Rule.

In its letters[32] dated December 13, 2013 and December 16, 2013 addressed to PBAC Chairman Undersecretary Jose Perpetuo M. Lotilla, FDC, citing published newspaper reports, brought up the following issues: (1) cancellation by the Maldives Government of the GMR Group's contract for modernizing the Male Ibrahim Nasir International Airport (Male International Airport) and which cancellation was affirmed in a Singapore court; (2) the rapid rise of GMR's debt level and MCC's equity of only roughly ₱8 Billion; (3) GMR's exit from the management of Istanbul Gokcen International Airport in Istanbul, Turkey, supposedly as part of the GMR Group's articulated strategy of "develop-build-create value-divest," which does not augur well for the long-term commitment intended for the 25-year concession period of the MCIA Project; (4) critical findings of the Comptroller and Auditor General of India based on the performance audit of the implementation of the public-private partnership for the Indira Gandhi International Airport at Delhi, India, including the development fee imposed on travelers which was used by DIAL (Delhi Airport concessionaire) to finance 27% of the project cost, outsourcing of numerous contracts which are not arms-length transactions and in violation of the Operation Management and Development Agreement (OMDA) because these were given to joint venture companies in which DIAL had substantial equity interest, violation of the Master Plan and delay in project completion, financial documents showing GMR posting net loss from operations in the last three years and debt levels increasing in relation to its equity; and (4) concern as to MCC's equity in view of several PPP projects awarded to it which involve substantial amount in project costs.

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[32] Annexes "7" and "7-A," *rollo* (G.R. No. 211737), Vol. III, pp. 1496-1507.

Supreme Court E-Library

As part of the Technical Qualifications, the ITPB mandates compliance with certain supporting documents from entities who fulfill the requirements for Development Experience, and Operation and Maintenance Experience:

> 3. The entity whose experience is being submitted in fulfillment of this requirement – whether the Prospective Bidder or a Consortium Member and any Affiliates of any of these entities, should submit a **certificate from an Auditor**, as per the format provided at Annex QD-11 to satisfactorily establish its claim.
>
> 4. The entity, whose experience is being submitted in fulfillment of this requirement – whether the Prospective Bidder or a Consortium Member and any Affiliates of any of these entities **must certify that they have no Unsatisfactory Performance Record** as per the format provided at Annex QD-4A or Annex QD-4B.[33] (Emphasis supplied)

The certificate from an Auditor, as per the format provided in Annex QD-11, serves as evidence of having the claimed Development Experience, and in Annex QD-13, a certificate for details of eligible projects for Operation and Maintenance Experience, such as the number of years in operation of the airport and the annual passenger throughout registered by the airport.[34] The more relevant document is the certificate from the entities whose experience is being submitted in fulfillment of the Development Experience, and Operation and Maintenance Experience, of "No Unsatisfactory Performance Record."

As per the format prescribed in Annex QD-4A, the Notarized Certification of Absence of Unsatisfactory Performance Record, the entity fulfilling the Development Experience, and Operation and Maintenance Experience, certifies that it does not have any record of unsatisfactory performance in any of its projects and contracts.

x x x "Unsatisfactory Performance" means any of the following:

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[33] *Rollo* (G.R. No. 211737), Vol. II, p. 795.

[34] *Id*. at 844, 846.

Supreme Court E-Library

1. within the last five (5) years prior to the Qualification Documents Submission Date –

    a. failure to satisfactorily perform any of its material obligations on any contract, as evidenced by an imposition of a judicial pronouncement or arbitration award;

    b. expulsion from any project or contract;

    c. termination or suspension of any of its projects or contracts due to breach of its obligations; or

    d. material violations of laws and/or regulations applicable to any of its projects or contracts x x x.[35]

Evaluating the information provided by FDC and the explanation given by private respondents concerning the latter's performance record, PBAC in its Resolution dated April 3, 2014, stated its findings and conclusion, *viz.*:

I. Existence of Unsatisfactory Performance in relation to GMR-Male

Pursuant to QD-4A of the ITPB, the relevant project or contract refers to any project or contract of the entity or entities whose experience is being used to meet any of the Technical Qualification Requirements which was commenced or in the process of implementation within the last five (5) years before the Qualification Documents Submission Date, and not just to the particular projects or contracts being submitted to meet such Technical Qualification Requirements. Based on the clear reading of the provisions under QD-4A, the performance record of GMR-Male is <u>not relevant</u> to the Project, considering its credentials were not used to satisfy any qualification requirement. The PBAC also appreciated that –

- the information pertaining to the Male Airport Contract was disclosed by GMR during the Pre-qualification process, even if it was not a required submission; and

- in a letter dated 23 December 2013 addressed to the DOTC, through Undersecretary Rene K. Limcaoco, Isabel Chaterton of the International Finance

[35] *Id.* at 824-828.

Supreme Court E-Library

> Corporation ("IFC") Public-Private Partnership Advisory Services for South Asia said that "IFC has been consistently of the view that the sanctity of the Male airport concession agreement should be upheld and have noted publicly our strong belief that the process leading to the award of the concession for that project was conducted in an open and transparent manner and in accordance with international best practice. We understand the matter is now under arbitration which is the appropriate dispute resolution mechanism provided for in the concession agreement. We should also point out, that in June 2013, the Anti-Corruption Commission of the Maldives concluded that there was no corruption involved in the award and concession of the Male airport to GMR-MAHB." IFC is a member of the World Bank Group and the largest global development institution focused exclusively on the private sector in developing countries. A copy of IFC's letter dated 20 December 2013 is attached hereto as Annex "AA."

II. Misrepresentation as to the Absence of Unsatisfactory Performance of DIAL

Based on the definition of unsatisfactory performance under the ITPB and ITB, absence of unsatisfactory performance must be evidenced by the imposition of a judicial pronouncement or arbitration award. The CAG Report is neither a judicial pronouncement nor an arbitration award. Therefore, based on the definition, the CAG Report is not sufficient basis for an adverse finding. On further evaluation of the documentary submissions and at the close of several discussions, it was determined that the CAG Report is primarily addressed to the relevant government agencies of India. The PBAC noted, among others, that the charging of development fee and outsourcing to service providers through a procurement process is allowed under the contract.

It has been reported as well that the Ministry of Civil Aviation has contested the findings under the CAG Report. Briefly, the Ministry has said that: (i) the charging of the development fee is authorized under the relevant law and known to all bidders prior to bid submission, (ii) there was no deviation from the Master Plan, particularly as regards the extent of permissible commercial development as follows:

Supreme Court E-Library

"Ministry of Civil Aviation has gone through the report of the CAG on Indira Gandhi International Airport, Delhi as tabled in Parliament today and strongly refutes the loss figures and other allegations as made in the report.

"The calculation of presumptive gain from the commercial use of land at the Delhi Airport is totally erroneous and misleading as it simply adds the nominal value of the projected revenue, without taking the net present value. In fact the net present value of the figure quoted by CAG is Rs 13795 crores only. CAG has further failed to appreciate that 46% of this amount would be payable to AAI as revenue share.

"It is also pointed out that the levy of Development Fee is under Section 22 (A) of AAI Act, 1994 and was in the knowledge of all the bidders prior to the bidding process. Hence, contrary to what the CAG has said, the levy of Development Fee by DIAL was not a post contractual benefit provided to DIAL at the cost of passengers. Further, the levy of the Development Fee has been upheld by the Supreme Court, which has already examined and rejected all the issues now being raised by CAG in its report.

"On the issue of lease of Airport land, it is clarified that the land has not been given to DIAL on rental basis. Rs100 is just a token amount for the purpose of the Conveyance Deed. The determining factor for grant of concession to the bidder was the Gross Revenue share quoted by the bidders. As a result, Airports Authority of India (AAI) now receives 45.99% share of Gross Revenues of DIAL and 26% of all Dividends. Benefit to AAI is likely to be more than Rs 3 lakh crores in this process during the entire Concession period. AAI has already got its revenue share of Rs.2936 crores in the last 6 years and likely to get Rs. 1770 crores in the year 2012-13 and Rs. 2287 crores in the year 2013-14. The AAI share of revenue from DIAL is further going to constantly rise every year in the balance concession period.

"It may also be noted that the right to use 5% of Airport land for commercial purpose was also defined in the bid and known to all bidders."

III. Misrepresentation as to financial capacity of GMR Infrastructure & Megawide Consortium

Pursuant to the ITPB and ITB, to be financially qualified to bid for the Project, a bidder must meet the following Financial Qualification

Supreme Court E-Library

requirements: (a) (i) Net Worth of at least Php 2.0 billion, or its equivalent as of its latest audited financial statements, which must be for financial year ending not earlier than 31 December 2011, or (ii) a Set-Aside Deposit equivalent to the same amount, and (b) a letter testimonial from a domestic universal/commercial bank or an international bank with a subsidiary/branch in the Philippines or any international bank recognized by the BSP attesting that the Prospective Bidder and/or members of the Consortium are banking with them, and that they are in good financial standing and/or are qualified to obtain credit accommodations from such banks to finance the Project. These parameters for the determination of financial qualification requirements are consistent with Section 5.4(c) of the BOT Law IRR.

On further evaluation, the PBAC determined that, for purposes of meeting the Financial Qualification requirement, QD-8, with supporting information, was submitted by Megawide for the GMR Infrastructure & Megawide Consortium. Megawide's submission was previously determined to have fulfilled these requirements. Furthermore, in the course of completing the financial evaluation, the PBAC examined the Financial Proposal comprising the Bid Amount and the Final Draft Concession Agreement signed and executed by the Authorized Representative of the GMR Infrastructure & Megawide Consortium pursuant to the ITB, and the PBAC has not found any deficiency in the financial proposal.

IV. Long term commitment to Project

Filinvest-CAI Consortium also shared its observation that it doubts the long term commitment of GMR Infrastructure & Megawide Consortium to the Project in view of its reported intention to withdraw from the ISGIA. The PBAC noted this observation and resolved that the reported divestment from Istanbul Airport does not affect the evaluation of GMR Infrastructure & Megawide Consortium's qualification to undertake the Project under the terms of the Concession Agreement. Divestment or withdrawal by a Consortium Member from the Project is permitted, subject to the applicable Lock-up Rules under V-05 and V-06 of the ITPB, as well, as under the Concession Agreement. This is an important provision in the ITB, ITPB and Concession Agreement, validated in the course of the market sounding exercise undertaken for the Project and in keeping with the declared policy under the BOT Law to provide the most appropriate incentives to mobilize private resources for the purpose of financing the

Supreme Court E-Library

construction, operation and maintenance of infrastructure and development projects. Further, under Annex BL-1, GMR Infrastructure & Megawide Consortium has certified that it will undertake the project in accordance with the Concession Agreement, including the applicable Lock-up Rules, which undertaking was affirmed in a letter addressed to PBAC dated 20 December 2013.

There is no reason to doubt the commitment in view of the certificate of good standing from the Ministry of Defence of Turkey, which states that the operating company founded by Limak Holding, GMR Infrastructure Limited and MAHB has been operating the Istanbul Sabiha Gocken International Airport Terminal satisfactorily per the provisions of the Implementation Agreement executed in 2008 and that the transfer of the forty percent (40%) shares held by GMR and its affiliates to Malaysia Airports MSC Sdn Bhd has been duly approved by the Undersecretary for Defense Industries on 20 March 2014, consistent with the terms of the Implementation Agreement.

V. Violation of Conflict of Interest

The ITB, in Section 5.6(c) states in part:

> *Each Bidder may submit only one Bid Proposal. To ensure a level playing field and a competitive Bidding Process, Bidders (in the case of Consortia, each Consortium Members), including their Affiliates, must not have any Conflict of Interest. Without limiting the generality of what would constitute a Conflict of Interest, any of the following will be considered a Conflict of Interest:*
>
> x x x x x x x x x
>
> *c. a member of the board of directors, partner, officer, employee or agent of a Bidder, any Consortium Member, or any of their Affiliates (of either the Bidder or any of its Consortium Members), is also directly involved in any capacity related to the Bidding Process for the Project for another Bidder, any Consortium Member of any other Bidder, or any of their Affiliates (of either the Bidder or any of its Consortium Members), within a period of two (2) years prior to the publication of the Invitation to Pre-Qualify and Bid and one (1) year after award of the Project.*
>
> *The same conflict of interest arises in case of professional advisors except when prior written disclosure was made*

Supreme Court E-Library

> *to their client-Bidders, DOTC/MCIAA and the Public-Private Partnership Center, including the submission of a Conflict Management Plan for this purpose. A written consent or clearance to this effect shall likewise be secured from DOTC.*

x x x x x x x x x

(This is similar to the Conflict of Interest provision appearing in the ITPB, Section V04-d.)

Consequently, in Annex BL-1 of the ITB, or the Form of Bid Letter, a bidder is required to state under oath that it "including all of its Consortium Members, and all of the entities it has proposed to comply with the Qualification Requirements under the ITPB, have not at any time (i) engaged in any Corrupt Practice, Fraud, Collusion, Coercion, Undesirable Practice, or Restrictive Practice, (ii) have a Conflict of Interest (iii) violated the Lock-Up Rules or (iv) has Unsatisfactory Performance Record."

During the pre-qualification stage, a question was submitted seeking clarification on Section V04-d of the ITPB on Conflict of Interest. In its answer to the query under SBB No. 06-2013, the PBAC stated that "without limiting the discretion of the PBAC to determine what constitutes Conflict of Interest, direct involvement shall mean actual participation in the deliberations and decision-making for the bidding process of the Prospective Bidder that would give the director knowledge / information regarding the bid of such Prospective Bidder."

In June 2013, GMR Infrastructure & Megawide Consortium submitted the following query:

> *PBAC to please confirm our understanding that a conflict of interest shall arise with respect to a director, partner, officer, advisor, employee, or agent if:*
>
> *1. such director, partner, officer, advisor, employee, or agent of a Bidder (Bidder "A") is directly involved in the Bidding Process for the Project; and*
>
> *2. such director, partner, officer, advisor, employee, or agent is also directly involved in any capacity related to the Bidding Process for the Project for another Bidder ("Bidder B"), any Consortium Member of Bidder B, or any of their Affiliates.*
>
> *Accordingly, a conflict of interest will arise only if such director, partner, officer, advisor, employee, or agent is directly involved*

Supreme Court E-Library

in the Bidding Process for the Project with respect to both Bidders A and B.

PBAC to further confirm that for purposes of Section 5.6(c) of the Instructions to Bidders, "direct involvement" shall mean actual participation in the deliberations and decision-making for the bidding process of the Bidder that would give the director, officer, advisor, employee or agent knowledge or information regarding the bid of the Bidder, as previously clarified by the PBAC in SBB 6-2013, Query 4.

The Consortium, further suggested the following revision to the ITB:

A member of the board of directors, partner, officer, employee or agent of a Bidder, any Consortium Member, or any of their Affiliates (of either the Bidder or any of Consortium Members), who is directly involved in the Bidding Process for the Project with respect to a Bidder, is also directly involved in any capacity related to the Bidding Process for the Project for another Bidder, any Consortium Member of any other Bidder, or any of their Affiliates (of either the Bidder or any of its Consortium Members), within a period of two (2) years prior to the publication of the Invitation to Pre-Qualify and Bid and one (1) year after award of the Project.

The same conflict of interest arises in case of professional advisors except when prior written disclosure was made to their client-Bidders, DOTC/MCIAA, and the Public-Private Partnership Centre, including the submission of a Conflict Management Plan for this purpose. A written consent or clearance to this effect shall likewise be secured from DOTC.

For purposes of this provision, direct involvement shall mean actual participation in the deliberations and decision-making for the bidding process of the Bidder that would give the director, officer, advisor, employee, or agent knowledge or information regarding the bid of the Bidder.

The PBAC, under SBB No. 11-2013 Query No. 5 released in August 2013, replied as follows:

Please be guided that in cases of conflict of interest under ITB, Sec. 5.6(c), Bidders who may be affected are advised to

Supreme Court E-Library

> *comply with SBB02-2013, Amendments to the ITPB, No. 10, with respect to the compliance requirements for professional advisors. Thus, Bidder, is advised, so that there will be no conflict of interest, to make a prior written disclosure to the affected Bidders, DOTC, and the PPPC, and submit a Conflict Management Plan. A written consent or clearance must be likewise secured from DOTC.*

Based on the relevant rule, there must be direct involvement or participation in the deliberations and decision-making as to the Bid Process of two or more bidders and that mere partnership or common directorship, or direct involvement in one bidder is not enough.

The rule under Section 5.6(c), as previously explained under SBB No. 06-2013 (Query No. 4), is that the existence of common partners, directors or officers between two Bidders is not of itself ground for a finding of Conflict of Interest. In SBB No. 07-2013 (Query No. 36), the PBAC reiterated that "[t]he position in the ITPB is reiterated. However, please note that Section V-04(d) shall only apply if the common director is directly involved in the bidding process for another Prospective Bidder. The PBAC provided guidance as to what would constitute direct involvement in our response to Query No. 4 in SBB No. 06-ANNEX A." There must be (1) common partner, director, officer, or employee and (2) direct involvement by such partner, director, officer, or employee, which consists of actual participation in the deliberations and decision-making for the Bidding Process of both Bidders affected, that would give the director knowledge or information regarding the bid of such Bidder.

The PBAC adopted and approved the Conflict of Interest provision in the ITPB(V04-d) and later in the ITB (5.6c) pursuant to its authority and function under the BOT Law IRR, Section 3.2, which states that the PBAC shall be responsible for all aspects of the pre-bidding and bidding process, including among others, the interpretation of the rules regarding the bidding. In adopting the ITPB and ITB provisions on conflict of interest, the PBAC was aware that in its implementation it would require direct involvement or actual participation in the deliberations and decision-making process as to the Bid for both affected bidders, for the following reasons.

- The clear expression of this intention in the use of the adverb "also," indicating similarity and further action of the same nature, in the qualifying phrase "is also directly involved,"

Supreme Court E-Library

meaning that in requiring such action on the part of one bidder, the same action should have been taken in behalf of or in relation to another bidder.

- The PBAC also noted that this meaning has been carried in the language of the provision as used in several other PPP projects implemented prior to the Project and from which reference documents the provision was drawn. Significant in this regard is SBB No. 3, Response No. 4 to Metro Pacific Tollways Corporation (see attached), issued in September 2012 for the NAIA Expressway Project, where it is clear that for conflict of interest to arise there has to be actual participation for or in both bidders involved. The meaning of the provision as explained in the SBB No. 3 has been retained and carried in its use in the Project's ITB and ITPB. A copy of SBB No. 3 issued in September 2012 for the NAIA Expressway Project is attached hereto as Annex "BB."

That this is the proper interpretation is supported by the PBAC's application of the same principle in the treatment of professional advisers. The ITPB and ITB in stating that "the same conflict of interest arises in case of professional advisors" has been implemented by the PBAC by requiring the disclosure and clearance where the professional adviser is under "the same conflict of interest," meaning they are involved in that capacity for two or more bidders. A written consent, clearance and compliance with conflict management plan was required in the case of a professional adviser who was understood to have taken such a role for two bidders in the Project. Otherwise, if at least two bidders are not involved, the PBAC would not have required a conflict management plan for the simple reason that a conflict of interest, in that case, would not exist.

In relation to the history of the conflict of interest provision, the PBAC also discussed that, due to the numerous interlocking directors prevalent among the Philippine conglomerates, an interpretation not requiring direct participation in both companies may possibly lead to the disqualification of a large number of bidders. The result would be extremely detrimental for the government, and surely this cannot be the purpose of the provision.

The purpose of specifying Section 5.6(c) as a form of Conflict of Interest is to prevent collusion among the bidders that may arise from the specific conflict of interest scenarios (as differentiated from Collusion as defined under the ITPB and ITB), which may prejudice

Supreme Court E-Library

or defeat competition in the Bidding Process. Particularly, Section 5.6(c) seeks to prevent a situation in which the common partner, director, or officer of two (or more) Bidders will have information and involvement in the preparation of the bids of both Bidders. By actual participation, the common partner, director, or officer can influence the bids of both bidders, which will not be achieved if a common director does not have direct involvement in both bids.

It is, therefore erroneous, to conclude that the PBAC has taken a different view solely on the basis of the response given under SBB No. 11-2013, Query No. 5. The PBAC responded only to the query with regard to professional advisers without taking action on the rest considering the lack of concrete factual scenario to support the query, apart from the fact that it is not necessary to adopt the proposed revision by the bidder under Query No. 5. The provision as it appears in the ITPB and ITB sufficiently conveys the meaning that for Conflict of Interest to arise under Section 5.6(c) of the ITB there must be direct involvement or participation in the deliberations and decision-making as to the Bid Process of two or more bidders. Mere partnership or common directorship, or direct involvement in only one bidder is not enough. It is worth recalling Section 6.1 of the BOT Law IRR, which states that the implementing agency concerned shall not assume any responsibility regarding erroneous interpretations or conclusions by the prospective bidder out of data furnished or indicated in the bidding documents.

Applying the foregoing interpretation, therefore, the sworn certifications submitted by GMR Infrastructure & Megawide Consortium set out the required certification on facts which indicate compliance with the rules on Conflict of Interest.

Upon further consideration of this issue, the PBAC noted that GMR Infrastructure & Megawide Consortium, in its comment on Filinvest-CA Consortium's letters dated 2 and 3 January, confirmed that Mr. Tansri Bashir Ahmad bin Abdul Majid ("Mr. Tansri Bashir Ahmad") is the Managing Director of MAHB, but not a member of the board of directors of GMR. While Mr. Tansri Bashir Ahmad sits on the board of DIAL, GHIAL, and GMR-Male, as well as ISGIA, GMR Infrastructure & Megawide Consortium, in its letter dated 6 January 2014, explained that "[a]side from using the Hyderabad and Delhi airports for meeting the technical requirements for the bid, DIAL, GHIAL, [GMR-Male] or ISGIA themselves were never involved in

Supreme Court E-Library

the bidding process and anything remotely connected with the bid was never discussed in the boards of these companies."

It is also worth noting that at the time the GMR Infrastructure & Megawide Consortium submitted its Qualification Documents on 22 April 2013, when it indicated that it is fulfilling the Qualification Requirements through Affiliates of GMR, namely DIAL and GHIAL, First Philippine Airport Consortium had as its members First Philippine Holdings Corporation and Infratil (of New Zealand). The First Philippine Airports Consortium requested the change in its consortium membership, with the replacement of Infratil by MAHB was approved only in September 2013, following the evaluation of the pre-qualification documents submitted by MAHB. In their respective Bid Letters (Annex BL-1), each of the GMR Infrastructure & Megawide Consortium and First Philippine Airport Consortium declared under oath the absence of Conflict of Interest. The PBAC further noted that the respective boards of DIAL and GHIAL authorized their respective Chief Financial Officers ("CFO") to sign and execute relevant documents on their behalf from a board meeting back in 2011 and 2012, way before the bid for the MCIA was published. The same CFOs signed on behalf of each of their boards for the use of their O&M experience as an affiliate of GMR.

The PBAC, in its meeting on 6 January 2013, resolved to require GMR Infrastructure & Megawide to submit within three (3) days a certification affirming under oath the absence of conflict of interest, specifically that neither MAHB nor Mr. Tansri Bashir Ahmad was directly involved in any capacity related to the Bidding Process for the Project for both GMR-Megawide Consortium and the Consortium of First Philippine Holdings Corporation and MAHB at the same time, or any of their respective Consortium members, or any of their respective Affiliates, through actual participation in the deliberations and decision-making for the Bidding Process of both GMR-Megawide Consortium and First Philippine Airports Consortium that would give MAHB or Mr. Tansri Bashir Ahmad knowledge / information regarding the bid of both GMR Infrastructure & Megawide Consortium and First Philippine Airports Consortium, within a period of two (2) years prior to the publication of the Invitation to Pre-Qualify and Bid. Through its letter dated 8 January 2013, GMR Infrastructure & Megawide Consortium submitted the requested certification.[36]

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[36] *Rollo* (G.R. No. 211737), Vol. II, pp. 2289-2298.

Supreme Court E-Library

On the basis of the foregoing, the PBAC resolved to recommend to public respondents to designate GMR-Megawide Consortium as the Winning Bidder for the MCIA Project, and to issue the corresponding Notice of Award.

It is well-settled in our jurisprudence that the government is granted broad discretion in choosing who among the bidders can offer the most advantageous terms and courts will not interfere therewith or direct the committee on bids to do a particular act or to enjoin such act within its prerogatives, except when in the exercise of its authority, it gravely abuses or exceeds its jurisdiction,[37] or otherwise commits injustice, unfairness, arbitrariness or fraudulent acts.[38] We have recognized that the exercise of that discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation. This task can best be discharged by the concerned government agencies, not by the courts.[39]

The Court thus expounded at length in *Bureau Veritas v. Office of the President*:[40]

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

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[37] *Public Estates Authority v. Bolinao Security and Investigation Service, Inc.,* 509 Phil. 157, 176 (2005), citing *Republic v. Silerio*, 338 Phil. 784, 793 (1997).

[38] *Id*., citing *National Power Corporation v. Court of Appeals,* 339 Phil. 605, 635 (1997).

[39] *National Power Corporation v. Pinatubo Commercial,* 630 Phil. 599, 608 (2010), citing *Albay Accredited Constructors Association, Inc. v. Desierto,* 516 Phil. 308, 322 (2006).

[40] G.R. No. 101678, February 3, 1992, 205 SCRA 705.

Supreme Court E-Library

The discretion to accept or reject a bid and award contracts is vested in the Government agencies entrusted with that function. The discretion given to the authorities on this matter is of such wide latitude that the Courts will not interfere therewith, unless it is apparent that it is used as a shield to a fraudulent award (Jalandoni v. NARRA, 108 Phil. 486 [1960]). x x x The choice of who among the bidders is best qualified to perform this task should be left to the sound discretion of the proper Government authorities in the executive branch since they are in a better position than the Courts to make the determination owing to the experience and knowledge that they have acquired by virtue of their functions. The exercise of this discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation. This task can best be discharged by the Government agencies concerned, not by the Courts. The role of the Courts is to ascertain whether a branch or instrumentality of the Government has transgressed its constitutional boundaries. But the Courts will not interfere with executive or legislative discretion exercised within those boundaries. Otherwise, it strays into the realm of policy decision-making.

It is only upon a clear showing of grave abuse of discretion that the Courts will set aside the award of a contract made by a government entity. Grave abuse of discretion implies a capricious, arbitrary and whimsical exercise of power (Filinvest Credit Corp. v. Intermediate Appellate Court, No. 65935, 30 September 1988, 166 SCRA 155). The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined by law, as to act at all in contemplation of law, where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility (Litton Mills, Inc. v. Galleon Trader, Inc., et al., L-40867, 26 July 1988, 163 SCRA 489).[41] (Emphasis supplied)

Under the ITPB, the PBAC reserves the right to waive any minor defects in the Qualification Documents, and accept the offer it deems most advantageous to the government.[42] Verily, a reservation of the government of its right to reject any bid, generally vests in the authorities a wide discretion as to who is the best and most advantageous bidder. The exercise of such

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[41] *Id.* at 717-718.

[42] Sec. V-09, ITPB, *rollo* (G.R. No. 211737), Vol. II, p. 812.

Supreme Court E-Library

discretion involves inquiry, investigation, comparison, deliberation and decision, which are quasi-judicial functions, and when honestly exercised, may not be reviewed by the court.[43]

We find no patent error or arbitrariness in the DOTC's decision to award the contract to private respondents after the PBAC had carefully verified and evaluated FDC's allegations regarding GMR's expulsion from the Male International Airport by the Maldives Government, DIAL's financing and operation of the Delhi Airport, GMR's poor financial health and violation of the Conflict of Interest Rule.

On GMR's supposed fiasco from the cancellation of the concession agreement of its subsidiary, GMR Male International Airport Private Ltd. (GMIAL), with the Maldives Government in 2010, more recent online news reports showed that GMIAL had won the arbitration case and is seeking compensation from the wrongful termination of its contract. Two of such published articles/reports reads:

GMR wins maldives airport case, seeks compensation

Anirban Chowdhury, ET Bureau Jun 20, 2014, 04.26AM IST

MUMBAI: GMR Infra on Thursday said it has won a more than 18-month long legal battle with the Maldives government which started after the government cancelled the company's contract to develop and operate the country's main airport.

According to GMR's filing on the National Stock Exchange, a Maldives' tribunal has judged the government's rejection of the contract "wrongful".

The tribunal has directed Maldives and the state-owned Maldives Airports Company (MACL) to pay $4 million legal damages to GMR within 42 days.

GMR has in addition, demanded a compensation of $1.4 billion for losses incurred in the last one year on its bid amount and investments in developing the airport.

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[43] *National Power Corporation v. Philipp Brothers Oceanic, Inc.,* 421 Phil. 532, 546 (2001).

Supreme Court E-Library

Hassan Areef, a spokesman for the MACL didn't immediately respond to emailed queries.

The ruling and possible compensation will bring much-needed relief for GMR whose international airport projects have been facing trouble.

After winning its latest project the Phillipines Mactan-Cebu International airport last year, the company had faced trouble when a rival bidder raised issues of conflict of interest. GMR, however, subsequently bagged the project.

Last December, the company sold its 40% stake in its second Turkey's Istanbul Sabiha Gokcen International Airport for 220 million. The company had invested 90 million (.'737 crore) in the airport but lost.'123 crore on it in 2012-13.

On July 28, 2010, a joint venture between GMR Infra (77%) and Malaysia Airports (Labuan) Private Limited (23%) bagged a development and operations contract for Ibrahim Nasir International Airport a brownfield airport at Male. The venture had bid $511 million.

The new terminal development project was on track for an early 2014 commercial opening date before it had to be halted due to a 'Stop-Work' order by the Maldives aviation ministry in August, 2012, according to GMR's latest annual report.[44]

GMR's Maldives airport concession pact was not void: Singapore-based tribunal

The tribunal has said that Maldives government and MACL should pay GMR $4 million as compensation within 42 days.

BY ANURADHA VERMA

GMR Infrastructure Limited's subsidiary GMR Male International Airport Ltd (GMIAL), whose contract for modernisation of Male international airport was unilaterally terminated by the Maldives government in 2012, has got relief as an international tribunal has declared its concession agreement for Maldives airport as valid.

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[44] "*GMR wins Maldives airport case, seeks compensation,*" <http://articles.economictimes.indiatimes.com/2014-06-20/news/50739360_1_maldives-airports-company-gmr-infra-macl> (visited last January 4, 2016).

Supreme Court E-Library

In a filing to the stock exchanges, GMR Infrastructure said that the Singapore-based Rt Hon Hoffman's Tribunal declared that the concession agreement "was not void for any mistake of law or discharged by frustration".

"Government of Maldives and Maldives Airport Co. Ltd (MACL) are jointly and severally liable in damages to GMIAL for loss caused by wrongful repudiation of the agreement as per the concession agreement," GMR Infrastructure said.

After detailed proceedings lasting more than 18 months, the tribunal has said that Maldives government and MACL should pay GMR $4 million of compensation within 42 days.

GMIAL had signed a concession agreement with the government of Maldives and MACL for the $500 million modernisation and operation of Ibrahim Nasir International Airport in 2010.

However, the Maldives government terminated the contract and subsequently started off arbitration proceedings on November 29, 2012, seeking a declaration that the concession agreement was void ab initio. GMIAL had disputed this termination.

Shares of the GMR Infrastructure were trading at Rs 33.15, up 0.91 per cent on the BSE from their previous close, in a flat Mumbai market on Thursday. GMR Infrastructure runs airports in Hyderabad and New Delhi. *(Edited by Joby Puthuparampil Johnson)*[45]

While the foregoing information was not yet available during the post-qualification stage, we find no unfairness or arbitrariness on the part of public respondents when they relied on the opinion of the IFC PPP Services for Southeast Asia that the Male project "was conducted in an open and transparent manner and in accordance with international best practice," citing the June 2013 report of the Anti-Corruption Commission of the Maldives which concluded that "there was no corruption involved in the award and concession of the Male airport to GMR-MAHB." As the lead advisor for the project, IFC has in fact, included

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[45] "*GMR's Maldives airport concession pact was not void: Singapore-based tribunal,*" <http://www.vccircle.com/news/infrastructure/2014/06/19/gmrs-maldives-airport-concession-pact-was-not-void-singapore-based> (visited last January 4, 2016).

Supreme Court E-Library

the Male International Airport as among the successful PPPs in various infrastructure sectors.[46] Public respondents thus committed no grave abuse of discretion in determining that GMR has complied with the technical qualifications insofar as the absence of Unsatisfactory Performance Record is concerned.

As to the financial incapacity of private respondents, this, too, has been sufficiently addressed by PBAC when it further evaluated the financial proposal of MCC prior to the execution of the Final Concession Agreement. And contrary to the claims of petitioner Osmeña III, representatives from GMR have satisfactorily answered the issue raised on their financial capability for the MCIA Project during the Senate hearing held on March 25, 2014. What petitioner Osmeña III chiefly assailed was DOTC's due diligence which to him, fell short because they did not "dig in" and made a more in-depth investigation into GMR's background, specifically on the negative findings of India's Comptroller and General Auditor. Herein reproduced are relevant portions of the transcript taken during said hearing:

THE ACTING CHAIRMAN (SEN. OSMEÑA). All right. Now, let's go to GMR so that they'll have a chance to explain.

You wanted to react to a certain point we raised earlier. You're Mr. Kapur?

MR. KAPUR. Yes, sir.

THE ACTING CHAIRMAN (SEN. OSMEÑA). Yes. Yes, please.

MR. KAPUR. I think there have been three points which were raised. One was about the financial.

And just to react to that point, as far as GMR is concerned, as I had mentioned in my last hearing also, the group is absolutely financially sound. It's rated BBB investment grade by the rating agencies. It has not departed to any lender. It has got letters of good standing from Asian Development Bank and Standard Chartered

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[46] Success Stories Public-Private Partnerships, "*Maldives: Male International Airport,*" <http://www.pidg.org/resource-library/case-studies/successstories-maleairport.pdf> (visited last January 4, 2016).

Supreme Court E-Library

Bank which have been submitted at the time of our submission. That was primarily about the GMR Group. And, in fact, last time, I had also made a very detailed submission about its financials, its operating profits and its cash profits and the group is very much profitable. It has the ability to meet the finances required to complete this project.

Having said that, the prime criteria of financial capability was that of Megawide because they were the 60 percent partner as far as this project is concerned.

x x x x x x x x x

THE ACTING CHAIRMAN (SEN. OSMEÑA).

x x x x x x x x x

Your net losses increased — surged to 10.7 billion rupees during the nine-month period ending December 31st 2013, is that correct?

x x x x x x x x x

MR. KAPUR. … Just give me a moment.

Our GMR's consolidated net loss for the 9-month period ending December of 2013 was about 4 billion Indian rupees.

THE ACTING CHAIRMAN (SEN. OSMEÑA). That's your net loss.

MR. KAPUR. Net loss. This is the net loss.

THE ACTING CHAIRMAN (SEN. OSMEÑA). Okay. And your EBITDA increased to 18 billion–

MR. KAPUR. Yeah. It is about 7 billion profit. There's a positive of 7 billion Indian rupees.

THE ACTING CHAIRMAN (SEN. OSMEÑA). No. I'm giving you more. I'm giving you 18 billion in EBITDA. That's Earnings Before Income Tax, Depreciation and Amortization.

MR. KAPUR. Ah, okay. That is 17 billion. Nine months is 17 billion—It's about 18.8 billion.

THE ACTING CHAIRMAN (SEN. OSMEÑA). Eighteen point eight billion. And your interest expenses jumped to 20.5 billion in that same period.

Supreme Court E-Library

MR. KAPUR. That's right, that's right.

THE ACTING CHAIRMAN (SEN. OSMEÑA). So, therefore, you don't even have–generate enough cash, operating profit to cover your interest expense?

It's just a simple question. Twenty billion is more than 18 billion, right?

MR. KAPUR. Your Honor, I think one has to understand this is a consolidated balance sheet.

THE ACTING CHAIRMAN (SEN. OSMEÑA). I'm just asking. I know it's a consolidated balance sheet, I know it's a mother company.

MR. KAPUR. So, I think what is really the element is that the GMR has the ability to implement this project whether it is credit rating because everybody has their own discretion to analyze what the profitability is and come to their own subjective judgment. But the subjective judgment has to be based upon a credible third party. And the credible third party in this case are the rating agencies who continuously rate any listed entity. And if found giving that information in public domain, other purpose of consumption of people who are going to deal with that entity. And the rating of GMR is something which is the most important and should be relied upon. Because if any point of time, GMR is potentially and financially distressed, it would impact the rating. And automatically, the rating agencies are going to come back and change the rating, and that has not happened. **The rating agencies have maintained consistently the investment credit rating of GMR Group. And I would just like to reiterate that the GMR Group is not in financial distress. It is robust, it has got the ability to meet its long-term debt as well as the short-term debt**.

THE ACTING CHAIRMAN (SEN. OSMEÑA). By borrowing some more.

MR. KAPUR. I think, sir, that is the–

THE ACTING CHAIRMAN (SEN. OSMEÑA). I'm not saying you're going belly up. What I am saying is that there are always warnings that those of us who understand the–how to read financial statements can always come to preliminary conclusions. We do ratios, we do analysis. And right here, this is very clear that you're spending more in interest than what you are earning. So, if things were to

Supreme Court E-Library

stand still today, you wouldn't be able to pay 2 billion in interest, 2 billion rupees interest.

That's all I'm saying. I'm not saying you're not going to pay it because you can always borrow some more tomorrow. But this is a situation that's been obtaining for some time. This is not just 2013. This happened in 2012, this happened in 2011. So, you've had operating losses for three years running.

MR. KAPUR. The EBITDA is before other income also. If you actually see the financial statement, there is another income also which is below the line after EBITDA. And that is also used to meet the interest and the payment liabilities.

THE ACTING CHAIRMAN (SEN. OSMEÑA). I understand what's below the line. Thank you for that. Anyway–

MR. KAPUR. And sir, I think can I also respond on the CAG report which you raised?

THE ACTING CHAIRMAN (SEN. OSMEÑA). On the…?

MR. KAPUR. The report of the Comptroller and Auditor General– Indian government audited.

THE ACTING CHAIRMAN (SEN. OSMEÑA). I think you responded to that already in the previous hearing.

MR. KAPUR. We have not responded. Last time we did not respond. It was not an issue raised last time.

THE ACTING CHAIRMAN (SEN. OSMEÑA). All right. Please respond to it.

MR. KAPUR. Let me explain the process of–

THE ACTING CHAIRMAN (SEN. OSMEÑA). You know, the whole point I'm trying to make is that there's always a response to any charge that's made. There are two sides in a question: There is the prosecutor; there is the defense. You can always come up with a defense. It will always sound very rational and very logical. **But what I am questioning is that why the DOTC did not exercise the due diligence to pick up the Comptroller and Auditor General's Report with regard to the performance of GMR. That's all I am saying**. Whether it's valid or not, whether you will dispute it or not, we expected you to dispute that, we expected you to have answers, and we have read your answers. But what I am saying is

Supreme Court E-Library

why didn't you know about it? Why didn't you take the effort to do more in-depth due diligence on whoever bidders came before you in order to protect the interest of the Filipino people. That's what I am saying. So, whether you can answer it or not is really beside the point. It's why did they not pick it up? And you can answer that, you can answer me **why DOTC didn't pick it up?**

MR. KAPUR. No, sir.

THE ACTING CHAIRMAN (SEN. OSMEÑA). So, I think you'll have to hold your comments first, Mr. Kapur, because we know what you're going to say, and we are not saying that they're not valid answers. My concern is why didn't they pick it up.

MR. KAPUR. Can I respond to that?

THE ACTING CHAIRMAN (SEN. OSMEÑA). I don't think you can answer that question why they didn't pick it up. That's the DOTC's question.

MR. KAPUR. No, sir. I just wanted to say something which is relevant for that purpose. He had submitted **a letter which is dated 19 December from the government of India, Ministry of Civil Aviation to the DOTC and PBAC, which actually is that DIAL has been operating the airport from May 2006 satisfactorily as per the provisions of the UNDA, executed between DIAL and airport authority.** Further, we have also been operating the Hyderabad Airport, and the airport also has been operating satisfactorily.

THE ACTING CHAIRMAN (SEN. OSMEÑA). Yes. That's a good side. Did you disclose it? Did you disclose the CAG findings to DOTC?

MR. KAPUR. That is for the letter of good standing from the government of India.

THE ACTING CHAIRMAN (SEN. OSMEÑA). And you disclosed that we were charged by the Comptroller and Auditor General of India with this, and this is our response. Did you disclose that you were charged?

MR. KAPUR. Sir, let me make a correction here, sir, may I request?

THE ACTING CHAIRMAN (SEN. OSMEÑA). No. Just answer the question. Yes or no. Did you disclose it?

Supreme Court E-Library

MR. KAPUR. We were not charged by the CAG.

THE ACTING CHAIRMAN (SEN. OSMEÑA). Did you disclose the existence of the CAG report?

MR. KAPUR. No, we were not required to disclose.

THE ACTING CHAIRMAN (SEN. OSMEÑA). You're not required.

MR. KAPUR. The charge is not on us.[47] (Emphasis supplied)

The issues raised against DIAL, as contained in the CAG's report had been addressed and resolved by the PBAC. In the same vein, GMR's alleged violation of the conflict of interest rule was found to be non-existent. Contrary to petitioners' asseveration, the interpretation made by PBAC on this bidding rule was reasonable, fair and practical. Under the BOT Law IRR, the PBAC shall be responsible for all aspects of the bidding process, including the interpretation of the rules regarding the bidding, the conduct of bidding, evaluation of bids, resolution of disputes between bidders, and recommendation for the acceptance of the bid award and/or for the award of the project.[48]

Petitioner Osmeña contends that the DOTC may not apply its own bidding rules in a manner that puts bidders on unequal footing. He emphasizes that the grounds raised to disqualify private respondents are not minor defects that may be waived by the PBAC in order to qualify a disqualified bidder. He points out that the arbitrariness of PBAC is apparent because despite its knowledge of grounds to disqualify private respondents, *i.e.,* the existence of a violation of the rule on conflict of interest and a showing of private respondents' poor financial health and track record, the resulting decision nevertheless declared them as qualified bidders.[49]

The contention has no merit.

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[47] *Rollo* (G.R. No. 211737), Vol. III, pp. 1792-1802.

[48] Rule 3, Sec. 3.2, BOT Law Implementing Rules and Regulations.

[49] *Rollo* (G.R. No. 211737), Vol. IV, pp. 2416-2419 (Consolidated Reply dated November 25, 2015).

Supreme Court E-Library

As earlier stated, PBAC's interpretation of the Conflict of Interest provision requiring direct involvement or participation in the deliberations and decision-making related to the bidding for the MCIA Project was fair, reasonable and practical. The issues regarding GMR's Male airport case and MCC's financial capability have been fully ventilated during the post-qualification stage. Both private respondents and the second highest bidder, FDC, argued their respective positions which were duly considered, including a detailed evaluation of their technical and financial qualification documents. That PBAC's own inquiry did not yield any concrete evidence of GMR's unsatisfactory performance, as defined in the ITPB, and MCC's poor financial health does not necessarily indicate preference for one bidder over the others, especially as the bidding in this case was conducted with transparency.

Increased Terminal Fees Valid and Legal

On the legality of the increased terminal fees imposed by GMCAC, this is based on the right granted under the Concession Agreement to collect such fees. For this kind of BOT projects, the law expressly provides that the project proponent operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals and charges not exceeding those proposed in its bid or as negotiated and incorporated in the contract to enable the project proponent to recover its investment and operating and maintenance expenses in the project.[50]

At any rate, the Concession Agreement provided for a formula and procedure to be applied should there be an increase in Passenger Service Charge, Aircraft Parking Fees and Tacking Fees, thus:

> 24.2.c Unless otherwise provided by any Relevant Rules and Procedure promulgated by MCIAA or by any Government Authority, the following procedure shall apply for every increase in the Passenger Service Charge, aircraft Parking

[50] Sec. 2 (b), R.A. No. 7718.

Supreme Court E-Library

Fees, and Tacking Fees, after the expiration of the first (1st) Contract Year:

24.2.c (1) The Concessionaire shall file with the MCIAA an application for such increase no later than six (6) months prior to the date that the relevant increase in the Passenger Service Charge, Aircraft Parking Fees, and Tacking Fees shall take effect.

24.2.c (2) The Concessionaire shall publish the application in a newspaper of general circulation at least two (2) weeks before the first hearing on the application.

24.2.c (3) MCIAA shall conduct a public hearing on the said application in accordance with any rule of procedure that it may promulgate.

24.2.c (4) The Concessionaire shall comply with all other requirements of Relevant Rules and Procedures that may be promulgated by MCIAA or any Government Authority for the increase of the Passenger Service Charge, Aircraft Parking Fees, and Tacking Fees.

24.2.c (5) The Grantors and the Concessionaire shall conduct the procedure for implementing the increase in Passenger Service Charge, Aircraft Parking Fees, and Tacking Fees in such a manner as to ensure that all Relevant Consents are secured promptly to enable the Concessionaire to implement a timely increase in Passenger Service Charge, Aircraft Parking Fees, and Tacking Fees in accordance with the parametric formula and at such times as contemplated in Annex 21-A (*Parametric Formula for Passenger Service Charge*) or Annex 21-

Supreme Court E-Library

B (*Parametric Formula for Aircraft Parking Fee and Tacking Fee*), as the case may be.[51]

Petitioners Not Entitled to Preliminary Injunction

For the writ of injunction to issue, the existence of a clear and positive right especially calling for judicial protection must be shown; injunction is not to protect contingent or future rights; nor is it a remedy to enforce an abstract right. An injunction will not issue to protect a right not *in esse* and which may never arise or to restrain an act which does not give rise to a cause of action. There must exist an actual right.[52]

Petitioners failed to establish such actual right that needs to be protected by injunctive relief. There being no violation of any law, regulation or the bidding rules, nor any arbitrariness or unfairness committed by public respondents, the presumption of regularity of the bidding for the MCIA Project must stand.

WHEREFORE, the petition in G.R. No. 211737 is hereby **DISMISSED** for lack of merit. The petition in G.R. No. 214756 is **DENIED** for lack of sufficient legal and factual bases.

No pronouncement as to costs.

SO ORDERED.

Velasco, Jr. (Chairperson), Peralta, Reyes, and *Perlas-Bernabe, JJ.,* concur.

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[51] *Rollo* (G.R. No. 214756), pp. 483-484.

[52] *Philippine Ports Authority v. Court of Appeals,* 323 Phil. 260, 291-292 (1996), citing *Prado v. Veridiano II,* G.R. No. 98118, December 6, 1991, 204 SCRA 654, 672.