EN BANC

[G.R. No. 217158, March 12, 2019]

GIOS-SAMAR, INC., REPRESENTED BY ITS CHAIRPERSON GERARDO M. MALINAO, PETITIONER, VS. DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS AND CIVIL AVIATION AUTHORITY OF THE PHILIPPINES, RESPONDENTS.

D E C I S I O N

JARDELEZA, J.:

The 1987 Constitution and the Rules of Court promulgated, pursuant to its provisions, granted us original jurisdiction over certain cases. In some instances, this jurisdiction is shared with Regional Trial Courts (RTCs) and the Court of Appeals (CA). However, litigants do not have unfettered discretion to invoke the Court's original jurisdiction. The doctrine of hierarchy of courts dictates that, direct recourse to this Court is allowed only to resolve questions of law, notwithstanding the invocation of paramount or transcendental importance of the action. This doctrine is not mere policy, rather, it is a constitutional filtering mechanism designed to enable the Court to focus on the more fundamental and essential tasks assigned to it by the highest law of the land.

On December 15, 2014, the Department of Transportation and Communication[1] (DOTC) and its attached agency, the Civil Aviation Authority of the Philippines (CAAP), posted an Invitation to Pre-qualify and Bid[2] (Invitation) on the airport development, operations, and maintenance of the Bacolod-Silay, Davao, Iloilo, Laguindingan, New Bohol (Panglao), and Puerto Princesa Airports (collectively, Projects).[3] The total cost of the Projects is P116.23 Billion, broken down as follows:[4]

Bacolod-Silay	P20.26 Billion
Davao	P40.57 Billion
Iloilo	P30.4 Billion
Laguindingan	P14.62 Billion
New Bohol (Panglao)	P4.57 Billion
Puetio Princesa	P5.81 Billion
	P116.23 Billion[5]

The Invitation stated that the Projects aim to improve services and enhance the airside and landside facilities of the key regional airports through concession

agreements with the private sector. The Projects will be awarded through competitive bidding, following the procurement rules and procedure prescibed under Republic Act (RA) No. 6957,[6] as amended by RA No. 7718[7] (BOT Law), and its Implementing Rules and Regulations. The concession period would be for 30 years.[8]

On March 10, 2015, the DOTC and the CAAP issued the Instructions to Prospective Bidders (ITPB),[9] which provided that prospective bidders are to pre-qualify and bid for the development, operations, and maintenance of the airports, which are now bundled into two groups (collectively, the Bundled Projects), namely:

> Bundle 1: Bacolod-Silay and Iloilo
> Bundle 2: Davao, Laguindingan, and New Bohol (Panglao)[10]

The costs of Bundle 1 and Bundle 2 are P50.66 Billion and P59.66 Billion, respectively. The Puerto Princesa Airport project was not included in the bundling.[11]

The general procedure for the bidding of the Bundled Projects stated that "[p]rospective [b]idders may bid for only Bundle 1 or Bundle 2, or bid for both Bundle 1 and Bundle 2. x x x The [Pre-Qualification, Bids and Awards Commitee (PBAC)] shall announce in a Bid Bulletin prior to the Qualifications Submission Date[,] its policy on whether a [p]rospective [b]idder may be awarded both bundles or whether a [p]rospective [b]idder may only be awarded with one (1) bundle."[12]

The submission of the Pre-Qualification Queries was scheduled for April 3, 2015 and the submission of Qualification Documents on May 18, 2015.[13]

On March 27, 2015, petitioner GIOS-SAMAR, Inc., represented by its Chairperson Gerardo M. Malinao (petitioner), suing as a taxpayer and invoking the transcendental importance of the issue, filed the present petition for prohibition.[14] Petitioner alleges that it is a non-governmental organization composed of subsistence farmers and fisherfolk from Samar, who are among the victims of Typhoon Yolanda relying on government assistance for the rehabilitation of their industry and livelihood.[15] It assails the constitutionality of the bundling of the Projects and seeks to enjoin the DOTC and the CAAP from proceeding with the bidding of the same.

Petitioner raises the following arguments:

First, the bundling of the Projects violated the "constitutional prohibitions on the anti-dummy and the grant of opportunity to the general public to invest in public utilities,"[16] citing Section 11, Article XII of the 1987 Constitution.[17] According to petitioner, bundling would allow companies with questionable or shaky financial background to have direct access to the Projects "by simply joining a consortium which under the bundling scheme adopted by the DOTC said [P]rojects taken altogether would definitely be beyond the financial capability of any qualified, single Filipino corporation."[18]

Second, bundling violates the constitutional prohibition on monopolies under Section

19, Article XII of the Constitution because it would allow one winning bidder to operate and maintain several airpm1s, thus establishing a monopoly. Petitioner asserts that, given the staggering cost of the Bundled Projects, the same can only be undertaken by a group, joint venture outfits, and consortiums which are susceptible to combinations and schemes to control the operation of the service for profit, enabling a single consortium to control as many as six airports.[19]

Third, bundling will "surely perpetrate an undue restraint of trade."[20] Mid-sized Filipino companies which may have previously considered participating in one of the six (6) distinct Projects will no longer have a realistic opportunity to participate in the bidding because the separate projects became two (2) gargantuan projects. This effectively placed the Projects beyond the reach of medium-sized Filipino companies. [21]

Fourth, the PBAC of the DOTC committed grave abuse of discretion amounting to excess of jurisdiction when it bundled the projects without legal authority.[22]

Fifth, bundling made a mockery of public bidding because it raised the reasonable bar to a level higher than what it would have been, had the projects been bidded out separately.[23]

In support of petitioner's prayer, for the issuance of a temporary restraining order and/or writ of preliminary injunction, it states that there is extreme urgency to enjoin the bidding of the Bundled Projects so as not to cause irreparable damage and injury to the coffers of the government.[24]

In its comment,[25] the DOTC counters that: (1) the petition is premature because there has been no actual bidding yet, hence there is no Justiciable controversy to speak of; (2) petitioner has no legal standing to file the suit whether as a taxpayer or as a private individual; (3) petitioner's allegation on the violation of anti-dummy and equal opportunity clauses of the Constitution are speculative and conjectural; (4) Section 11, Article XII of the Constitution is not applicable to the bidding process assailed by petitioner; (5) the bundling of the Projects does not violate the prohibitions on monopolies or combinations in restraint of trade; and (6) the DOTC and the CAAP did not commit grave abuse of discretion amounting to lack or excess of jurisdiction.[26]

For its part, the CAAP asserts that the petition violated the basic fundamental principle of hierarchy of courts. Petitioner had not alleged any special and compelling reason to allow it to seek relief directly from the Court. The case should have been filed with the trial court, because it raises factual issues which need to be threshed out in a full-blown trial.[27] The CAAP also maintains that petitioner has neither legal capacity nor authority to file the suit and that the petition has no cause of action.[28]

In its reply,[29] petitioner argues that it need not wait for the conduct of the bidding to file the suit because doing so would render useless the very purpose for filing the petition for prohibition.[30] As it is, five groups have already been pre-qualified to bid in the Bundled Projects.[31] Petitioner also submits that direct recourse to this

Court is justified as the "matter of prohibiting the bidding process of the x x x illegally bundled projects are matters of public interest and transcendental importance."[32] It further insists that it has legal standing to file the suit through Malinao, its duly authorized representative.[33]

The main issue brought to us for resolution is whether the bundling of the Projects is constitutional.

Petitioner argues that the bundling of the Projects is unconstitutional because it will: (i) create a monopoly; (ii) allow the creation and operation of a combination in restraint of trade; (iii) violate anti-dummy laws and statutes giving citizens the opportunity to invest in public utilities; and (iv) enable companies with shaky financial backgrounds to participate in the Projects.

I

While petitioner asserts that the foregoing arguments involve legal (as opposed to factual) issues, our examination of the petition shows otherwise. As will be demonstrated shortly, petitioner's arguments against the constitutionality of the bundling of the Projects are inextricably intertwined with underlying questions of fact, the determination of which require the reception of evidence. This Court, however, is not a trier of fact. We cannot resolve these factual issues at the first instance. For this reason, we **DISMISS** the petition.

A

Petitioner claims that the bundling of the Projects violates the constitutional provisions on monopolies and combinations in restraint of trade under Section 19, Article XII of the Constitution, which reads:

> Sec. 19. The State shall regulate or prohibit monopolies while the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

In *Tatad v. Secretary of the Department of Energy*,[34] we clarified that the Constitution does not prohibit the operation of monopolies *per se*.[35] With particular respect to the operation of public utilities or services, this Court, in *Anglo-Fil Trading Corporation v. Lazaro*,[36] further clarified that "[b]y their very nature, certain public services or public utilities such as those which supply water, electricity, transportation, telephone, telegraph, etc. must be given exclusive franchises if public interest is to be served. Such exclusive franchises are not violative of the law against monopolies."

In short, we find that the grant of a concession agreement to an entity, as a winning bidder, for the exclusive development, operation, and maintenance of any or all of the Projects, does not *by itself* create a monopoly violative of the provisions of the Constitution. *Anglo-Fil Trading Corporation* teaches that exclusivity is inherent in the grant of a concession to a private entity to deliver a public service, where Government chooses not to undertake such service.[37] Otherwise stated, while the grant may result in a monopoly, it is a type of monopoly *not violative of law*. This is the essence of the policy decision of the Government to enter into concessions with

the private sector to build, maintain and operate what would have otherwise been government-operated services, such as airports. In any case, the law itself provides for built-in protections to safeguard the public interest, foremost of which is to require public bidding. Under the BOT Law, for example, a private-public pat1nership (PPP) agreement may be undertaken through public bidding, in cases of solicited proposals, or through "Swiss challenge" (also known as comparative bidding), in cases of unsolicited proposals.

In any event, the Constitution provides that the State may, by law, prohibit or regulate monopolies *when the public interest so requires*.[38] Petitioner has failed to point to any provision in the law, which specifically prohibits the bundling of bids, a detail supplied by the respondent DOTC as implementing agency for the PPP program for airpm1s. Our examination of the petition and the relevant statute, m fact, provides further support for the dismissal of the present action.

Originally, monopolies and combinations in restraint of trade were governed by, and penalized under, Article 186[39] of the Revised Penal Code. This provision has since been repealed by RA No. 10667, or the Philippine Competition Act, which defines and penalizes "all forms of anti-competitive agreements, abuse of dominant position, and anti-competitive mergers and acquisitions."[40]

RA No. 10667 does not define what constitutes a "monopoly." Instead, it prohibits one or more entities which has/have acquired or achieved a "dominant position" in a "relevant market" from "abusing" its dominant position. In other words, an entity is not prohibited from, or held liable for prosecution and punishment for, simply securing a dominant position in the relevant market in which it operates. It is only when that entity engages in conduct *in abuse* of its dominant position that it will be exposed to prosecution and possible punishment.

Under RA No. 10667, "dominant position" is defined as follows:

> Sec. 4. *Definition of Terms*. - As used in this Act:
>
> x x x x
>
> (g) *Dominant position* refers to a position of economic strength that an entity or entities hold which makes it capable of controlling the relevant market independently from any or a combination of the following: competitors, customers, suppliers, or consumers[.]

"Relevant market," on the other hand, refers to the market in which a particular good or service is sold and which is a combination of the relevant product market and the relevant geographic market.[41] The determination of a particular relevant market depends on the consideration of factors which affect the substitutability among goods or services constituting such market, and the geographic area delineating the boundaries of the market.[42] An entity with a dominant position in a relevant market is deemed to have abused its dominant position if it engages in a conduct that would substantially prevent, restrict, or lessen competition.[43]

Here, petitioner has not alleged ultimate facts to support its claim that bundling will create a monopoly, in violation of the Constitution. By merely stating legal