

## EN BANC

[ G.R. No. 169914, April 07, 2009 ]

**ASIA'S EMERGING DRAGON CORPORATION, PETITIONER, VS. DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS, SECRETARY LEANDRO R. MENDOZA AND MANILA INTERNATIONAL AIRPORT AUTHORITY, RESPONDENTS.**

[G.R. NO. 174166]

**REPUBLIC OF THE PHILIPPINES, REPRESENTED BY THE DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS AND MANILA INTERNATIONAL AIRPORT AUTHORITY, PETITIONERS, VS. HON. COURT OF APPEALS AND SALACNIB BATERINA, RESPONDENTS.**

### R E S O L U T I O N

**CHICO-NAZARIO, J.:**

In the Decision<sup>[1]</sup> dated 18 April 2008, We dismissed the Petitions in G.R. No. 169914 and G.R. No. 174166 of Asia's Emerging Dragon Corporation (AEDC) and Salacnib F. Baterina (Baterina), respectively. The *fallo* of the Decision reads:

WHEREFORE, in view of the foregoing:

- a. The Petition in G.R. No. 169914 is hereby DISMISSED for lack of merit; and
- b. The Petition in G.R. No. 174166 is hereby likewise DISMISSED for being moot and academic.

No costs.

Presently before us are the separate Motions for Reconsideration of the aforementioned Decision filed by AEDC and Baterina.

**The Motion for Reconsideration of AEDC (G.R. No. 169914)**

AEDC invokes the following grounds for its Motion for Reconsideration:

I.

AEDC, BEING THE ORIGINAL PROPONENT OF THE [NINOY AQUINO INTERNATIONAL AIRPORT-INTERNATIONAL PASSENGER TERMINAL III (NAIA IPT III)] PROJECT, THOUGH NOT ENTITLED TO ANY UNDUE PREFERENCE, HAS VESTED RIGHTS, BOTH LEGAL (UNDER THE BOT LAW) AND CONTRACTUAL, WHICH MUST BE RESPECTED AND/OR RECOGNIZED.

A) THE DECISION MISTAKENLY CHARACTERIZED THE PROCESS OF UNSOLICITED PROPOSALS UNDER SECTION 4-A OF THE BOT LAW AS A BIDDING. AEDC, AS THE ORIGINAL PROPONENT, HAS RIGHTS UNDER THE BOT LAW, WHICH MUST BE RESPECTED AND RECOGNIZED.

B) THE DECISION MISTAKENLY CONCLUDES THAT EVEN IF THE CHALLENGE WAS SUBSEQUENTLY DECLARED VOID, THE ORIGINAL PROPONENT IS LEFT WITHOUT ANY RIGHTS OR REMEDY SIMPLY BECAUSE THE DISQUALIFIED CHALLENGER HAS ALREADY PROCEEDED TO IMPLEMENT THE PROJECT.

II.

GIVEN THE DECLARATION OF THIS HONORABLE COURT THAT THE [PHILIPPINE INTERNATIONAL AIR TERMINALS CO., INC. (PIATCO)] CONTRACTS ARE VOID *AB INITIO*, AT THE VERY LEAST, THE [NAIA IPT III] PROJECT SHOULD BE COVERED ANEW BY SECTION 10.11, RULE 10 OF THE [IMPLEMENTING RULES AND REGULATIONS (IRR)] OF THE BOT LAW, WHEREIN INVITATIONS FOR COMPARATIVE PROPOSALS SHALL AGAIN BE MADE AND THE RIGHT OF AEDC AS THE ORIGINAL PROPONENT TO MATCH THE BEST OFFER SHOULD BE REINSTATED.

III.

WITH THE NULLIFICATION OF THE PIATCO CONTRACTS, GOVERNMENT SHOULD NOT HAVE INITIATED EXPROPRIATION PROCEEDINGS AGAINST THE [NAIA IPT III] FACILITIES. BUT HAVING DONE SO, THE GOVERNMENT MAY PROCEED WITH THE EXPROPRIATION AND THEN USE THE FAIR AND JUST VALUATION, AS MAY BE DETERMINED IN THE EXPROPRIATION PROCEEDINGS, AS THE FLOOR PRICE FOR THE NEW INVITATION FOR COMPARATIVE PROPOSALS FOR THE [NAIA IPT III] PROJECT.

IV.

IN THE EVENT OF A NEW INVITATION FOR COMPARATIVE PROPOSALS, LAW AND EQUITY DICTATES THAT GOVERNMENT SHOULD RECOGNIZE AND/OR REINSTATE AEDC'S RIGHT TO MATCH THE LOWEST PRICE OFFER/PROPOSAL FOR THE [NAIA IPT III] PROJECT WITHIN THE PERIOD ALLOWED UNDER THE BOT LAW.

V.

THERE IS NO FACTUAL BASIS TO CONCLUDE THAT AEDC WAS NOT FINANCIALLY QUALIFIED TO UNDERTAKE THE [NAIA IPT III] PROJECT BECAUSE THIS MATTER WAS NOT PUT IN ISSUE BY THE PARTIES. A DECLARATION THAT AEDC WAS NOT QUALIFIED WILL JEOPARDIZE THE REPUBLIC'S POSITION IN THE INTERNATIONAL ARBITRATION CASES BECAUSE THE GOVERNMENT WILL BE VIEWED AS HAVING LET PIATCO TO BELIEVE THAT PIATCO'S CONTRACTING PROCESS WAS LEGAL AND

THAT PIATCO COMMITTED NO VIOLATION. CONSEQUENTLY, PIATCO MAY BE ENTITLED NOT ONLY TO COMPENSATION BUT ALSO TO DAMAGES.

VI.

[NAIA IPT III] WAS BUILT BY PIATCO WITH SIGNIFICANT DEVIATION FROM THE BID DOCUMENTS AND DRAFT CONCESSION AGREEMENT. AEDC'S TAKING OVER OF [NAIA IPT III] WILL NOT RESULT IN AN AMENDMENT OF ITS PROPOSAL. INSTEAD AEDC WILL IMPLEMENT OR ENFORCE THE DRAFT CONCESSION AGREEMENT AND THE TECHNICAL SPECIFICATIONS APPROVED BY THE NEDA, ICC AND OTHER GOVERNMENT AGENCIES, THE MEMORANDUM OF UNDERSTANDING AND TERMS OF REFERENCE OR BID DOCUMENTS.

VII.

THIS HONORABLE COURT SHOULD NOT HAVE PASSED UPON EITHER THE AUTHENTICITY OR IMPORT OF THE MEMORANDUM OF UNDERSTANDING ("MOU") BECAUSE IT WAS NOT A LITIGATED ISSUE. GOVERNMENT NEVER DISPUTED THE CAPACITY OF THE MOU TO CREATE RIGHTS AND OBLIGATIONS. TO CONCLUDE THAT THE MOU WAS VOID IS TO NECESSARILY ALSO CONCLUDE THAT THERE WAS NO CONTRACT TO OPEN UP TO CHALLENGE, AND THAT PIATCO WAS WRONGFULLY LED TO MOUNT A CHALLENGE THAT COULD NOT POSSIBLY BE VALID. BASED ON THIS PREMISE, GOVERNMENT IS ENTIRELY TO BLAME FOR THE [NAIA IPT III] DISASTER AND WILL ENTITLE PIATCO TO DAMAGES.

VIII.

AEDC RELIED ON AND ACTED DETRIMENTALLY IN RELYING ON THE MOU. IT IS A DANGEROUS JUDICIAL POLICY TO PERMIT GOVERNMENT TO UNILATERALLY BREACH CONTRACTUAL OBLIGATIONS WITHOUT CONSEQUENCE, ESPECIALLY WHEN THE OTHER PARTY IS NOT IN BREACH.

IX.

THE PETITION IS NOT BARRED BY THE DISMISSAL OF THE PASIG CASE. WHETHER THE DISMISSAL CONSTITUTES RES JUDICATA OR PRECLUDES AEDC'S CLAIM IS NOT AMONG THE ISSUES RAISED AND LITIGATED BY THE PARTIES IN THIS CASE. HENCE, THE STATEMENT THAT THE INSTANT PETITION IS NOT BARRED BY RES JUDICATA SHOULD NOT HAVE BEEN MADE. TO UPHOLD THE DISMISSAL OF THE PASIG CASE AS A VALID JUDGMENT WOULD BE TO PUT GOVERNMENT'S ARBITRATION CASES IN PERIL BECAUSE IT WOULD AFFIRM THAT GOVERNMENT, INCLUDING THE SOLICITOR GENERAL, AND NOT JUST MIAA OR DOTC, UPHELD THE VALIDITY OF THE PIATCO CONTRACTS, SUCH WOULD PLACE GOVERNMENT IN ESTOPPEL TO DENY CLAIMS FOR DAMAGES, IN ADDITION TO COMPENSATION, BY PIATCO.

X.

THE FUNDAMENTAL PREMISE FOR THE COMPROMISE AGREEMENT (I.E. THE AMICABLE SETTLEMENT OF AEDC'S AND PUBLIC RESPONDENTS' CLAIMS) HAS CEASED TO EXIST IN VIEW OF PUBLIC RESPONDENTS' ADOPTION OF AEDC'S LEGAL POSITION THAT THE AWARD OF THE [NAIA IPT III] PROJECT TO PIATCO WAS ILLEGAL. THEREFORE, BOTH AEDC AND PUBLIC RESPONDENTS SHOULD BE RELEASED FROM THEIR MUTUAL OBLIGATIONS UNDER THE COMPROMISE AGREEMENT.

XI.

THE PETITION FOR MANDAMUS WAS TIMELY FILED WITHIN THE PERIOD PROVIDED UNDER THE RULES OF COURT.<sup>[2]</sup>

At the end of its Motion, AEDC prays to this Court to reconsider the latter's Decision of 18 April 2008, insofar as the former's Petition in G.R. No. 169914 is concerned, and render, in its stead, judgment -

1. Directing Public Respondents, their officers, agents, successors, representatives or persons or entities acting on their behalf to recognize AEDC's rights as an Original Proponent of an unsolicited project as set forth above;
2. Directing Public Respondents to issue the appropriate Notice of Award of the Project to AEDC, sign the draft concession agreement with AEDC and implement the same;
3. Directing Public Respondents, their officers, agents, successors, representatives or persons or entities acting on their behalf to recognize AEDC's right to conduct an invasive inspection and valuation of the structures currently built as [NAIA IPT III] for an effective valuation and determination of the work to be conducted thereon; and
4. Permanently enjoining Public Respondents, their officers, agents, successors, representatives or persons or entities acting on their behalf, from negotiating, re-bidding, awarding or otherwise entering into any concession contract with PIATCO and other third parties, except as otherwise stated above, within the context of permitting AEDC to complete the construction and operation of the [NAIA IPT III] Project.
5. In the alternative, directing Public Respondents to effect a new invitation for comparative proposals for the [NAIA IPT III] Project in accordance with Rule 10 of the IRR of the BOT Law, as soon as practicable and in the process recognize and/or reinstate the right of AEDC to match the best offer.

Other reliefs, just and equitable in the premises, are likewise prayed for.<sup>[3]</sup>

AEDC persistently asserts its right to be awarded the NAIA IPT III Project as the original proponent thereof, following the declaration of nullity of the award of the said project to PIATCO in *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*

[4] Extensive as its Motion for Reconsideration may seem, it is mostly a reiteration of the arguments AEDC already raised in its Petition for *Mandamus* and Prohibition (with Application for Temporary Restraining Order), considered by this Court when it rendered its Decision dated 18 April 2008 dismissing said Petition.

We are not persuaded, whether by the previous Petition or the present Motion, to grant AEDC the writs of *mandamus* and prohibition it prays for in the absence of a clear right to the same. The declaration of nullity of the award of the NAIA IPT III Project to PIATCO in *Agan* does not automatically entitle AEDC to the award of the said project on the mere basis that it was the original proponent thereof.

The rights of the original proponent of an unsolicited proposal are rooted in Section 4-A of Republic Act No. 6957, [5] more commonly known as the Build-Operate-Transfer (BOT) Law, as amended by Republic Act No. 7718, which reads:

SEC. 4-A. *Unsolicited proposals.* - Unsolicited proposals for projects may be accepted by any government agency or local government unit on a negotiated basis: Provided, That, all the following conditions are met: (1) such projects involve a new concept or technology and/or are not part of the list of priority projects, (2) no direct government guarantee, subsidy or equity is required, and (3) the government agency or local government unit has invited by publication, for three (3) consecutive weeks, in a newspaper of general circulation, comparative or competitive proposals and no other proposal is received for a period of sixty (60) working days: Provided, further, That in the event another proponent submits a lower price proposal, the original proponent shall have the right to match the price within thirty (30) working days.

In his dissent to this Resolution, Mr. Justice Renato C. Corona submits that the original proponent of an unsolicited proposal for a BOT project, under Section 4-A of Republic Act No. 6957, as amended, is entitled to the award of the project in at least three circumstances: (1) no competitive bid was submitted; (2) there was a lower bid by a qualified bidder but the original proponent matched it; and (3) there was a lower bid but it was made by a person/entity not qualified to bid, in which case, it is as if no competitive bid had been made. Both Justice Corona and Mr. Justice Presbiterio J. Velasco, Jr., in their dissenting opinions, conclude that AEDC is entitled to the award of the NAIA IPT III project as the original proponent thereof because the third circumstance is extant in this case.

We can only accept in part the afore-mentioned enumeration of the circumstances when an original proponent is entitled to the award of the project under Section 4-A of Republic Act No. 6957, as amended. In the 18 April 2008 Decision, we have already exhaustively scrutinized Section 4-A of the BOT Law, as amended, in relation to its IRR, [6] and in consideration of the intent of the legislators who crafted the BOT Law. We find no reason to disturb our conclusion therein that:

The special rights or privileges of an original proponent thus come into play only when there are other proposals submitted during the public bidding of the infrastructure project. As can be gleaned from the plain