

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

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

Ponente: CHICO-NAZARIO, J.

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CHICO-NAZARIO, J.:

In the Decision[1] 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. Bateria (Bateria), respectively. The fallo of the Decision reads:

WHEREFORE, in view of the foregoing:

- The Petition in G.R. No. 169914 is hereby DISMISSED for lack of merit; and
- 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 Bateria.

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 [NINYOY 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.[2]

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 -

- 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;

- 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;
- 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
- 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.
- 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.[3]

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 language of the statutes and the IRR, the original proponent has: (1) the right to match the lowest or most advantageous proposal within 30 working days from notice thereof, and (2) in the event that the original proponent is able to match the lowest or most advantageous proposal submitted, then it has the right to be awarded the project. The second right or privilege is contingent upon the actual exercise by the original proponent of the first right or privilege. Before the project could be awarded to the original proponent, he must have been able to match the lowest or most advantageous proposal within the prescribed period. Hence, when the original proponent is able to timely match the lowest or most advantageous proposal, with all things being equal, it shall enjoy preference in the awarding of the infrastructure project.[7]

It is without question that in a situation where there is no other competitive bid submitted for the BOT project that the project would be awarded to the original proponent thereof. However, when there are competitive bids submitted, the original proponent must be able to match the most advantageous or lowest bid; only when it is able to do so, will the original proponent enjoy the preferential right to the award of the project over the other bidder. These are the general circumstances covered by Section 4-A of Republic Act No. 6957, as amended.

We cannot accede to include in such enumeration the situation in this case and categorically declare that the right of AEDC to the NAIA III Project is ensured and protected by Section 4-A of Republic Act No. 6957, as amended. What had happened in the proposal, bidding, and awarding process of the NAIA IPT III Project is indisputably unique and convoluted. We cannot subscribe to disposing of the controversy as regards the NAIA IPT III Project with a generalized rule, i.e., 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. As we said in the Decision of 18 April 2008, it would be a simplistic approach to what is a complex problem.

In the instant case, AEDC may be the original proponent of the NAIA IPT III Project; however, the Pre-Qualification Bids and Awards Committee (PBAC) also found the People's Air Cargo & Warehousing Co., Inc. Consortium (Paircargo), the predecessor of PIATCO, to be a qualified bidder for the project. Upon consideration of the bid of Paircargo/PIATCO, PBAC found the same to be far more advantageous than the original offer of AEDC. It is already an established fact in Agan that AEDC failed to match the more advantageous proposal submitted by PIATCO by the time the 30-day working period expired on 28 November 1996;[8] and since it did not exercise its right to match the most advantageous proposal within the prescribed period, it cannot assert its right to be awarded the project.

Also, in Agan, the Court disqualified PIATCO from the NAIA IPT III Project for failure to put up the required minimum equity of P2.7 million. The feasibility, however, of the financial proposal of Paircargo/PIATCO was never put in issue. The proposals of AEDC and Paircargo/PIATCO contained the following terms:

Both proponents offered to build the NAIA Passenger Terminal III for at least \$350 million at no cost to the government and to pay the government: 5% share in gross revenues for the first five years of operation, 7.5% share in gross revenues for the next ten years of operation, and 10% share in gross revenues for the last ten years of operation, in accordance with the Bid Documents. However, in addition to the foregoing, AEDC offered to pay the government a total of P135 million as guaranteed payment for 27 years while Paircargo Consortium offered to pay the government a total of P17.75 billion for the same period. x x x.[9] (Emphasis

ours.)

Clearly, the P17.75 billion guaranteed payment of PIATCO is more advantageous to the government. There is not a single allegation that such proposal is impossible to implement. It is true that AEDC instituted before the Regional Trial Court (RTC) of Pasig City Civil Case No. 66213, complaining that it was not given access to certain documents by which it could have evaluated the financial proposal of PIATCO and its ability to match the same. Thus, AEDC sought, among other things, the nullification of the proceedings before the PBAC and the declaration of the absence of any other competitive bid by a qualified bidder. Nevertheless, AEDC would also later jointly move (with therein public respondents[10]) for the dismissal of Civil Case No. 66213 pursuant to a Concession Agreement it executed on 12 July 1997 with the Department of Transportation and Communications (DOTC). The Pasig City RTC granted the joint motion of the parties and accordingly dismissed with prejudice Civil Case No. 66213 in an Order dated 30 April 1999. Therefore, AEDC not only failed to match the more advantageous proposal of PIATCO, but it also agreed to no longer pursue its objections thereto.

In the meantime, PIATCO already began building the NAIA IPT III facilities. By the time this Court promulgated its Decision in *Agan*, disqualifying PIATCO as a bidder and annulling the award of the NAIA IPT III Project to it, the NAIA IPT III facilities were substantially complete. The Court, in its Resolution in *Agan*, recognized the right of PIATCO to just compensation for the NAIA IPT III facilities, in accordance with law and equity. The Government, thereafter, instituted an expropriation case for the determination of the just compensation to be paid to PIATCO. In *Republic v. Gingoyon*,^[11] the Court affirmed the application of Republic Act No. 8974^[12] to the expropriation case and the right of the Government to take possession of the NAIA IPT III facilities upon the payment to PIATCO of the proffered value of the same.

On 11 September 2006, the Manila International Airport Authority (MIAA) tendered a Land Bank check in the amount of P3,002,125,000.00 representing the proffered value of NAIA IPT III, which was received by a duly authorized representative of PIATCO. As a result, the MIAA and other concerned government agencies were able to take possession of the NAIA IPT III facilities and prepare them for operation. The NAIA IPT III opened for domestic air travel on 22 July 2008.^[13] The first international flight took off from NAIA IPT III on 1 August 2008.^[14]

These developments, as well as the implications and consequences thereof, cannot be conveniently ignored. The factual backdrop has significantly changed from the time of the bidding of the NAIA IPT III Project, which prevents us from concluding that, with the disqualification of PIATCO, AEDC shall automatically acquire NAIA IPT III Project as the original proponent thereof. The bidding and awarding process for the NAIA IPT III Project had long been closed. The Court could not just conveniently revert to the stage of bidding and awarding of the said project and ignore all the factual and legal developments that had already taken place.

There is no point in subjecting the NAIA IPT III Project to another bidding and awarding process when it is substantially finished and, contrary to the averments of AEDC, already operational. Worth stressing is that the NAIA IPT III Project is a build-operate-transfer project. When the NAIA IPT III facilities have already been built, their possession transferred to the government, and are now being operated by the latter, nothing much remains of the project. The ultimate goal of a BOT project is for the government to eventually gain possession, ownership, and control of the infrastructure subject thereof from the private sector that undertook its building and financing, after allowing the latter to recoup its investments and reap reasonable profit. In this case, the government has already attained possession and control of the NAIA IPT III facilities. It would also acquire ownership of said facilities once the just and equitable compensation due PIATCO as builder^[15] has been determined and paid in the ongoing expropriation proceedings, docketed as Case No. 04-0876CFM, before the Pasig City RTC. To return the NAIA IPT III facilities to the private sector would only be a step backwards.

The lack of technical skill and competence of the Government to operate NAIA IPT III cannot justify turning over the same to AEDC. There are several other ways for the Government to cope, i.e., recruiting more qualified people, without it having to relinquish ownership, possession, and control of NAIA IPT III.

The protestation by AEDC of our characterization of the process on unsolicited proposal as public bidding is specious.

We call attention to the following relevant sections of Rule 10 of the IRR specifically on Unsolicited Proposals:

Sec. 10.9. Negotiation With the Original Proponent. - Immediately after ICC/Local Sanggunian's clearance of the project, the Agency/LGU shall proceed with the in-depth negotiation of the project scope, implementation arrangements and concession agreement, all of which will be used in the Terms of Reference for the solicitation of comparative proposals. The Agency/LGU and the proponent are given ninety (90) days upon receipt of ICC's approval of the project to conclude negotiations. The Agency/LGU and the original proponent shall negotiate in good faith. However, should there be unresolvable differences during the negotiations, the Agency/LGU shall have the option to reject the proposal and bid out the project. On the other hand, if the negotiation is successfully concluded, the original proponent shall then be required to reformat and resubmit its proposal in accordance with the requirements of the Terms of Reference to facilitate comparison with the comparative proposals. The Agency/LGU shall validate the reformatted proposal if it meets the requirements of the TOR prior to the issuance of the invitation for comparative proposals.

Sec. 10.10. Tender Documents. - The qualification and tender documents shall be prepared along the lines specified under Rules 4 and 5 hereof. The concession agreement that will be part of the tender documents will be considered final and non-negotiable by the challengers. Proprietary information shall, however, be respected, protected and treated with utmost confidentiality. As such, it shall not form part of the bidding/tender and related documents.

Sec. 10.11. Invitation for Comparative Proposals. - The Agency/LGU shall publish the invitation for comparative or competitive proposals only after ICC/Local Sanggunian issues a no objection clearance of the draft contract. The invitation for comparative or competitive proposals should be published at least once every week for three (3) weeks in at least one (1) newspaper of general circulation. It shall indicate the time, which should not be earlier than the last date of publication, and place where tender/bidding documents could be obtained. It shall likewise explicitly specify a time of sixty (60) working days reckoned from the date of issuance of the tender/bidding documents upon which proposals shall be received. Beyond said deadline, no proposals shall be accepted. A pre-bid conference shall be conducted ten (10) working days after the issuance of the tender/bidding documents.

Sec. 10.12. Posting of Bid Bond by Original Proponent. - The original proponent shall be required at the date of the first date of the publication of the invitation for comparative proposals to submit a bid bond equal to the amount and in the form required of the challengers.

Sec. 10.13. Simultaneous Qualification of the Original Proponent. - The Agency/LGU shall qualify the original proponent based on the provisions of Rule 5 hereof, within thirty (30) days from start of negotiation. For consistency, the evaluation criteria used for qualifying the original proponent should be the same criteria used in the Terms of Reference for the challengers.

Sec. 10.14. Submission of Proposal. - The bidders are required to submit the proposal in three envelopes at the time and place specified in the Tender Documents. The first envelope shall contain the qualification documents, the second envelope the technical proposal as required under Sec. 7.1.(b), and the third envelope as required under Sec. 7.1.(c).

Sec. 10.15. Evaluation of Proposals. - In terms of procedure, the evaluation will be in three stages: Stage 1 is the evaluation of qualification documents; Stage 2, the technical proposal; and Stage 3, the financial proposal.

Only those bids which passed the first stage will be considered for the second stage and similarly, only those which passed the second stage will be considered for the third stage evaluation. The Agency/LGU will return to the disqualified bidders the remaining envelopes unopened together with a letter explaining why they were disqualified. The criteria for evaluation will follow Rule 5 for the qualification of bidders and Rule 8 for the technical and financial proposals. The time frames under Rules 5 and 8 shall likewise be followed.

Sec. 10.16. Disclosure of the Price Proposal. - The disclosure of the price proposal of the original proponent in the Tender Documents will be left to the discretion of the Agency/LGU. However, if it was not disclosed in the Tender Documents, the original proponent's price proposal should be revealed upon the opening of the financial proposals of the challengers. The right of the original proponent to match the best proposal within thirty (30) working days starts upon official notification by the Agency/LGU of the most advantageous financial proposal. (Emphasis ours.)

After the concerned government agency or local government unit (LGU) has received, evaluated, and approved the pursuance of the project subject of the unsolicited proposal, the subsequent steps are fundamentally similar to the bidding process conducted for ordinary government projects.

The three principles of public bidding are: the offer to the public, an opportunity for competition, and a basis for an exact comparison of bids,[16] all of which are present in Sec. 10.9 to Sec. 10.16 of the IRR. First, the project is offered to the public through the publication of the invitation for comparative proposals. Second, the challengers are given the opportunity to compete for the project through the submission of their tender/bid documents. And third, the exact comparison of the bids is ensured by using the same requirements/qualifications/criteria for the original proponent and the challengers, to wit: the proposals of the original proponent[17] and the challengers must all be in accordance with the requirements of the Terms of Reference (TOR) for the project; the original proponent and the challengers are required to post bid bonds equal in amount and form;[18] and the qualifications of the original proponent and the challengers shall be evaluated by the concerned agency/LGU using the same evaluation criteria.[19]

A perusal of Sec. 10.9 to Sec. 10.16 of the IRR further reveals repeated mention of "comparative proposals" and "tender/bid documents"; as well as reference to and required compliance with the same rules followed in ordinary bidding of government projects, such as Rule 4 (Bid/Tender Documents); Rule 5 (Qualification of Bidders); and Sec. 7.1(b) and Sec. 7.1(c) of Rule 7 (Submission, Receipt and Opening of Bids) of the same IRR.

Hence, the process of unsolicited proposals does involve public bidding where, in the end, the government is free to choose the bid or proposal most advantageous to it. However, by adoption of the Swiss Challenge, special consideration is given in said process to the original proponent of the project, namely, the right to be awarded the project should it be able to match the lowest or most advantageous proposal within 30 working days from notice.

There is no truth to the averment of AEDC that by our Decision of 18 April 2008, we are allowing PIATCO to benefit from its own fraud and wrongdoing. Our refusal to award the NAIA IPT III Project to AEDC does not in any way benefit PIATCO. PIATCO cannot benefit from the NAIA IPT III Project when its Concession Agreements involving the same were set aside for being null and void, rendering it unable to derive profit therefrom. It is only entitled to just and equitable compensation for building the NAIA IPT III facilities, "for the government cannot unjustly enrich itself at the expense of PIATCO and investors." [20]

AEDC takes exception to the doubts raised by this Court on the authenticity of the Memorandum of Understanding (MOU) dated 26 February 1996 it executed with the DOTC.

To recall, our Decision of 18 April 2008 states:

It is important to note, however, that the document attached as Annex "E" to the Petition of AEDC is a

"certified photocopy of records on file." This Court cannot give much weight to said document considering that its existence and due execution have not been established. It is not notarized, so it does not enjoy the presumption of regularity of a public document. It is not even witnessed by anyone. It is not certified true by its supposed signatories, Secretary Jesus B. Garcia, Jr. for DOTC and Chairman Henry Sy, Sr. for AEDC, or by any government agency having its custody. It is certified as a photocopy of records on file by an Atty. Cecilia L. Pesayco, the Corporate Secretary, of an unidentified corporation.[21]

AEDC itself invoked the provisions of the MOU and attached a copy thereof as one of the Annexes to its Petition in G.R. No. 169914. By submitting a copy of the MOU, AEDC subjects the said document to the scrutiny of the Court, which is duty-bound to examine and weigh the same in accordance with the rules. We are not obligated to receive a copy of the MOU just as AEDC offered it; and accept hook, line, and sinker, the references made by AEDC to the contents thereof without ascertaining that it was actually the very same document executed by the parties. Nowhere in our 18 April 2008 Decision did we expressly declare that there was no MOU between AEDC and the government. What we called attention to therein was the fact that the document attached to the Petition of AEDC was highly suspect, not being a clear copy and not being properly certified as a true copy of the MOU, for which reasons, it could not be given much weight and credence in establishing the exact contents of the MOU in question.

Furthermore, it would do well for AEDC to remember that we did proceed, for the sake of argument, to rule on the contents of the MOU as follows:

Even assuming for the sake of argument, that the said Memorandum of [Understanding], is in existence and duly executed, it does little to support the claim of AEDC to the award of the NAIA IPT III Project. The commitments undertaken by the DOTC and AEDC in the Memorandum of [Understanding] may be simply summarized as a commitment to comply with the procedure and requirements provided in Rules 10 and 11 of the IRR. It bears no commitment on the part of the DOTC to award the NAIA IPT III Project to AEDC. On the contrary, the document includes express stipulations that negate any such government obligation. Thus, in the first clause, the DOTC affirmed its commitment to pursue, implement and complete the NAIA IPT III Project on or before 1998, noticeably without mentioning that such commitment was to pursue the project specifically with AEDC. Likewise, in the second clause, it was emphasized that the DOTC shall pursue the project under Rules 10 and 11 of the IRR of Republic Act No. 6957, as amended by Republic Act No. 7718. And most significantly, the tenth clause of the same document provided:

- Nothing in this Memorandum of Understanding shall be understood, interpreted or construed as permitting, allowing or authorizing the circumvention of, or non-compliance with, or as waiving, the provisions of, and requirements and procedures under, existing laws, rules and regulations.[22]

Hence, even after a consideration of the contents of the MOU, we do not find therein an absolute undertaking on the part of the government, represented by the DOTC, to award the NAIA IPT III Project to AEDC.

There is likewise no sufficient reason for us to reverse the pronouncements in our Decision dated 18 April 2008 that the Petition of AEDC in G.R. No. 169914 suffered from procedural defects: having been filed beyond reasonable time and being barred by res judicata.

We have already adequately explained in our 18 April 2008 Decision our finding that the Petition of AEDC was filed beyond reasonable time, to wit:

AEDC revived its hope to acquire the NAIA IPT III Project when this Court promulgated its Decision in Agan on 5 May 2003. The said Decision became final and executory on 17 February 2004 upon the denial by this Court of the Motion for Leave to File Second Motion for Reconsideration submitted by PIATCO. It is this Decision that declared the award of the NAIA IPT III Project to PIATCO as null and void; without the same,

then the award of the NAIA IPT III Project to PIATCO would still subsist and other persons would remain precluded from acquiring rights thereto, including AEDC. Irrefutably, the present claim of AEDC is rooted in the Decision of this Court in *Agan*. However, AEDC filed the Petition at bar only 20 months after the promulgation of the Decision in *Agan* on 5 May 2003.[23]

AEDC is merely reiterating in its Motion for Reconsideration the same disputation it previously made in its Petition - that the period for filing of said Petition should only be counted from 21 September 2005, the date when it received the letter of the Solicitor General denying its offer to take over the NAIA IPT III Project - and which we had already considered and rejected in our Decision dated 18 April 2008 for the following reasons:

AEDC contends that the "reasonable time" within which it should have filed its petition should be reckoned only from 21 September 2005, the date when AEDC received the letter from the Office of the Solicitor General refusing to recognize the rights of AEDC to provide the available funds for the completion of the NAIA IPT III Project and to reimburse the costs of the structures already built by PIATCO. It has been unmistakable that even long before said letter - especially when the Government instituted with the RTC of Pasay City expropriation proceedings for the NAIA IPT III on 21 December 2004 - that the Government would not recognize any right that AEDC purportedly had over the NAIA IPT III Project and that the Government is intent on taking over and operating the NAIA IPT III itself.[24]

Without any new argument on this issue, we are not persuaded to change our afore-quoted ruling.

On the issue of *res judicata*, AEDC argues that we erred in taking cognizance thereof even when the issue was not raised by the parties. We disagree.

Even if the public respondents in G.R. No. 169914 failed to plead *res judicata* in their Comment and is deemed to have waived the said defense, we may still *motu proprio* dismiss the Petition by reason thereof if it appears in the pleadings or the evidence on record that the said Petition is barred by prior judgment.

Section 1, Rule 10 of the Revised Rules of Court provides:

SECTION 1. Defenses and objections not pleaded. - Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. However, when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by a prior judgment or by statute of limitations, the court shall dismiss the claim. (Emphasis ours.)

Although the foregoing provision appears under the rules on proceedings before the trial court, the power to dismiss provided therein is among the residual prerogatives which the Court of Appeals[25] and even this Court may exercise by virtue of Section 2, Rule 1 of the Revised Rules of Court.[26]

The Petition[27] of AEDC itself brought to our attention the institution of, the developments in, as well as the eventual dismissal with prejudice of Civil Case No. 66213 by the Pasig City RTC. We had to take cognizance thereof, and after careful consideration, found that the dismissal with prejudice of Civil Case No. 66213 by the Pasig City RTC effectively bars the instant Petition of AEDC.

AEDC had waived its right to challenge the award of the NAIA IPT III Project to PIATCO when it amicably settled Civil Case No. 66213 before the Pasig City RTC, resulting in the dismissal with prejudice of said case. We should not allow the revival by AEDC of its right to the NAIA IPT III Project as the original proponent thereof, after some other party secured the annulment of the award to PIATCO, not only because it is barred by *res judicata*, but also because it constitutes palpable opportunism.

Finally, we find baseless the averment of AEDC that our judgment recognizing and respecting the final and

immediately executory Order dated 30 April 1999 of the Pasig City RTC - which granted, with prejudice, the Joint Motion to Dismiss Civil Case No. 66213 filed by the parties therein - will imperil the position of the government in the international arbitration cases involving the NAIA IPT III Project still pending before the International Chamber of Commerce (ICC). AEDC points out that the position taken by the government in Civil Case No. 66213 (that PIATCO was qualified to participate in the bidding for the NAIA IPT III Project) is inconsistent with the position the latter is espousing in the international arbitration cases (that PIATCO was financially disqualified from bidding for the NAIA IPT III Project).

It should be recalled, however, that in the Joint Motion to Dismiss Civil Case No. 66213, the parties, without admitting liability or conceding to the position taken by the other, agreed to release and forever discharge each other from any and all liabilities, whether criminal or civil, arising in connection with the case. Evidently, the parties consented to release and discharge each other from any liability regardless of whether the other party maintained or conceded its position. Stated otherwise, the position taken by the parties on the issues in the case was not material to their agreement to release and discharge each other from any liability. The Order dated 30 April 1999 of the Pasig City RTC merely granted the Joint Motion to Dismiss Civil Case No. 66213, the very terms of which rendered it unnecessary for the said court to consider or rule upon the positions of the parties. Thus, nothing in the said Order of the Pasig City RTC precludes the government in the international arbitration proceedings before the ICC from adopting the position that PIATCO was financially disqualified to bid for the NAIA IPT III Project.

The Motion for Reconsideration of Baterina (G.R. No. 174166)

Baterina presents the following arguments in support of his Motion for Reconsideration:

The principles of *res judicata* and *stare decisis*, and the doctrine of the "law of the case," do not apply to Baterina because he was not a party to the previous cases; and because the issues raised here are not the same issues litigated in *Gingoyon*.^[28]

The issues advocated by Baterina, especially on the ownership of Terminal 3 and the propriety of paying just compensation to PIATCO, have not become moot and academic because these issues remain to be viable and justiciable controversies; a resolution on the merits of these issues will serve a useful purpose that will inure to the benefit of the Filipino people.^[29]

The issues advocated by Baterina remain to be viable and justiciable controversies because the pronouncements relating thereto in *AGan* and in *Gingoyon* were not a final adjudication on the merits.^[30]

Baterina was deprived of a fair opportunity to be heard because the Court may have unwittingly failed to explain the factual and legal reasons that led the Court to reject Baterina's arguments that the pronouncement in *Gingoyon* regarding PIATCO's ownership of Terminal 3 was not a final adjudication on the merits and may have been improvident.^[31]

A resolution on the merits of the ownership of Terminal 3 will serve a useful and practical purpose, and will inure to the benefit of the Filipino people, because it will determine the regime of compensation that must be applied to PIATCO.^[32]

Baterina then seeks from this Court the following:

PRAYER

WHEREFORE, premises considered, it is respectfully prayed that the Honorable Court RECONSIDER and SET ASIDE the Decision dated 18 April 2008, at least insofar as G.R. No. 174166 is concerned, and RENDER a new judgment as follows:

- DECLARE that: (i) Terminal 3 as a matter of law, is public property and thus not a proper object of eminent domain proceedings; and (ii) PIATCO, as a matter of law, is merely the builder of Terminal 3 and, as such, it may file a claim for recovery on quantum meruit with the Commission on Audit for determination of the amount thereof, if any.
- DIRECT the Regional Trial Court of Pasay City, Branch 117 to dismiss the expropriation case, Civil Case No. 04-0876-CFM.
- DECLARE that the Php3 Billion paid to PIATCO on 11 September 2006 (representing the proffered value of Terminal 3) as funds held in trust by PIATCO for the benefit of the Republic and subject to the outcome of the proceedings to determine recovery on quantum meruit due to PIATCO, if any.
- DIRECT the Solicitor General to disclose the evidence it has gathered on the corruption, bribery, fraud, bad faith, etc., to this Honorable Court and the Commission on Audit, and to DECLARE such evidence to be admissible in any proceeding for the determination of any compensation due to PIATCO, if any.
- In the alternative, to:
 - SET ASIDE the expropriation court's Order dated 08 August 2006 denying Bateria's motion for intervention in the expropriation case, and
 - DIRECT the expropriation court to hear and resolve the issue of ownership of Terminal 3 consistent with the Honorable Court's holding in *Gingoyon* that "the interests of the movants-in-intervention may be duly litigated in proceedings which are extant before lower courts."
 - As another alternative, even should this Honorable Court not reconsider its Decision dated 18 April 2008, to declare that the expropriation court is empowered and is mandated, by both law and to protect the public interest and to ensure good governance, to consider evidence of PIATCO's illegal activities and unreasonable expenses and to accordingly adjust the amount of just compensation due to PIATCO.

Other reliefs, just and equitable in the premises, are likewise prayed for.[33]

Bateria's present Motion presents no new arguments for our consideration and only displays his obstinate refusal to acknowledge and respect our final and executory decisions in *Agan* and *Gingoyon*.

We stand firm on our pronouncement in our Decision dated 18 April 2008 that the entitlement of PIATCO to just and equitable consideration for its construction of NAIA IPT III and the propriety of the Republic's resort to expropriation proceedings were already recognized and upheld by this Court in *Agan* and *Gingoyon*. Undoubtedly, the Republic and PIATCO, the parties in Case No. 04-0876CFM, the expropriation case instituted by the Republic before the Pasay City RTC, are bound by *Agan* and *Gingoyon* by conclusiveness of judgment and law of the case.

However, as to Bateria, a second hard look at this case convinces us that the issue of whether he is bound by *Agan* and *Gingoyon* is not even material, given the fact that he has repeatedly failed to establish to the satisfaction of the courts his interest and legal standing to intervene in previous or pending judicial proceedings involving the NAIA IPT III Project.

Bateria's Motion for Intervention and Motion for Reconsideration-in-Intervention of the Decision in *Gingoyon* were denied by the Court, not only for having been belatedly filed, but also pursuant to the following significant observation:

In the case of Representative Bateria, he invokes his prerogative as legislator to curtail the disbursement without appropriation of public funds to compensate PIATCO, as well as that as a taxpayer, as the basis of his legal standing to intervene. However, it should be noted that the amount which the Court directed to be paid by

the Government to PIATCO was derived from the money deposited by the Manila International Airport Authority, an agency which enjoys corporate autonomy and possesses a legal personality separate and distinct from those of the National Government and agencies thereof whose budgets have to be approved by Congress.[34]

True, we also noted that the interests of the movants-in-intervention in Gingoyon, which included Baterina, "may be duly litigated in proceedings which are extant before the lower courts." [35] But such statement simply recognized Baterina's option to pursue his intervention in Case No. 04-0876CFM before the Pasay City RTC, and contained no absolute assurance to Baterina or categorical directive to the trial court that his intervention shall be allowed and given due course. The Pasay City RTC can still exercise its discretion in granting or denying Baterina's Motion for Intervention and in admitting or rejecting his Petition in Intervention.

In fact, in its exercise of said discretion, the Pasay City RTC issued an Order [36] dated 8 August 2006 denying Baterina's Motion for Intervention and refusing to admit his Petition in Intervention in Case No. 04-0876CFM, ratiocinating thus:

As regards Congressman Baterina, et.al., (sic) the Court finds that, as legislators and taxpayers, they have no legal interest to intervene in this case.

x x x x

There has been no showing up to this point that plaintiffs intend to use tax refunds in the course of their expropriation of NAIA IPT 3. In fact, the amount that plaintiffs initially deposited with the Land Bank of the Philippines for the purposes of this case comprised funds (sic) of plaintiff Manila International Authority (MIAA) (sic) and did not come from the collection of taxes. The reasoning behind the Supreme Court's denial of their motion to intervene in Republic vs. Gingoyon also applies here:

x x x x

More importantly, this Court itself will decide how much payment will be due from plaintiffs to defendant PIATCO, in accordance with law, since the determination of just compensation is a judicial function. The amount of just compensation is not for the plaintiffs or defendant PIATCO to decide. This, Congressman Baterina, Et (sic) al. could not possibly set up a petition against both plaintiffs and defendant for illegal disbursement of public funds when it is precisely the Court, not plaintiff or defendant, which will ensure that the determination and payment of just compensation to defendant PIATCO would be in compliance with Philippine laws.

There is, therefore, no room in this expropriation case for a taxpayer's intervention. Similarly, there is also no room in this expropriation case for the accommodation of a legislator's petition. Plaintiffs' exercise of the right of eminent domain does not infringe howsoever on legislative prerogatives, powers of (sic) privileges.

x x x x

The motion that private property may be taken without need for payment of just compensation, as espoused by Congressman Baterina, et al., is so foreign to Philippine Constitutional democracy that it has no place for consideration in an expropriation case. Congressman Baterina, et.al., (sic) also cannot rely on criminal charges filed against private individuals, not involving defendant PIATCO, to defeat the payment of just compensation for the taking of private property, which no less than the Philippine Constitution mandates. Those criminal cases are irrelevant to this expropriation.

Neither may Congressman Baterina, et al., rely on the Supreme Court's ruling in *Agan vs. PIATCO* (G.R. No. 155001, May 5, 2003) to establish legal standing here. *Agan vs. PIATCO* was an entirely different case, involving very different legal interests. It was not an expropriation case. Congressman Baterina, Et.al., (sic)

cannot use this expropriation case as a venue to belatedly ventilate arguments that they may forgotten to raise in *Agan vs. PIATCO*. That is not allowed, especially since Congressman Bateria, Et.al., (sic) has (sic) every opportunity to seek reconsideration of the Supreme Court's decision in *Agan vs. PIATCO*.

Furthermore, there is no basis under the Rules of Court or in jurisprudence for the allowance of a petition for prohibition being intermingled with a special civil action for expropriation.

Finally, the Court notes that Congressman Bateria et.al. (sic) never paid filing fees for their petition for prohibition in intervention. This Court, therefore, never obtained jurisdiction over their petition and never acquired jurisdiction to permit their intervention. As the Supreme Court clarified in *Serrano vs. Delica* (G.R. No. 136325, July 29, 2005). (sic) It is not simply the filing of the complaint or appropriate initiatory pleading, but the payment of the prescribed docket fees that vests a trial court with jurisdiction over the subject matter or nature of the action. [37]

There is no showing that Bateria filed a Motion for Reconsideration of the foregoing Order dated 8 August 2006 of the Pasay City RTC denying his Motion for Intervention; or that he appealed the said Order or challenged the same in a Petition for Certiorari before the higher courts.

Bateria's Petition for Certiorari and Prohibition (With Urgent Prayer for the Issuance of a Temporary Restraining Order and Writ of Preliminary Injunction), docketed as CA-G.R. No. 95539, was filed before the Court of Appeals on 6 August 2006. It questioned the issuance by the Pasay City RTC, allegedly in grave abuse of discretion, of the Orders dated 27 March 2006 and 15 June 2006 and Writ of Execution dated 27 March 2006, which directed the MIAA and Land Bank of the Philippines to already pay PIATCO the proffered value of the NAIA IPT III facilities, so that the government could take possession of the said infrastructures. Thus, the 8 August 2006 Order denying Bateria's Motion for Intervention was clearly not among the orders of the Pasay City RTC assailed in CA-G.R. No. 95539. Additionally, it was the issuance by the Court of Appeals of a Temporary Restraining Order (TRO) in CA-G.R. No. 95539 that gave rise to the Petition for Certiorari and Prohibition of the Republic before this Court, docketed as G.R. No. 174166. The Republic sought to enjoin the appellate court from implementing the said TRO and from proceeding with CA-G.R. No. 95539. None of the afore-described proceedings before the Court of Appeals or this Court involve the Pasay City RTC Order dated 8 August 2006.

Since Bateria failed to avail himself of any remedy from the denial of his Motion for Intervention in Case No. 04-0876CFM, the same has become final and executory as to him. Bateria, therefore, can no longer participate in the proceedings before the Pasay City RTC in Case No. 04-0876CFM, for he is already a stranger to said case. Having been barred from participating any further in Case No. 04-0876CFM before the Pasay City RTC, Bateria is attempting to have us rule on the merits of his Petition in Intervention (which was not admitted by the Pasay City RTC) by merely reiterating the contents thereof in his Comment on the Petition of the Republic in G.R. No. 174166. This is a blatant circumvention of the rules of procedure which we cannot countenance. In light of Bateria's failure to have the denial by the Pasay City RTC of his Motion for Intervention reversed, no court, not even this Court, can take cognizance of his Petition in Intervention, even if so cleverly presented as another pleading but with essentially the same prayer.

WHEREFORE, premises considered, the Motions for Reconsideration of our 18 April 2008 Decision filed by Asia's Emerging Dragon Corporation and Salacnib F. Bateria are hereby DENIED WITH FINALITY.

SO ORDERED.

Puno, C.J., Ynares-Santiago, Carpio Morales, Tinga, Leonardo-De Castro, and Brion, JJ., concur.
Quisumbing, and Peralta, J., join the dissent of J. Corona.
Carpio, and Nachura, J., no part

Austria-Martinez, J., certify that J. Martinez, concurred with J. Nazario. Corona, and Velasco, Jr., JJ., pls. see dissenting opinion.

[1] Rollo, G.R. No. 169914, Vol. II, pp. 302-429; rollo, G.R. No. 174166, Vol. IV, pp. 196-322.

[2] Rollo, G.R. No. 169914, Vol. II, pp. 512-515.

[3] Id. at 579-580.

[4] Decision, 450 Phil. 744 (2003); the Resolution on the Motion for Reconsideration, 465 Phil. 545 (2004).

[5] An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for other Purposes.

[6] The entire Rule 10 on Unsolicited Proposals.

[7] Rollo, G.R. No. 169914, Vol. II, pp. 24-25.

[8] Decision, Agan, Jr. v. Philippine International Air Terminals Co., Inc., supra note 4 at 794.

[9] Id.

[10] The Secretary of the Department of Transportation and Communications (DOTC) and the Chairman and Members of the Prequalification Bids and Awards Committee for the NAIA IPT III Project.

[11] Decision, G.R. No. 166429, 19 December 2005, 478 SCRA 474.

[12] An Act to Facilitate the Acquisition of Right-of-Way, Site or Location for National Government Infrastructure Projects and For Other Purposes.

[13]

<http://newsinfo.inquirer.net/breakingnews/metro/view/20080722-149917/UPDATE-3-Planes-start-flying-out-of-NAIA-3-for-1st-time;>
[http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080723-150120/After-6-years-NAIA-3-finally-opens.](http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080723-150120/After-6-years-NAIA-3-finally-opens)

[14] <http://www.bworldonline.com/BW080208/content.php?id=005>

[15] As mandated in the Resolution on the Motion for Reconsideration, Agan, Jr. v. Philippine International Air Terminals Co., Inc., supra note 4 at 603.

[16] Malaga v. Penachos, Jr., G.R. No. 86695, 3 September 1992, 213 SCRA 516, 526.

[17] Section 10.9 of the IRR obliges the original proponent to reformat and resubmit its proposal in accordance with the Terms of Reference (TOR) of the project.

[18] Section 10.12 of the IRR.

[19] Section 10.13 of the IRR.

[20] Supra note 15.

[21] Rollo, G.R. No. 169914, Vol. II, p. 332.

[22] Id. at 332-333.

[23] Id. at 337.

[24] Id. at 338.

[25] See *Katon v. Palanca*, G.R. No. 151149, 7 September 2004, 437 SCRA 565, 573.

[26] SEC. 2. In what courts applicable. - These Rules shall apply in all the courts, except as otherwise provided by the Supreme Court.

[27] *Rollo*, G.R. No. 169914, Vol. I, pp. 26-29.

[28] *Rollo*, G.R. No. 174166, Vol. IV, p. 327.

[29] Id. at 356.

[30] Id. at 358.

[31] Id. at 369.

[32] Id. at 376.

[33] Id. at 380-382.

[34] The Resolution on the Motion for Reconsideration, *Republic v. Gingoyon*, G.R. No. 166429, 1 February 2006, 481 SCRA 457, 471.

[35] Id.

[36] Penned by Acting Presiding Judge Jesus B. Mupas; *rollo*, G.R. No. 174166, Vol. I, pp. 371-377.

[37] Id. at 373-375.

DISSENTING OPINION

(on Justice Nazario's draft resolution of the Motion for Reconsideration)

CORONA, J.:

In my dissent to the April 18, 2008 decision in these cases, I dissented from the majority's narrow interpretation of Section 4-A of the BOT Law.[1] The majority insisted that only two rights are conceded to the original proponent of an unsolicited proposal: (1) the right to match the lowest or most advantageous proposal within 30 working days from notice thereof and (2) in the event that the original proponent is able to match the lowest or most advantageous proposal submitted, then it has the right to be awarded the project.[2] Thus, the original proponent is awarded the project only if it exercises its right to match the most advantageous proposal.

I maintain my position that the original proponent is entitled to the award of the project in at least three cases: (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. This is consistent not only with Article II, Section 20 of the Constitution:

"[the] State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives needed to investments"

but also the rationale behind Section 4-A of the BOT Law which is to protect the original proponent. This is also in accord with logic because, contrary to the majority's interpretation, it recognizes the very real possibility that no other competitive bid exists. It is illogical that an original proponent would have preferential rights when there are

other bidders but none if there are no other qualified bidders. The rationale for an original proponent's preferential rights under Section 4-A of the BOT Law is to protect and recognize said proponent's entrepreneurial spirit, its willingness to assume risks and incur costs in connection with a national government infrastructure project. This rationale does not depend on the submission of competitive bids. Consequently, the preferential rights of the original proponent exist whether or not there are competitive bids. As I stated:

The majority's reading of the law considerably waters down the rights accorded to an original proponent. In failing to consider a situation where either no competitive bid was submitted or a lower bid was submitted by an entity not qualified to bid, the rights of the original proponent are unduly subjected to the condition of the presence of competitive bids. To reiterate, the spirit of the provision is "to protect project proponents which have already incurred costs in the conceptual design and in the preparation of the proposal." Certainly, regardless of the presence of competitive bids, the original proponent incurs costs. As such, it deserves the protection which the law seeks to afford it. The law which seeks to encourage private sector participation should be interpreted in a way that would recognize, not emasculate, rights of private investors.[3]

More than logic, experience (which is the life of the law)[4] shows that investors, original proponents included, are encouraged to invest in a climate of broad rather than limited incentives. Reduced to its essence, business is all about reduction of costs, maximization of benefits and optimization of profits. The majority's restrictive interpretation of Section 4-A, however, fails to promote such kind of an investor-friendly business climate. Rather than breathing life into the law, the majority effectively emasculated Section 4-A and imprisoned its spirit in a bottle.

Worse, Section 4-A (as interpreted by the majority) is constitutionally infirm. It contradicts the equal protection clause as it made a suspect classification when it limited the application of Section 4-A to an original proponent whose proposal was challenged by competitive bids. I repeat: the rationale of Section 4-A is not conditioned on the presence of competitive bids. On this account, the majority's classification is not germane to the purpose of the law. Nor does the classification rest on substantial distinctions. An original proponent incurs costs in the conceptual design and in the preparation of the proposal whether its proposal is challenged by another bidder or not. Therefore, it deserves the protection of Section 4-A.

The majority declares that PIATCO's disqualification as a challenger did not mean that its financial proposal was also objectionable[5] and that, on the contrary, it was still the most advantageous proposal. Since AEDC failed to match such proposal, it could no longer assert its right to be awarded the project. This does not make sense. There can only be a valid competitive bid if there is a qualified competitive bidder. Since PIATCO was disqualified as a bidder, it follows that its bid also could not be considered. Consequently, there was no other valid proposal left standing aside from that of AEDC.

If we accept the reasoning of the majority, it means that an original proponent has no right to expect an award in case of a failure or absence of a qualified challenger even if its proposal has already been accepted. Furthermore, an original proponent must match even an invalid challenge because it is only in this way that an award can be expected. This reasoning is absolutely absurd. It nullifies the rights given by the BOT Law to the original proponent. Again, the law clearly does not confer rights on the proponent only if a challenge is made. Based on the wording and spirit of the BOT Law, AEDC had the right to legally expect that only a qualified bidder with a valid bid could defeat its originally accepted proposal. Without this pre-requisite, its right to match would actually work to its disadvantage if it had to match even an invalid proposal. This could not have been the intention of the law.

According to the majority, it would be a step backwards to return the project to the private sector considering the developments in NAIA IPT III.[6] I disagree. Under the BOT Law, it is AEDC which had and still has the right to the project. Not only is it a step in the right direction to recognize the clear legal rights of the private

sector, it is also imperative since the State encourages it to take part in national development.

I hope we do not close our eyes to the fact that, given its inherent inefficiencies and its crippling bureaucratic shortcomings, government should not be in business. NAIA Terminal III is a fully computerized, high-tech facility that needs not only quick, continuous funding but also an international expertise to run, operate and maintain. We have seen the humiliating downgrading of our rating by the U.S. Federal Aviation Administration to Category II. How can government operate it well?

I cannot also agree with the position of the majority that the petition of AEDC was filed beyond a reasonable time. This is premised on the fact that AEDC filed this petition 20 months after the promulgation of Agan. When the government chose to expropriate the structures built pursuant to the NAIA IPT III project, AEDC chose to first demand the award of the project from the former. When it became evident that the government was not willing to recognize AEDC's rights to the project, the latter did not delay in filing this petition. What it did was to exhaust administrative remedies and it should not be faulted for doing so.

The majority rigidly applied the doctrine of res judicata and ruled that the dismissal of Civil Case No. 66213 (Pasig Case) bars the instant petition of AEDC. This point has been sufficiently addressed in my dissenting opinion. There is no identity of causes of action between the two cases. The principal relief sought by AEDC in the Pasig case was to prevent the award of the project to PIATCO on the ground that the latter was not a qualified bidder. In this case, AEDC is seeking that the project be awarded to it as the unchallenged original proponent. More importantly, I reiterate my stance that, in view of the monumental importance of this case, the billions of pesos of investments involved and its implications to the whole nation and the Asean region, it would not be sound judicial policy to blindly apply the technical doctrine of res judicata.

Accordingly, I maintain my position and I respectfully vote to GRANT petitioner Asia's Emerging Dragon Corporation's motion for reconsideration.

[1] Republic Act No. 6957, amended by RA 7718.[2] 18 April 2008, 552 SCRA 59, 91.[3] Id., Dissenting Opinion, pp. 156-157.[4] Holmes, Oliver Wendell, The Common Law, Little, Brown & Co., 1881, p. 1. See also Estrada v. Escritor, 455 Phil. 411, 583 (2003), citing Justice Holmes.

[5] Resolution, pp. 11-12.

[6] Id., p. 14.

DISSENTING OPINION

VELASCO, JR., J.:

I concur with the reasons advanced by Justice Corona in his dissent on why the Motion for Reconsideration of the Decision dated April 18, 2008 should be granted. I, however, would like to elaborate more on the grounds already provided.

A summary of the pertinent facts is as follows:

In 1993, six business leaders consisting of John Gokongwei, Andrew Gotianun, Henry Sy, Sr., Lucio Tan, George Ty and Alfonso Yuchengco met with then President Fidel V. Ramos to explore the possibility of investing in the construction and operation of a new international airport terminal. To signify their commitment to pursue the project, they formed the Asia's Emerging Dragon Corporation (AEDC).

Consequently, on October 5, 1994, AEDC submitted an unsolicited proposal to the Government through the Department of Transportation and Communication (DOTC) and the Manila International Airport Authority (MIAA) for the development of the Ninoy Aquino International Airport International Passenger Terminal III (NAIA IPT III) under a build-operate-transfer arrangement pursuant to Republic Act No. 6957, as amended by Republic Act No. 7718 (BOT Law).[1]

The unsolicited proposal submitted by AEDC was endorsed by DOTC to the National Economic and Development Authority (NEDA) on March 27, 1995. A revised proposal, however, was forwarded by DOTC to NEDA on December 13, 1995. The NEDA-Investment Coordinating Council (NEDA-ICC) Technical Board then favorably endorsed the project to the ICC-Cabinet Committee on January 5, 1996. Subsequently, the ICC-Cabinet Committee approved the same on January 19, 1996. Then on February 13, 1996, the NEDA Board passed Resolution No. 2, which approved the NAIA IPT Project as proposed by AEDC.

Upon the approval of the project, DOTC and AEDC then entered into a Memorandum of Understanding on February 26, 1996 (DOTC-AEDC MOU).

On June 7, 14, and 21, 1996, the DOTC and MIAA caused the publication in two daily newspapers of an invitation for competitive or comparative proposals on AEDC's unsolicited proposal, in accordance with Section 4-A of the BOT Law.

As a result of the invitation to bid, the consortium composed of People's Air Cargo and Warehousing Co., Inc. (Paircargo), Phil. Air and Grounds Services, Inc. (PAGS) and Security Bank Corporation (Security Bank) (collectively, Paircargo Consortium) submitted their competitive proposal to the Prequalification Bids and Awards Committee (PBAC) on September 20, 1996.

Both AEDC and Paircargo Consortium offered to build the NAIA IPT III for at least USD 350 million at no cost to the government and to pay the government: 5% share in gross revenues for the first five years of operation, 7.5% share in gross revenues for the next ten years of operation, and 10% share in gross revenues for the last 10 years of operation, in accordance with the Bid Documents. In addition to the foregoing, AEDC, however, offered to pay the government a total of PhP 135 million as guaranteed payment for 27 years while Paircargo Consortium offered to pay the government a total of PhP 17.75 billion for the same period.

Thus, the PBAC formally informed AEDC that it accepted the price proposal submitted by the Paircargo Consortium, and gave AEDC 30 working days within which to match the said bid; otherwise, the project would be awarded to Paircargo Consortium. AEDC, however, failed to match the bid and expressed certain objections as to the prequalification of Paircargo Consortium.

On February 27, 1997, Paircargo Consortium incorporated into Philippine International Airport Terminals Co., Inc. (PIATCO).

Subsequently, AEDC protested the alleged undue preference given to PIATCO and reiterated its previously expressed objections. Accordingly, on April 16, 1997, AEDC filed with the Regional Trial Court in Pasig City a Petition for Declaration of Nullity of the Proceedings, Mandamus and Injunction against the Secretary of the DOTC, the Chairman of the PBAC, and the voting members of the PBAC and Pantaleon D. Alvarez, in his capacity as Chairperson of the PBAC Technical Committee.

Yet, on July 9, 1997, the DOTC issued the notice of award for the project to PIATCO. Several agreements were then entered into between the Government, through DOTC, in furtherance of the project, namely: (1) the Concession Agreement for the Build-Operate-and-Transfer Arrangement of the Ninoy Aquino International Airport Passenger Terminal III (1997 Concession Agreement); (2) the Amended and Restated Concession

Agreement (ARCA); (3) the First Supplement to the ARCA; (4) the Second Supplement to the ARCA; and (5) the Third Supplement to the ARCA.

As a result of these agreements, several petitions were filed before the Court assailing the validity of the agreements.

In deciding the legality of the agreements, this Court ruled in *Agan, Jr. v. Philippine International Air Terminals Co., Inc.* that:

In sum, this Court rules that in view of the absence of the requisite financial capacity of the Paircargo Consortium, predecessor of respondent PIATCO, the award by the PBAC of the contract of construction, operation and maintenance of the NAIA IPT III is null and void. Further, considering that the 1997 Concession Agreement contains material and substantial amendments, which amendments had the effect of converting the 1997 Concession Agreement into an entirely different agreement from the contract bidden upon, the 1997 Concession Agreement is similarly null and void for being contrary to public policy. The provisions under Sections 4.04(b) and (c) in relation to Section 1.06 of the 1997 Concession Agreement and Section 4.04(c) in relation to Section 1.06 of the ARCA, which constitute a direct government guarantee expressly prohibited by, among others, the BOT Law and its Implementing Rules and Regulations are also null and void. The Supplements, being accessory contracts to the ARCA, are likewise null and void.[2]

Further, in a Resolution[3] dated January 21, 2004, the Court denied with finality the Motions for Reconsideration of its May 5, 2003 Decision in *Agan* filed by therein respondents PIATCO and Congressman Paras, et al., and respondents-intervenors.[4] Notably, the Court declared in the same Resolution that:

This Court, however, is not unmindful of the reality that the structures comprising the NAIA IPT III facility are almost complete and that funds have been spent by PIATCO in their construction. For the government to take over the said facility, it has to compensate respondent PIATCO as builder of the said structures. The compensation must be just and in accordance with law and equity for the government can not unjustly enrich itself at the expense of PIATCO and its investors.[5]

Meanwhile, in a letter to respondent DOTC dated March 14, 2005, AEDC offered to immediately operate the NAIA IPT III project.[6] Yet, DOTC did not respond. Thus, AEDC sent another letter dated September 1, 2005, demanding the immediate implementation of the DOTC-AEDC MOU. Again, DOTC did not reply. It was only on September 21, 2005 that DOTC replied, after AEDC sent a third letter, saying that AEDC had no basis in law to claim a vested and perfected legal right to operate NAIA IPT III and that the Government had no obligation to recognize AEDC's right to operate the terminal.[7]

Therefore, on October 20, 2005, AEDC filed the Petition for Mandamus and Prohibition (with Application for Temporary Restraining Order). This Court, however, denied AEDC's petition in its Decision rendered on April 18, 2008. AEDC now comes before us praying for a motion for reconsideration of the decision. AEDC prays that this Court: (1) direct 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; (2) direct 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) direct 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 3 for an effective valuation and determination of the work to be conducted thereon; (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 3 Project;

and (5) in the alternative, directing public respondents to effect a new invitation for comparative proposals for the NAIA 3 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.[8]

A careful examination of the law applicable to this case will reveal that the motion for reconsideration should be granted.

AEDC has a Legal Right to the NAIA IPT III Project
as the Original Proponent

The proposal submitted by AEDC for the NAIA IPT III is called an "unsolicited proposal." Such proposal is governed by Section 4-A of the BOT Law:

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 that price within thirty [30] working days.

The Implementing Rules and Regulations (IRR) of the BOT Law further expound on unsolicited proposals:

Sec. 10.1. Requisites for Unsolicited Proposals. - Any Agency/LGU may accept unsolicited proposals on a negotiated basis provided that all the following conditions are met:

- the project involves a new concept or technology and/or is not part of the list of priority projects;
- no direct government guarantee, subsidy or equity is required; and
- the Agency/LGU concerned 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. In the event that another project proponent submits a price proposal lower than that submitted by the original proponent, the latter shall have the right to match said price proposal within thirty (30) working days. Should the original project proponent fail to match the lower price proposal submitted within the specified period, the contract shall be awarded to the tenderer of the lowest price. On the other hand, if the original project proponent matches the submitted lowest price within the specified period, he shall immediately be awarded the project.

x x x x

Sec. 10.6. Evaluation of Unsolicited Proposals. - The Agency/LGU is tasked with the initial evaluation of the proposal. The Agency/LGU shall: 1) appraise the merits of the project; 2) evaluate the qualification of the proponent; and 3) assess the appropriateness of the contractual arrangement and reasonableness of the risk allocation. The Agency/LGU is given sixty (60) days to evaluate the proposal from the date of submission of the complete proposal. Within this 60-day period the Agency/LGU, shall advise the proponent in writing whether it accepts or rejects the proposal. Acceptance means commitment of the Agency/LGU to pursue the project and recognition of the proponent as the "original proponent". At this point, the Agency/LGU will no longer entertain other similar proposals until the solicitation of comparative proposals. The implementation of the project, however, is still contingent primarily on the approval of the appropriate approving authorities consistent with Section 2.7 of these IRR, the agreement between the original proponent and the Agency/LGU of the contract terms, and the approval of the contract by the ICC or Local Sanggunian.

x x x x

Sec. 10.9. Negotiation With the Original Proponent. - Immediately after ICC/Local Sanggunian's clearance of the project, the Agency/LGU shall proceed with the in-depth negotiation of the project scope, implementation arrangements and concession agreement, all of which will be used in the Terms of Reference for the solicitation of comparative proposals. The Agency/LGU and the proponent are given ninety (90) days upon receipt of ICC's approval of the project to conclude negotiations. The Agency/LGU and the original proponent shall negotiate in good faith. However should there be unresolvable differences during the negotiations, the Agency/LGU shall have the option to reject the proposal and bid out the project. On the other hand, if the negotiation is successfully concluded, the original proponent shall then be required to reformat and resubmit its proposal in accordance with the requirements of the Terms of Reference to facilitate comparison with the comparative proposals. The Agency/LGU shall validate the reformatted proposal if it meets the requirements of the TOR prior to the issuance of the invitation for comparative proposals.

Clearly, the BOT Law and its IRR confer legal rights to the original proponent of an unsolicited proposal. According to Sec. 10.6 of the IRR, once an "unsolicited proposal" is accepted, the proponent is then recognized as the "original proponent." Consequently, the Government becomes obligated to pursue the project with the "original proponent" unless a challenger in a process known as the "Swiss Challenge" offers a better competitive or comparative proposal, and the "original proponent" is unable to match the better offer.

Thus, on February 13, 1996, when the Government accepted the unsolicited proposal of AEDC through the DOTC, favorably endorsed by the NEDA-ICC and approved it through ICC-Cabinet Committee and NEDA Board, AEDC became the "recognized original proponent" of the NAIA IPT III Project.

As a result of such recognition, DOTC became obligated to pursue the NAIA IPT III project with AEDC pursuant to Sec. 10.6 of the IRR of the BOT Law, subject only to a better offer being received and accepted by the Government in a "Swiss Challenge" process. Moreover, the Government lost its option to reject the proposal and bid out the project after the successful conclusion of the negotiation process as described in Sec. 10.9 of the IRR of the BOT Law.

Undoubtedly, as the recognized original proponent of the unsolicited proposal, AEDC has the legal rights afforded to him by the BOT Law and its IRR. Notably, this Court stated in *Agan* that the rights or privileges to the original proponent of an unsolicited proposal for an infrastructure project are meant to encourage private sector initiative in conceptualizing infrastructure projects that would benefit the public.[9] Further, acceptance by the proper authorities of a bid in accordance with the specifications converts the offer into a binding contract,[10] even though a formal bidder's contract has not been executed.[11] It cannot be denied, therefore, that AEDC, as an original proponent, has legal rights under the BOT Law, as well as its IRR.

Further, in a Decision rendered by the United States District Court,[12] a disappointed bidder has a constitutionally protected property interest if applicable state law acknowledges such.[13] It further states that to establish a property interest, the plaintiff must have a legitimate claim of entitlement as determined by reference to state law.[14] Property interests do not only emanate from the Constitution, but also from state or federal statutory schemes, which create legitimate claims of entitlement to the benefits which they confer.[15]

Moreover, a majority of the courts in the United States follows the rule that such protected property interest is entitled to the non-arbitrary exercise by the city of its discretion in making the award and that a deprivation of the protected property interest without due process is an actionable wrong.[16]

In the present case, the BOT Law and its IRR acknowledge the rights of the original proponent in an unsolicited proposal. Thus, it rightfully follows that AEDC, as the original proponent, has a protected property interest in the

NAIA IPT III proposal as the law creates this protected property interest in the BOT Law.

Furthermore, the intent of Section 4-A of the BOT Law is the protection of the original proponent. In Senator Gloria Macapagal-Arroyo's[17] sponsorship speech, she explained the object of the amendment to Section 4-A of the BOT Law, to wit:

The object of the amendment is to protect proponents which may have already incurred costs in the conceptual design and in the preparation of the proposal, and which may have adopted an imaginative method of construction or innovative concept for the proposal.[18]

Certainly, it cannot be emphasized enough that this Court should accord AEDC, as the recognized original proponent, its protected rights under the BOT Law.

Disqualification of PIATCO Makes AEDC the Sole Bidder

A "Swiss Challenge" occurs after the Agency or Local Government Unit (LGU) concerned has invited, by publication in a newspaper of general circulation, comparative or competitive proposal and another project proponent submits a price proposal lower than that submitted by the original proponent. The original proponent shall then have the right to match the said price proposal within 30 days. If the original project proponent fails to match the lower price proposal submitted, the contract shall be awarded to the tenderer of the lowest price. If, on the other hand, the original project proponent matches the submitted lowest price, the original proponent shall immediately be awarded the project.[19]

Hence, should the "Swiss Challenge" process fail to produce a better offer, the right to the award belongs to the original proponent.

As this Court ruled in *Agan*, the "Swiss Challenge" conducted by DOTC failed to produce a better offer from a qualified challenger because PIATCO was found to be ineligible and disqualified by this Court and the award to PIATCO and all agreements it entered into with DOTC and MIAA were declared null and void.

Thus, since there was no qualified bidder during the "Swiss Challenge," it follows, therefore, that no other proposals could have been considered by respondents and the original proponent remain unchallenged.

In other words, since there was no qualified challenger to AEDC's unsolicited proposal, the obligation to match the better offer never arose. PIATCO's disqualification had the effect of making AEDC as the sole and unchallenged bidder for the NAIA IPT III project. As a result, AEDC should be awarded NAIA IPT III Project.

Further, it is helpful to look at the legislative intent of the BOT Law as clarified by former Congressman Renato Diaz of the 2nd District of Nueva Ecija when he stated that the original proponent should be automatically awarded the project in case nobody presents a valid challenge within the period prescribed by law.[20] Such is the situation in the case at hand.

Furthermore, it could also be argued that failure to award the project to AEDC would result in a denial of equal protection. In *L&H Sanitation, Inc. v. Lake City Sanitation, Inc.*, [21] the United States District Court stated that there is a denial of equal protection as to the unsuccessful bidder when there is: (1) a regulated bidding procedure, (2) material compliance with the procedure by the unsuccessful bidder, and (3) material and significant noncompliance with the procedure by the successful bidder.[22]

In the present instance, PIATCO failed to comply with the requirements set by DOTC and yet, was still awarded the project. This results in a denial of equal protection to AEDC, who complied with all the requirements. As a matter of fact, the appropriate government bodies already approved AEDC's unsolicited proposal. Further, the execution of the DOTC-AEDC Memorandum clearly shows that AEDC already submitted all requirements.

Evidently, AEDC, as the unchallenged and recognized original proponent, has the right to be awarded the NAIA IPT III Project. This Court should not refuse its duty to uphold the intent and meaning of the BOT Law when it seeks to protect the original proponent in situations such as these.

Policy of the Government to Promote Private Business

It has been the long-standing policy of the government to promote investments in private businesses and veer away from engaging in business that would otherwise be best served by private interests. Indeed, this policy is declared in the Constitution that "[t]he State recognized the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments." [23]

This policy of the State has been consistently put into operation in several legislations, such as in Republic Act No. 9168. [24]

Also, in Section 1 of Proclamation No. 50, [25] it is declared that it is the "policy of the State to promote privatization through an orderly, coordinated and efficient program for the prompt disposition of the large number of non-performing assets of the government financial institutions, and certain government-owned or controlled corporations which have been found unnecessary or inappropriate for the government sector to remain." It should be noted, however, that while Proclamation No. 50 mandates that non-performing assets should be promptly sold, it does not prohibit the disposal of other kinds of assets, whether performing, necessary or appropriate. [26]

Without a doubt, the State's policy of establishing the privatization program is to promote private businesses and not to engage in business itself.

More significantly, in the BOT Law, Section 1 provides:

It is the declared policy of the State to recognize the indispensable role of the private sector as the main engine for national growth and development and provide the most appropriate incentives to mobilize private resources for the purpose of financing the construction, operation and maintenance of infrastructure and development projects normally financed and undertaken by the Government. Such incentives, aside from financial incentives as provided by law, shall include providing a climate of minimum government regulations and procedures and specific government undertakings in support of the private sector. [27] (Emphasis supplied.)

Clearly, the Government's consistent policy on the promotion of the private sector cannot be denied. Thus, while the judiciary does not want to intrude in the actions of the executive department, it must be stressed that the law supports privatization and this should be upheld. The Government should not be engaged in business.

The NAIA IPT III Project is a BOT Project
that should be Awarded to AEDC

Undeniably, the NAIA IPT III Project stemmed from an unsolicited proposal and is, therefore, covered by the BOT Law. As such, the BOT Law still applies despite completion of the building of the project.

A BOT Project is divided into three stages: (1) build, (2) operate, and (3) transfer. Thus, even though the first stage has been completed, there remain two stages that still need execution. In this light, AEDC, as the original proponent of NAIA IPT III, can conclude the last two stages despite the completion of the first stage.

To recapitulate, AEDC has the legal right to the NAIA IPT III Project as the original proponent for lack of a qualified bidder. And to advance the policy of the State to promote the private sector, the operation and possession of the NAIA IPT III should be turned-over to AEDC. In this way, the Government would make use of the resources of the private sector in the financing, operation and maintenance of infrastructure and development projects which are necessary for national growth and development but which the government, unfortunately,

could not afford due to lack of funds.[28]

Likewise, prohibition is in order to prevent respondents from bidding out or awarding the operation of NAIA IPT III to third parties. This would result in the violation of the rights of AEDC.

However, should AEDC be awarded the NAIA IPT III Project, it is obligated to comply with the following:

- (1) to construct an underground passenger access terminal connecting terminals I, II, and III;[29]
- (2) complete the construction of NAIA IPT III;[30]
- (3) finance the additional investments necessary to put NAIA IPT III in operation;[31]
- (4) reimburse the government the initial payment of PhP 3,002,125,000.00 it made to PIATCO;[32]
- (5) pay the balance of the compensation due to PIATCO as the builder of NAIA IPT III; and
- (6) pay the obligations owing to the general contractors.[33]

Similarly, under the BOT Law, the government is also entitled to the fees and income it should receive from AEDC.

I, therefore, vote to GRANT petitioner Asia's Emerging Dragon Corporation's motion for reconsideration.

[1] An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes (1990).

[2] G.R. Nos. 155001, 155547 & 155661, May 5, 2003, 402 SCRA 612, 678-679.

[3] *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, G.R. Nos. 155001, 155547 & 155661, January 21, 2004, 420 SCRA 575.

[4] *Id.* at 580-581. Identified as employees of PIATCO, other workers of NAIA IPT III, and Nagkaisang Maralita ng Tanong Association, Inc. (NMTAI),

[5] *Id.* at 603.

[6] *Rollo* (G.R. No. 169914), p. 31.

[7] *Id.* at 32.

[8] *Id.* at 579-580.

[9] *Supra* note 2, at 667.

[10] *Harvey v. United States*, 105 US 671, 26 L.Ed. 1206 (1881).

[11] *Pennington v. Sumner*, 222 Iowa 1005, 270 NW 629, 109 ALR 355 (1936).

[12] *Metric Constructors, Inc. v. Gwinnet County, Georgia*, 729 F.Supp. 101 (1990).

[13] *Id.*

[14] *Id.*; See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

[15] *Board of Regents, supra*.

[16] *Kendrick v. City Council*, 516 F.Supp. 1134, 1138 (S.D. Ga. 1981). See also *Three Rivers Cablevision, Inc.*,

et al., v. City of Pittsburgh, et al., 502 F.Supp. 1118 (W.D. Pa. 1980); Teleprompter of Erie, Inc. v. City of Erie, 567 F.Supp. 1277 (W.D. Pa. 1983); Higgins, Inc. v. Florida Keys, 565 F.Supp. 126 (S.D. Fla. 1983); L&H Sanitation, Inc. v. Lake City Sanitation, Inc., 769 F.2d 517 (8th Cir. 1985); Kasom v. City of Sterling Heights, 600 F.Supp. 1555 (E.D. Mich. 1985).

[17] Now incumbent President of the Republic of the Philippines.

[18] January 25, 1994, Senate deliberations; rollo (G.R. No. 169914), p. 75.

[19] See Sec. 10.1(c) of the IRR of the BOT Law.

[20] Rollo (G.R. No. 169914), p. 46.

[21] Supra note 16.

[22] L&H Sanitation, Inc., supra note 16; citing Three Rivers Cablevision, Inc., supra note 16; Kendrick, supra note 16.

[23] CONSTITUTION, Art. II, Sec. 20.

[24] An Act to Provide Protection to New Plant Varieties, Establishing a National Plant Variety Protection Board and For Other Purposes (2002).

[25] Proclaiming and Launching a Program for the Expeditious Disposition and Privatization of Certain Government Corporations and/or the Assets Thereof, and Creating the Committee on Privatization and the Asset Privatization Trust (1986).

[26] Amado S. Bagatsing v. Committee on Privatization, G.R. No. 112399, July 14, 1995, 246 SCRA 334.

[27] Republic Act No. 6957 (1990), as amended by Republic Act No. 7718 (1994), Sec. 1.

[28] Agan, supra note 2, at 667.

[29] AEDC's Motion for Reconsideration of the Decision dated April 18, 2008, p. 36.

[30] Id.

[31] Id.

[32] Id.

[33] Id. These are the Takenaka and Asahikosan Corporations.

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