

**PHILCO AERO, INC., PETITIONER, VS. DEPARTMENT OF
TRANSPORTATION SECRETARY ARTHUR P. TUGADE, BASES
CONVERSION AND DEVELOPMENT AUTHORITY, VIVENCIO B. DIZON,
MEGAWIDE CONSTRUCTION ...**

G.R. No. 237486. July 03, 2019

Ponente: REYES, J. JR., J.

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REYES, J. JR., J.:

Before us is a Petition for Certiorari, Prohibition, and Mandamus with Prayer for the Issuance of a Writ of Preliminary Injunction and/or Temporary Restraining Order (TRO)[1] filed by Philco Aero, Inc. (petitioner).

The Clark International Airport Corporation (CIAC) which is authorized to operate and manage the Clark Aviation Complex, was created by virtue of Executive Order No. 192, Series of 1994 (E.O. No. 192).

Under E.O. No. 192, the CIAC shall be a wholly-owned subsidiary corporation of the Clark Development Corporation (CDC) and shall be formed in accordance with the Corporation Code and existing rules and regulations promulgated by the Securities and Exchange Commission (SEC).[2]

The CIAC shall be subject to the policies, rules and regulations promulgated by the Bases Conversion Development Authority (BCDA)/CDC.[3]

Sometime in 2008, CIAC declared its invitation to qualified entities to participate in the design, financing, construction, and operation of the Diosdado Macapagal International Airport (DMIA) Passenger Terminal 2 in the Clark Freeport Zone.[4]

In response, petitioner submitted to CIAC its expression of interest and unsolicited proposal.[5] Upon CIAC's acknowledgment of the receipt of such proposal, it advised the petitioner that it shall conduct detailed negotiations with it to determine petitioner's eligibility and to discuss the technical and financial aspects of its unsolicited proposal.[6]

Pursuant to such advice, CIAC and petitioner underwent a series of negotiations. On July 31, 2010, the CIAC signified its approval of the advancement of the negotiations to Stage Two, as defined in the Annex C of the 2008 Joint Ventures Guidelines issued by the National Economic and Development Authority (NEDA).[7]

Negotiations continued until July 19, 2011 when CIAC informed petitioner, in a letter, of its intent to cease in participating in any negotiation.[8]

Petitioner sought the reconsideration of the same, which was denied by the CIAC.

The project was eventually awarded to Megawide Construction Corp., and GMR Infrastructure Ltd. (collectively as Megawide-GMR) as joint venturers by the Department of Transportation (DOTr) and BCDA.[9]

Aggrieved, petitioner filed a Petition for Certiorari, Prohibition, and Mandamus with a Prayer for the Issuance of a

Writ of Preliminary Injunction and/or TRO before this Court.

Petitioner contends that said award to Megawide-GMR was illegal and violative of its right to due process because its unsolicited proposal for the engineering, procurement, and construction of the DMIA Passenger Terminal 2 was duly approved and already partially made the subject of a series of negotiations.

The Issues

I.

WHETHER OR NOT THE AWARD OF THE CONTRACT TO MEGAWIDE-GMR WAS ILLEGAL; and

II.

WHETHER OR NOT SAID AWARD VIOLATES PETITIONER'S RIGHT TO DUE PROCESS.

The Court's Ruling

We dismiss the petition.

Preliminarily, Section 3 of Republic Act (R.A.) No. 8975[10] expressly vests jurisdiction upon the Supreme Court to issue any TRO, preliminary injunction or preliminary mandatory injunction against the government, or any of its subdivisions, officials or any person or entity, whether public or private acting under the government's direction, to restrain, prohibit or compel the following acts: (a) acquisition, clearance and development of the right-of-way and/or site or location of any national government project; (b) bidding or awarding of contract/project of the national government as defined under Section 2 hereof; (c) commencement prosecution, execution, implementation, [and] operation of any such contract or project; (d) termination or rescission of any such contract/project; and (e) the undertaking or authorization of any other lawful activity necessary for such contract/project.

Hence, direct recourse to this Court is in order.

Substantively, the applicable rule is the Guidelines and Procedures for Entering into Joint Venture Agreements between Government and Private Entities, particularly Annex C. Annex C states in detail the stages in negotiated Joint Venture Agreements (Guidelines), to wit:

Stage One – A private sector entity submits an unsolicited proposal to the Government Entity, or the Government Entity seeks out a JV partner after failed competition for a JV activity deemed manifestly advantageous to Government. The private sector entity submits a proposal to the Government Entity for a projected JV activity/undertaking. The Government Entity, through its JV-SC, is tasked with the initial evaluation of the proposal. Upon completion of the initial evaluation, the Head of the Government Entity, upon recommendation of the JV-SC, shall either issue an acceptance or non-acceptance of the proposal. The Government Entity concerned shall act on the proposal within ten (10) working days upon submission of complete documents by the private sector entity. An acceptance shall not bind the Government Entity to enter into the JV activity, but, shall mean that authorization is given to proceed with detailed negotiations on the terms and conditions of the JV activity. In case of non-acceptance, the private sector entity shall be informed of the reasons/grounds for non-acceptance.

Stage Two – The parties negotiate and agree on the terms and conditions of the JV activity. The following rules shall be adhered to in the conduct of detailed negotiations and the preparation of the proposal documents in case of successful negotiations:

- Both parties shall negotiate on, among others, the purpose, terms and conditions, scope, as well as all legal, technical, and financial aspects of the JV activity.

- The JV-SC shall determine the eligibility of the private sector entity to enter into the JV activity in accordance with Sec. IV.2 (Eligibility Requirements) under Annex A hereof.

- Negotiations shall comply with the process, requirements and conditions as stipulated under Sections 6 (General Guidelines) and 7 (Process for Entering into JV Agreements) of the Guidelines. Once negotiations are successful, the Head of the Government Entity and the authorized representative of the private sector entity shall issue a signed certification that an agreement has been reached by both parties. Said certification shall also state that the Government Entity has found the private sector participant eligible to enter into the proposed JV activity and shall commence the activities for the solicitation for comparative proposals. However, should negotiations not result to an agreement acceptable to both parties, the Government Entity shall have the option to reject the proposal by informing the private sector participant in writing stating the grounds for rejection and thereafter may accept a new proposal from private sector participants, or decide to pursue the proposed activity through alternative routes other than JV. The parties shall complete the Stage Two process within thirty (30) calendar days upon acceptance of the proposal under Stage One above.

- After an agreement is reached, the contract documents, including the selection documents for the competitive challenge are prepared.

Stage Three – Once the negotiations have been successfully completed, the JV activity shall be subjected to a competitive challenge, as follows:

- The Government Entity shall prepare the tender documents pursuant to Section II (Selection/Tender Documents) of Annex A hereof. The eligibility criteria used in determining the eligibility of the private sector entity shall be the same as those stated in the tender documents. Proprietary information shall, however, be respected and protected, and treated with confidentiality. As such, it shall not form part of the tender and related documents. The Head of the Government Entity shall approve all tender documents including the draft contract before the publication of the invitation for comparative proposals.

- Within seven (7) calendar days from the issuance of the Certification of a successful negotiation referred to in Stage Two above, the JV-SC shall publish the invitation for comparative proposals in accordance with Section III.2. (Publication of Invitation to Apply for Eligibility and to Submit Proposal) under Annex A hereof.

- The private sector entity shall post the proposal security at the date of the first day of the publication of the invitation for comparative proposals in the amount and form stated in the tender documents.

- The procedure for the determination of eligibility of comparative proponents/private sector participants, issuance of supplemental competitive selection bulletins and pre-selection conferences, submission and receipt of proposals, opening and evaluation of proposals shall follow the procedure stipulated under Annex A hereof. In the evaluation of proposals, the best offer shall be determined to include the original proposal of the private sector entity. If the Government Entity determines that an offer made by a comparative private sector participant other than the original proponent is superior or more advantageous to the government than the original proposal, the private sector entity who submitted the original proposal shall be given the right to match such superior or more advantageous offer within thirty (30) calendar days from receipt of notification from the Government Entity of the results of the competitive selection. Should no matching offer be received within the stated period, the JV activity shall be awarded to the comparative private sector participant submitting the most advantageous proposal. If a matching offer is received within the prescribed period, the JV activity shall be awarded to the original proponent. If no comparative proposal is received by the Government Entity, the JV activity shall be immediately awarded to the original private sector proponent.

- Within seven (7) calendar days from the date of completion of the Competitive Challenge, the JV-SC shall submit the recommendation of award to the Head of the Government Entity. Succeeding activities shall be in accordance with Sections VIII. (Award and Approval of Contract) and X (Final Approval) of Annex A hereof.[11]

In sum, Stage One refers to the submission of the unsolicited proposal by the proponent, which is subject to the initial evaluation of the government. Once the proposal is accepted, negotiations may then proceed. Stage Two refers to the negotiation phase, the determination of eligibility of the proponent, and the preparation of documents for competitive challenge should an agreement be reached. Lastly, Stage Three pertains to the completion of the negotiation phase and the completed competitive challenge.

The case of *SM Land, Inc. v. Bases Conversion and Development Authority*[12] defines that only in two instances may termination of the negotiations be allowed: at Stage One, prior to the acceptance of the unsolicited proposal; and at Stage Two, when detailed negotiations prove unsuccessful, to wit:

A review of the outlined three-stage framework reveals that there are only two occasions where pre-termination of the Swiss Challenge process is allowed: at Stage One, prior to acceptance of the unsolicited proposal; and at Stage Two, should the detailed negotiations prove unsuccessful. In the Third Stage, the BCDA can no longer withdraw with impunity from conducting the Competitive Challenge as it became ministerial for the agency to commence and complete the same. x x x

Hence, whether petitioner's right to due process was violated in view of the award of the contract to Megawide-GMR depends on which stage was successfully reached by the parties.

The records of the case reveal that petitioner offered an unsolicited proposal to the Government; hence, Stage One was reached. Stage Two came into play when a series of negotiations as to the terms and conditions of the proposal ensued. However, the Government opted to withdraw from negotiating with petitioner at this point, evidenced by a letter which categorically declared the termination of the negotiations and the reasons therefor, viz.:

In view of the new DMIA Land Use Plan and current policy pronouncement of the National Government to conduct public bidding for the Public-Private Partnership (PPP) projects, please be informed that the CIAC Board of Directors has directed the Joint Venture Selection Committee (JVSC) to terminate the joint venture negotiation process under the NEDA JV Guidelines.[13]

Such withdrawal is completely acceptable under the Guidelines, which reads:

Stage Two – The parties negotiate and agree on the terms and conditions of the JV activity. The following rules shall be adhered to in the conduct of detailed negotiations and the preparation of the proposal documents in case of a successful negotiations:

x x x x

x x x However, should negotiations not result to an agreement acceptable to both parties, the Government Entity shall have the option to reject the proposal by informing the private sector participant in writing stating the grounds for rejection and thereafter may accept a new proposal from private sector participants, or decide to pursue the proposed activity through alternative routes other than JV. The parties shall complete the Stage Two process within thirty (30) calendar days upon acceptance of the proposal under Stage One above. (Emphasis supplied)

Moreover, in a Letter[14] dated January 18, 2018, the BCDA and the DOTr apprised petitioner that its proposal was rejected because of non-feasibility, to wit:

x x x x

In fact, may we point out that the CIAC did not whimsically reject your proposal. Based on CIAC's evaluation, Philco Aero's proposal was found to be non-feasible with the change in plans and requirements of the airlines as well as the change in government policy to bid our PPP projects. The truth of the matter is, Philco Aero's

unsolicited proposal was rejected based on its own shortcomings and weaknesses, x x x (Emphasis in the original)

Contrary to the stance of the petitioner, the SM Land, Inc. case is inapplicable because of difference in factual milieu. In the former, negotiations were proven successful; hence, it becomes mandatory for the competitive challenge to proceed,[15] while in the latter, negotiations fell through and there was no agreement reached between the parties. Thus, petitioner cannot insist that its right to due process was violated when the contract was awarded to Megawide-GMR. It must be emphasized that petitioner did not acquire a right to a completed competitive challenge under Stage Three of the Guidelines.

With these, there was no showing that the CIAC was arbitrary in discontinuing its negotiations with petitioner for the former complied with the requirements under the law for its termination. Thus, CIAC cannot be faulted from withdrawing from its negotiations with petitioner. More so when it can legally do the same under the rules.

Anent the application for the issuance of an injunctive writ, we decline to grant the same.

A writ of preliminary injunction and a TRO are injunctive reliefs and preservative remedies for the protection of substantive rights and interests. Essential to granting the injunctive relief is the existence of an urgent necessity for the writ in order to prevent serious damage.[16]

It is granted only to protect actual and existing substantial rights. Without actual and existing rights on the part of the applicant, and in the absence of facts bringing the matter within the conditions for its issuance, the ancillary writ must be struck down for being issued in grave abuse of discretion.[17]

Based on the discussion above, there was no actual and existing right on the part of petitioner to seek the relief prayed for. To stress, petitioner did not acquire any right when the negotiations with the CIAC fell through. In the absence of the same, the issuance of an injunctive writ is improper.

WHEREFORE, premises considered, the instant petition is hereby DISMISSED.

SO ORDERED.

Carpio, (Chairperson), Perlas-Bernabe, Caguioa and Lazaro-Javier, JJ., concur.

[*] Also referred to as "Philco Aero Consortium" in some parts of the rollo.

[1] Rollo, pp. 3-21.

[2] Executive Order No. 192 (1994), Sec. 1.

[3] Id.

[4] Rollo, p. 4.

[5] Id. at 22-50.

[6] Id. at 52.

[7] Id. at 149.

[8] Id.

[9] Id. at 150.

[10]AN ACT TO ENSURE THE EXPEDITIOUS IMPLEMENTATION AND COMPLETION OF GOVERNMENT INFRASTRUCTURE PROJECTS BY PROHIBITING LOWER COURTS FROM ISSUING TEMPORARY RESTRAINING ORDERS. PRELIMINARY INJUNCTIONS OR PRELIMINARY MANDATORY INJUNCTIONS, PROVIDING PENALTIES FOR VIOLATIONS THEREOF, AND FOR OTHER PURPOSES.

[11] Guidelines and Procedures for Entering into Joint Venture Agreements Between Government and Private Entities < www.neda.gov.ph/references/Guidelines.pdf > (visited June 28, 2019).

[12] 741 Phil. 269, 305 (2014).

[13] Rollo, p. 170.

[14] Id. at 84-86.

[15] Id.

[16] Australian Professional Realty Inc, v. Municipality of Padre Garcia, Batangas, 684 Phil. 283, 289 (2012).

[17] Spouses Lim v. Court of Appeals, 763 Phil. 328, 337 (2015).

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