

## THIRD DIVISION

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

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

[G.R. NO. 214756]

**BUSINESS FOR PROGRESS MOVEMENT AS REPRESENTED BY MEDARDO C. DEACOSTA, JR., PETITIONER, VS. DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS, GMR-MEGAWIDE CEBU AIRPORT CORPORATION, RESPONDENTS.**

### D E C I S I O N

**VILLARAMA, JR., J.:**

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

#### **The Facts**

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

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

<sup>[2]</sup> PBAC sets as criteria the following: (1) legal qualification; (2) technical

qualification; and (3) financial capability requirements.<sup>[3]</sup> On December 27, 2012, the DOTC and Mactan-Cebu International Airport Authority (MCIAA) issued the Instructions to Prospective Bidders (ITPB).<sup>[4]</sup>

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

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

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

1	GMR-Megawide Consortium	Php 14,404,570,002.00
2	Filinvest-Changi Airport Consortium	Php 13,999,999,999.99
3	Premier Airport Group	Php 12,500,088,888.88
4	MPIC-JGS Airport Holdings, Inc.	Php 11,230,000.000.00
5	AAA Airport Partners	Php 11,088,888,889.00
6	San Miguel & Incheon Airport	Php 9,050,000,000.00
7	First Philippine Airports	Php 4,700,000,000.00 <sup>[7]</sup>

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

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

Development Experience	
* Delhi International Airport (P) Limited (DIAL)	Affiliate of GMR Infrastructure Limited
* GMR Hyderabad	Affiliate of GMR Infrastructure

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

x x x x

**WHEREAS**, upon completion of verification of the information, representations and statements made in its Qualification Documents, Bid Letter, Technical Proposal and Financial Proposal and recommendation of the TWG [Technical Working Group] under its report dated 2 April 2014, (i) the PBAC has not found any deficiency in the Financial Proposal, (ii) nor has any misrepresentation been found in the information, representations and statements made by the GMR Infrastructure & Megawide Consortium in its Qualification Documents, Technical Proposal, Financial Proposal, and (iii) nor has the Consortium been found to have engaged in any Corrupt Practice, Fraud, Collusion, Coercion, Undesirable and Restrictive Practice, Conflict of Interest, or violated the Lock-up Rules. A copy of the TWG Report dated 2 April 2014 is attached as Annex "DD";

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

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

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

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

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

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

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

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

### **Petitioners' Arguments**

#### **G.R. No. 211737**

The following grounds are set forth in the petition:

#### **I**

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

#### **II**

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

#### **III**

PUBLIC RESPONDENTS ILLEGALLY FAILED TO AND LATER REFUSED TO

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

#### IV

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

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

Another ground of disqualification raised by petitioner Osmeña III concerns the financial and technical capabilities of GMR as his investigation and online research showed that GMR was in dire financial health and has been offloading several assets and its stake in various infrastructure projects to meet its financial obligations. He likewise discovered GMR's unsavory record involving the Delhi International Airport Pvt. Ltd. (DIAL), which is the concessionaire for GMR's Indira Gandhi International Airport at Delhi. According to the Auditor General of India, (i) 27% of the project cost for Delhi Airport was not funded by DIAL but charged to the travelling public; (ii) outsourcing of contracts to GMR joint venture companies was not on arms-length basis in violation of contract; and (iii) DIAL violated the master plan and incurred delay in the completion of the project. The Male International Airport (MIA) case also proves GMR's lack of technical qualification to undertake the MCIA Project. GMR Male International Airport Pvt. Ltd. (GMIAL), an indirect subsidiary of GMR, through its direct subsidiary GMR Infrastructure (Mauritius) Limited, entered into a Concession Agreement dated June 28, 2010 with the Maldives Airport Company Ltd. (MACL) and the Maldives Government Ministry of Finance and Treasury for the Rehabilitation, Expansion, Modernization, Operation and Maintenance of Male International Airport for a period of 25 years. However, on November 27, 2012, the Maldives Government and MACL declared the Concession Agreement void *ab initio* and gave GMIAL seven days to vacate the MIA, which prompted GMIAL to initiate arbitration proceedings. GMIAL sought a declaration that it was entitled to adjust the fees payable to MACL by virtue of the invalidity of portions of the Concession Agreement, while MACL sought the declaration of the Concession Agreement as void *ab initio*. GMIAL had applied for an injunction before the courts of Singapore to restrain the Maldives Government from interfering with the performance of the Concession Agreement pending arbitration proceedings. On appeal, the Singapore Court of Appeal set aside the preliminary injunction issued by a High Court judge of Singapore. Thus, effective December 8, 2012, the Maldives Government and MACL took control of the MIA.