

## FIRST DIVISION

[ G.R. No. 176657, September 01, 2010 ]

**DEPARTMENT OF FOREIGN AFFAIRS AND BANGKO SENTRAL NG PILIPINAS, PETITIONERS, VS. HON. FRANCO T. FALCON, IN HIS CAPACITY AS THE PRESIDING JUDGE OF BRANCH 71 OF THE REGIONAL TRIAL COURT IN PASIG CITY AND BCA INTERNATIONAL CORPORATION, RESPONDENTS.**

### D E C I S I O N

**LEONARDO-DE CASTRO, J.:**

Before the Court is a Petition for *Certiorari* and prohibition under Rule 65 of the Rules of Court with a prayer for the issuance of a temporary restraining order and/or a writ of preliminary injunction filed by petitioners Department of Foreign Affairs (DFA) and Bangko Sentral ng Pilipinas (BSP). Petitioners pray that the Court declare as null and void the Order<sup>[1]</sup> dated February 14, 2007 of respondent Judge Franco T. Falcon (Judge Falcon) in *Civil Case No. 71079*, which granted the application for preliminary injunction filed by respondent BCA International Corporation (BCA). Likewise, petitioners seek to prevent respondent Judge Falcon from implementing the corresponding Writ of Preliminary Injunction dated February 23, 2007<sup>[2]</sup> issued pursuant to the aforesaid Order.

The facts of this case, as culled from the records, are as follows:

Being a member state of the International Civil Aviation Organization (ICAO),<sup>[3]</sup> the Philippines has to comply with the commitments and standards set forth in ICAO Document No. 9303<sup>[4]</sup> which requires the ICAO member states to issue machine readable travel documents (MRTDs)<sup>[5]</sup> by April 2010.

Thus, in line with the DFA's mandate to improve the passport and visa issuance system, as well as the storage and retrieval of its related application records, and pursuant to our government's ICAO commitments, the DFA secured the approval of the President of the Philippines, as Chairman of the Board of the National Economic and Development Authority (NEDA), for the implementation of the Machine Readable Passport and Visa Project (the MRP/V Project) under the Build-Operate-and-Transfer (BOT) scheme, provided for by Republic Act No. 6957, as amended by Republic Act No. 7718 (the BOT Law), and its Implementing Rules and Regulations (IRR). Thus, a Pre-qualification, Bids and Awards Committee (PBAC) published an invitation to pre-qualify and bid for the supply of the needed machine readable passports and visas, and conducted the public bidding for the MRP/V Project on January 10, 2000. Several bidders responded and BCA was among those that pre-qualified and submitted its technical and financial proposals. On June 29, 2000, the PBAC found BCA's bid to be the sole complying bid; hence, it permitted the DFA to engage in direct negotiations with BCA. On even date, the PBAC recommended to

the DFA Secretary the award of the MRP/V Project to BCA on a BOT arrangement.

In compliance with the Notice of Award dated September 29, 2000 and Section 11.3, Rule 11 of the IRR of the BOT Law,<sup>[6]</sup> BCA incorporated a project company, the Philippine Passport Corporation (PPC) to undertake and implement the MRP/V Project.

On February 8, 2001, a Build-Operate-Transfer Agreement<sup>[7]</sup> (BOT Agreement) between the DFA and PPC was signed by DFA Acting Secretary Lauro L. Baja, Jr. and PPC President Bonifacio Sumbilla. Under the BOT Agreement, the MRP/V Project was defined as follows:

**Section 1.02 MRP/V Project** - refers to all the activities and services undertaken in the fulfillment of the Machine Readable Passport and Visa Project as defined in the Request for Proposals (RFP), a copy of which is hereto attached as Annex A, including but not limited to project financing, systems development, installation and maintenance in the Philippines and Foreign Service Posts (FSPs), training of DFA personnel, provision of all project consumables (related to the production of passports and visas, such as printer supplies, etc.), scanning of application and citizenship documents, creation of data bases, issuance of machine readable passports and visas, and site preparation in the Central Facility and Regional Consular Offices (RCOs) nationwide.<sup>[8]</sup>

On April 5, 2002, former DFA Secretary Teofisto T. Guingona and Bonifacio Sumbilla, this time as BCA President, signed an Amended BOT Agreement<sup>[9]</sup> in order to reflect the change in the designation of the parties and to harmonize Section 11.3 with Section 11.8<sup>[10]</sup> of the IRR of the BOT Law. The Amended BOT Agreement was entered into by the DFA and BCA with the conformity of PPC.

The two BOT Agreements (the original version signed on February 8, 2001 and the amended version signed April 5, 2002) contain substantially the same provisions except for seven additional paragraphs in the whereas clauses and two new provisions - Section 9.05 on Performance and Warranty Securities and Section 20.15 on Miscellaneous Provisions. The two additional provisions are quoted below:

**Section 9.05.** The PPC has posted in favor of the DFA the performance security required for Phase 1 of the MRP/V Project and shall be deemed, for all intents and purposes, to be full compliance by BCA with the provisions of this Article 9.

x x x x

**Section 20.15** It is clearly and expressly understood that BCA may assign, cede and transfer all of its rights and obligations under this Amended BOT Agreement to PPC, as fully as if PPC is the original signatory to this Amended BOT Agreement, provided however that BCA shall nonetheless be jointly and severally liable with PPC for the

performance of all the obligations and liabilities under this Amended BOT Agreement.<sup>[11]</sup>

Also modified in the Amended BOT Agreement was the Project Completion date of the MRP/V Project which set the completion of the implementation phase of the project within 18 to 23 months from the date of effectivity of the Amended BOT Agreement as opposed to the previous period found in the original BOT Agreement which set the completion within 18 to 23 months from receipt of the NTP (Notice to Proceed) in accordance with the Project Master Plan.

On April 12, 2002, an Assignment Agreement<sup>[12]</sup> was executed by BCA and PPC, whereby BCA assigned and ceded its rights, title, interest and benefits arising from the Amended BOT Agreement to PPC.

As set out in Article 8 of the original and the Amended BOT Agreement, the MRP/V Project was divided into six phases:

**Phase 1. Project Planning Phase** - The Project Proponent [BCA] shall prepare detailed plans and specifications in accordance with Annex A of this [Amended] BOT Agreement within three (3) months from issuance of the NTP (Notice to Proceed) [from the date of effectivity of this Amended BOT Agreement]. This phase shall be considered complete upon the review, acceptance and approval by the DFA of these plans and the resulting Master Plan, including the Master Schedule, the business process specifications, the acceptance criteria, among other plans.

x x x x

The DFA must approve all detailed plans as a condition precedent to the issuance of the CA [Certificate of Acceptance] for Phase 1.

**Phase 2. Implementation of the MRP/V Project at the Central Facility** - Within six (6) months from issuance of the CA for Phase 1, the PROJECT PROPONENT [BCA] shall complete the implementation of the MRP/V Project in the DFA Central Facility, and establish the network design between the DFA Central Facility, the ten (10) RCOs [Regional Consular Offices] and the eighty (80) FSPs [Foreign Service Posts].

x x x x

**Phase 3. Implementation of the MRP/V Project at the Regional Consular Offices** - This phase represents the replication of the systems as approved from the Central Facility to the RCOs throughout the country, as identified in the RFP [Request for Proposal]. The approved systems are those implemented, evaluated, and finally approved by DFA as described in Phase 1. The Project Proponent [BCA] will be permitted to begin site preparation and the scanning and database building operations in all offices as soon as the plans are agreed upon and accepted. This includes site preparation and database building operations in these Phase-3 offices.

Within six (6) months from issuance of CA for Phase 2, the Project Proponent [BCA] shall complete site preparation and implementation of the approved systems in the ten (10) RCOs, including a fully functional network connection between all equipment at the Central Facility and the RCOs.

**Phase 4. Full Implementation, including all Foreign Service Posts**

- Within three (3) to eight (8) months from issuance of the CA for Phase-3, the Project Proponent [BCA] shall complete all preparations and fully implement the approved systems in the eighty (80) FSPs, including a fully functional network connection between all equipment at the Central Facility and the FSPs. Upon satisfactory completion of Phase 4, a CA shall be issued by the DFA.

**Phase 5. In Service Phase** - Operation and maintenance of the complete MRP/V Facility to provide machine readable passports and visas in all designated locations around the world.

**Phase 6. Transition/Turnover** - Transition/Turnover to the DFA of all operations and equipment, to include an orderly transfer of ownership of all hardware, application system software and its source code and/or licenses (subject to Section 5.02 [H]), peripherals, leasehold improvements, physical and computer security improvements, Automated Fingerprint Identification Systems, and all other MRP/V facilities shall commence at least six (6) months prior to the end of the [Amended] BOT Agreement. The transition will include the training of DFA personnel who will be taking over the responsibilities of system operation and maintenance from the Project Proponent [BCA]. The Project Proponent [BCA] shall bear all costs related to this transfer.<sup>[13]</sup> (Words in brackets appear in the Amended BOT Agreement)

To place matters in the proper perspective, it should be pointed out that both the DFA and BCA impute breach of the Amended BOT Agreement against each other.

According to the DFA, delays in the completion of the phases permeated the MRP/V Project due to the submission of deficient documents as well as intervening issues regarding BCA/PPC's supposed financial incapacity to fully implement the project.

On the other hand, BCA contends that the DFA failed to perform its reciprocal obligation to issue to BCA a Certificate of Acceptance of Phase 1 within 14 working days of operation purportedly required by Section 14.04 of the Amended BOT Agreement. BCA bewailed that it took almost three years for the DFA to issue the said Certificate allegedly because every appointee to the position of DFA Secretary wanted to review the award of the project to BCA. BCA further alleged that it was the DFA's refusal to approve the location of the DFA Central Facility which prevented BCA from proceeding with Phase 2 of the MRP/V Project.

Later, the DFA sought the opinion of the Department of Finance (DOF) and the Department of Justice (DOJ) regarding the appropriate legal actions in connection with BCA's alleged delays in the completion of the MRP/V Project. In a Letter dated

February 21, 2005,<sup>[14]</sup> the DOJ opined that the DFA should issue a final demand upon BCA to make good on its obligations, specifically on the warranties and responsibilities regarding the necessary capitalization and the required financing to carry out the MRP/V Project. The DOJ used as basis for said recommendation, the Letter dated April 19, 2004<sup>[15]</sup> of DOF Secretary Juanita Amatong to then DFA Secretary Delia Albert stating, among others, that BCA may not be able to infuse more capital into PPC to use for the completion of the MRP/V Project.

Thus, on February 22, 2005, DFA sent a letter<sup>[16]</sup> to BCA, through its project company PPC, invoking BCA's financial warranty under Section 5.02(A) of the Amended BOT Agreement.<sup>[17]</sup> The DFA required BCA to submit (a) proof of adequate capitalization (*i.e.*, full or substantial payment of stock subscriptions); (b) a bank guarantee indicating the availability of a credit facility of P700 million; and (c) audited financial statements for the years 2001 to 2004.

In reply to DFA's letter, BCA, through PPC, informed the former of its position that its financial capacity was already passed upon during the prequalification process and that the Amended BOT Agreement did not call for any additional financial requirements for the implementation of the MRP/V Project. Nonetheless, BCA submitted its financial statements for the years 2001 and 2002 and requested for additional time within which to comply with the other financial requirements which the DFA insisted on.<sup>[18]</sup>

According to the DFA, BCA's financial warranty is a continuing warranty which requires that it shall have the necessary capitalization to finance the MRP/V Project in its entirety and not on a "per phase" basis as BCA contends. Only upon sufficient proof of its financial capability to complete and implement the whole project will the DFA's obligation to choose and approve the location of its Central Facility arise. The DFA asserted that its approval of a Central Facility site was not ministerial and upon its review, BCA's proposed site for the Central Facility was purportedly unacceptable in terms of security and facilities. Moreover, the DFA allegedly received conflicting official letters and notices<sup>[19]</sup> from BCA and PPC regarding the true ownership and control of PPC. The DFA implied that the disputes among the shareholders of PPC and between PPC and BCA appeared to be part of the reason for the hampered implementation of the MRP/V Project.

BCA, in turn, submitted various letters and documents to prove its financial capability to complete the MRP/V Project.<sup>[20]</sup> However, the DFA claimed these documents were unsatisfactory or of dubious authenticity. Then on August 1, 2005, BCA terminated its Assignment Agreement with PPC and notified the DFA that it would directly implement the MRP/V Project.<sup>[21]</sup> BCA further claims that the termination of the Assignment Agreement was upon the instance, or with the conformity, of the DFA, a claim which the DFA disputed.

On December 9, 2005, the DFA sent a Notice of Termination<sup>[22]</sup> to BCA and PPC due to their alleged failure to submit proof of financial capability to complete the entire MRP/V Project in accordance with the financial warranty under Section 5.02(A) of the Amended BOT Agreement. The Notice states: