

THIRD DIVISION

**G.R. No. 211122 – HARBOUR CENTRE PORT TERMINAL, INC.,
v. HON. ARMAND C. ARREZA, Administrator of Subic Bay
Metropolitan Authority, and/or THE BOARD OF DIRECTORS OF
SUBIC BAY METROPOLITAN AUTHORITY, SUBIC SEAPORT
TERMINAL INC.,**

Promulgated:

December 6, 2021

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DISSENTING OPINION

CARANDANG, J.:

Before Us is a Petition for Review on *Certiorari* filed by Harbour Centre Port Terminal Inc. (petitioner) assailing the Decision¹ dated August 8, 2013 of the Court of Appeals (CA) in CA-G.R. SP No. 125330, which reversed the Decision² dated January 12, 2012 of the Regional Trial Court (RTC), Branch 72 of Olongapo City in Civil Case No. 108-0-2011 granting the writ of *mandamus* and directing respondent Armand C. Arreza (Arreza) and/or his successor as Administrator of the Subic Bay Metropolitan Authority (SBMA) to issue the Notice of Award and Notice to Proceed to petitioner.

Antecedents

Petitioner is a bulk and break-bulk port operator in the Philippines that currently operates the 15- hectare multi-purpose port terminal inside the 79- hectare port-city complex called the Manila Harbour Centre. On the other hand, respondent SBMA was created pursuant to Republic Act (R.A.) No. 7227.³ The SBMA is tasked to operate, manage, regulate, administer and develop the Subic Special Economic Zone also known as the Subic Bay Freeport Zone (SBFZ).

Upon the SBMA's determination of the need to consolidate all break-bulk, bulk and other essential port services at the Naval Supply Depot, Boton, Alava, Rivera and Bravo Wharfs/Ports (joint venture areas) to achieve efficiency and optimization of port resources, the SBMA decided to undertake the development, management and operation of the joint venture areas through a Public-private partnership.⁴

¹ Penned by Associate Justice Noel G. Tijam (Former Member of this Court), with the concurrence of Associate Justices Romeo F. Barza and Ramon A. Cruz; *rollo*, pp. 41-54.

² Penned by Judge Richard A. Paradeza; *id.* at 61-77.

³ Bases Conversion and Development Act of 1992.

⁴ *Rollo*, p. 62.

On November 16, 2009, SBMA received an unsolicited proposal from petitioner to enter into an unincorporated joint venture (JV) for the development, management and operation of the joint venture areas at the SBFZ.

On November 20, 2009, the SBMA Board of Directors (SBMA Board), acting pursuant to the 2008 Joint Venture Guidelines and Procedures for Entering into Joint Venture Agreements between Government and Private Entities (JV Guidelines), issued Resolution No. 09-11-3400 that "accepted in principle" petitioner's unsolicited proposal. The acceptance authorized the SBMA Management to commence further negotiations with petitioner on the terms, conditions and scope, as well as legal, technical and financial aspects of petitioner's unsolicited proposal. Consequently, the SBMA Board constituted the SBMA Joint Venture Selection Panel (SBMA-JVSP) which was tasked, among others, to pursue negotiations with petitioner. Since the JV guidelines required that a representative from NEDA shall sit as a voting member of the JVSP, the SBMA invited and requested the NEDA to appoint its representative to the same. Accordingly, the NEDA was duly represented before the SBMA-JVSP in all stages.

Thereafter, the SBMA-JVSP proceeded with the evaluation of petitioner's qualifications and proposal, which was found to be consistent and favorable to SBMA's objective of increasing revenues and maximizing its port resources. The SBMA-JVSP likewise found petitioner qualified in undertaking the proposed JV project. After a series of in-depth negotiations, the results of the negotiations were embodied in the Terms of Reference for the solicitation of comparative proposals. At the same time, the parties likewise exchanged pertinent documents, corporate records and formal inquiries relative to the proposed JV project.

Meanwhile, a similar unsolicited proposal was jointly submitted by Amerasia International Services, Inc. and Mega Subic Terminal Services, Inc. which was, however, returned for being insufficient in form and content, with the option of resubmitting a revised proposal. No revised proposal was however submitted.

On February 5, 2010, the SBMA-JVSP presented to the SBMA Board the results of the negotiations with petitioner on the latter's proposed JV. Thus, the SBMA Board issued Resolution No. 10-02-3514 approving the terms and conditions negotiated by the SBMA-JVSP.

On February 24, 2010, in order to formalize the agreements reached between the parties pending the result of the challenge process under the JV Guidelines, petitioner and SBMA executed the Joint Venture Agreement for the Development, Operation And Management of The Naval, Supply Depot, Boton, Alava, Rivera And Bravo Wharfs/Ports (JVA). Per the JV Guidelines in Stage Two of the process, SBMA started preparation of the contract and selection documents for the Competitive Challenge.



On the same date, February 24, 2010, respondent Subic Seaport Terminal Inc. (SSTI) filed a case against SBMA before the RTC of Dinalupihan, Bataan for the Declaration of Nullity of the JVA. Petitioner was not impleaded in this case.

On February 26, 2010, petitioner submitted the required Bid Security for the project.

On March 3, 2010, SBMA sent petitioner a formal communication where it proposed certain measures/arrangements aimed at respecting all existing agreements/contracts which the SBMA may have with locators at the SBFZ. Petitioner replied in a letter dated March 19, 2010 expressing its commitment to abide by SBMA's existing contractual undertakings.

On March 5, 2010, SBMA published in the Philippine Daily Inquirer the "Invitation to Pre-qualify and to Submit Comparative Proposals" scheduled on April 22, 2010. This was also posted in SBMA's website and in conspicuous places in the SBFZ. In the same invitation, SBMA announced that prospective challengers to petitioner's proposal may purchase bid documents starting March 12, 2010 with the deadline for the submission of completed bids on or before April 12, 2010.

On March 12, 2010, Asian Terminals, Inc. (ATI) purchased bid documents indicating a possible challenger to petitioner.

The SBMA scheduled the pre-proposal conference on March 25, 2010. However due to lack of quorum on that day, the pre-proposal conference was re-scheduled to April 7, 2010 and the opening of eligibility documents and proposals to April 22, 2010. On the scheduled date of the pre-proposal conference, no competitive challenge was interposed by any party. Also, none had submitted bids or comparative proposals to challenge petitioner during the scheduled deadline and opening of eligibility documents and comparative proposals on April 22, 2010. Thus, the SBMA-JVSP issued a Resolution on April 22, 2010 recommending the award of the project to petitioner.

On May 7, 2010, the SBMA Board issued Resolution No. 10-05-3646 which resolved to adopt the recommendation of the SBMA-JVSP to award the project to petitioner subject *only* to the COMELEC exemption, and the favorable opinion of the Office of the Government Corporate Counsel (OGCC).

The request of SBMA for exemption from the COMELEC from the election ban of its priority projects and other related procurements, which included the proposed JV with petitioner was rendered *functus officio* since the election period lapsed without any award being given by SBMA.

Noting error in the computation of the bid security earlier posted by petitioner, the SBMA-JVSP on June 22, 2010, advised petitioner to post an additional bid security in the corrected amount of ₱100 million, to which

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petitioner immediately complied.

On July 12, 2010, the SBMA, through then Administrator and CEO, respondent Arreza, formally sought for the favorable legal opinion of the OGCC on the legality and propriety of the proposed JVA. Petitioner sought updates on the status of the project. However, SBMA in response, stated in a letter dated September 23, 2010 that per SBMA Board Resolution, the award of the JVA is subject to the favorable legal opinion of the OGCC and that SBMA has yet to receive such favorable legal opinion. Pending receipt of the OGCC favorable legal opinion, petitioner continuously renewed its Bid Security.

In the meantime, on May 23, 2011, NEDA informed SBMA through a letter that the JVA's compliance with the JV Guidelines and existing laws, rules and regulations "could not be ascertained" because: (1) there was no COMELEC exemption; (2) the JVA was executed as early as Stage Two of the process; (3) inadequate amount of the bid security; and 4) SBMA's failure to submit the JVA to NEDA.

On May 27, 2011, SBMA sent its reply to the NEDA refuting the allegations raised in its earlier letter. SBMA countered that: (i) the requirement of COMELEC exemption had been rendered inapplicable as this requirement applies only to cover award of contracts during an election period, the election period having lapsed for more than a year; (ii) no harm was done by the signing of the JVA during the Stage 2 as the JVA itself provides that it is not a final and executory contract being expressly made to subject to the result of the bidding or Swiss Challenge process; (iii) the error on value of the bid security was purely by reason of a good faith misinterpretation of the vague provisions of the JV guidelines, which was subsequently corrected and no harm may be said to have been because the lower bid security could have in fact encouraged more bidders; (iv) the non-submission of the JVA to the NEDA was precisely because the same is not yet executory.

Finally, on June 22, 2011, the SBMA received the OGCC's favorable legal opinion (Opinion No. 131, Series of 2011) dated June 2, 2011. The OGCC stated that the JVA was signed in compliance with the JV Guidelines and is consistent with the JV principles, as such the same may be given due course subject to the proposed amendments of the OGCC.

Acting on the OGCC favorable opinion, a meeting was held on July 8, 2011 between petitioner and SBMA to discuss the proposed changes/amendments raised in the OGCC opinion. In the said meeting, both parties manifested their willingness to conform to the proposed changes/amendments of the OGCC. Thus, thru a letter dated July 11, 2011, the SBMA formally sent its proposed amendments to the JVA to petitioner, which formally signified its conformity thereto on the same day of its receipt of the SMBA letter.

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Meanwhile, on July 5, 2011, NEDA withdrew its endorsement of the project based on the alleged violations and/or deviations with the JV Guidelines. NEDA withdrew its endorsement mainly because of: (1) the execution of the JVA as early as the Stage Two of the Swiss challenge; (2) the total cost of the JV activity was changed from US\$16.584 million (or ₱763.029 million at ₱46.01 exchange rate as of March 2010) to ₱5.537 billion after the competitive challenge. The change by at least ₱4 billion materially affects the substance of the competitive challenge; and (3) since the project cost has not been clearly established, the bid security was incorrect.⁵

In a letter dated August 5, 2011, SBMA wrote NEDA requesting for reconsideration, stating that the NEDA “misconstrued and did not fully understand the intricacies of the issues it raised against the JVA.” Nonetheless, SBMA issued Resolution No. 11- 08-4080 deferring action on the award of the project to petitioner pending NEDA’s response to its letter.

Seeing that no Notice of Award and Notice to Proceed is forthcoming, petitioner filed a Petition for *Mandamus* on August 25, 2011 with the RTC of Olongapo City.

Thereafter, in a letter dated September 30, 2011, NEDA denied SBMA’s request for reconsideration and reiterated its withdrawal. Then, on October 17, 2011, the OGCC recommended that the issuance of the Notice of Award be suspended in light of NEDA’s withdrawal of its endorsement.

Ruling of the Regional Trial Court

On January 12, 2012, the RTC issued its Decision in favor of petitioner. The RTC found that petitioner can rightfully enforce the JVA against SBMA. The JVA clearly provides that if no bidder will challenge the proposal of petitioner within the prescribed period, the Agreement shall become the final contract of the parties for the development of the joint venture areas. The RTC also held that the JV Guidelines categorically provided that if no comparative proposal is received by the government entity, the JV activity shall be immediately awarded to the original proponent. Since there was no challenger to the proposal of petitioner, the latter already acquired a vested right to the said project. The award of the JVA was only made dependent on the issuance of OGCC’s favorable opinion and with the subsequent favorable opinion, petitioner’s vested right on the project is without dispute. Further, the mandatory wording of the JV Guidelines that the project shall be immediately awarded to the original proponent, takes away any form of discretion on the part of the SBMA. Thus,

WHEREFORE, viewed from the foregoing premises, this Court hereby grants the Writ of Mandamus mandating the respondents Armand C. Arreza, and/or his successor as Administrator of the Subic Bay Metropolitan Authority, and the Board of Directors of SBMA, to

⁵ Id. at 305-306.

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immediately issue the Notice of Award and Notice to Proceed to Harbour Centre Port Terminal, Inc. for the development, operation and management of the Naval Supply Depot, Boton, Alava, Rivera and Bravo Wharfs/Ports pursuant to the Joint Venture Agreement dated 24 February 2010.

The writ of preliminary injunction granted by this Court on September 20, 2011 is hereby made permanent.

SO ORDERED.

Ruling of the Court of Appeals

On appeal, the CA in its Decision dated August 8, 2013, reversed the Decision of the RTC. It held that the RTC erred in granting the petition for mandamus. Petitioner has not shown any cause for the issuance of the writ of mandamus. There appears no legal duty on the part of SBMA to issue the Notice of Award and Notice to Proceed. The JV Guidelines provide that the SBMA has the discretionary function to either approve or reject the recommendation to award. Thus,

WHEREFORE, the appeal is GRANTED. The Decision dated January 12, 2012, of the Regional Trial Court of Olongapo City, Branch 72 in Civil Case No. 108-0-2011 is hereby reversed and set aside.

SO ORDERED.

Arguments of Petitioner

Petitioner argues that the duty of SBMA to issue a Notice of Award is a ministerial act. As stated in the JV Guidelines, in the absence of a comparative proposal, the project shall be immediately awarded to the original proponent. SBMA-JVSP recommended the award to petitioner and SBMA approved the same in its Resolution No. 10-05-3646 subject only to the COMELEC exemption and the favorable opinion of the OGCC, which conditions had already been complied with. Thus, petitioner has a clear and unmistakable right over the project. The compliance with those conditions grant petitioner a vested right over the project.

Petitioner alleges that NEDA's withdrawal of its endorsement should have no significant effect on the award of the project to petitioner. NEDA is a mere member of the SBMA-JVSP. The JV Guidelines does not clothe NEDA of any sort of veto power. At most, NEDA's withdrawal of endorsement was a dissenting opinion that does not render the JVA void. Further, there is nothing in the JV Guidelines that show that the endorsement or approval of NEDA is necessary for the validity, enforceability and implementation of the JVA.

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Arguments of SBMA

SBMA countered that the findings of NEDA on the validity of the JVA and the process of evaluating whether the JVA is fully compliant with the conditions imposed by law necessarily involves the exercise of discretion. As such, cannot be compelled by a writ of mandamus. Petitioner failed to establish the existence of a clear legal right to the issuance of the Notice of Award and Notice to Proceed. While the OGCC in its Opinion No. 131, series of 2011 held that the JVA was signed in compliance with the JV Guidelines, the OGCC subsequently held that the award of the project be suspended in light of the NEDA withdrawal, as such, petitioner's claim to a writ of mandamus is untenable. Further, the RTC of Dinalupihan, Bataan in Civil Case No. DH-1231-10 on September 10, 2012, rendered a Decision declaring the JVA as null and void. The said Decision became final and executory on October 4, 2012. Since the JVA has been declared null and void with finality, there can be no vested right to speak of.

Arguments of SSTI

The issuance of SBMA Resolution No. 10-05-3646 which approved the recommendation of the SBMA-JVSP to award the project to petitioner has not reduced the issuance of a Notice of Award and Notice to Proceed to a ministerial function. The JV Guidelines provide that the decision to award or the approval of the Head of the Government entity shall be manifested by signing and issuing the Notice of Award. A mere board resolution will not suffice to show that there was already an award.

Further, the award of the project is subject to the favorable opinion of the OGCC. However, the favorable opinion of the OGCC was also withdrawn by the latter in its subsequent letter. The OGCC recommended that the issuance of the Notice of Award and/or Notice to Proceed be suspended.

Also, the NEDA endorsement is vital to the validity of the JVA as it determined compliance with the relevant laws and regulations.

SSTI also argues that the petition for *mandamus* is premature because petitioner failed to exhaust all available remedies. Admittedly, petitioner did not send any demand to implement the JVA and issue a Notice of Award and/or Notice to Proceed. A writ of *mandamus* is not proper when there has been no refusal to act by the party against whom the writ is sought.

The critical issue to be resolved is whether SBMA can be compelled through a writ of *mandamus* to issue a Notice of Award and a Notice to Proceed in favor of petitioner.



I hereby register my dissent from the majority opinion for the following reasons:

Preliminary Issues

The doctrine of exhaustion of administrative remedies does not apply in the present case.

The doctrine of exhaustion of administrative remedies is a cornerstone of our judicial system. The thrust of the rule is that courts must allow administrative agencies to carry out their functions and discharge their responsibilities within the specialized areas of their respective competence. The rationale for this doctrine is obvious. It entails lesser expenses and provides for the speedier resolution of controversies.⁶ However, such rule is not inflexible as it admits exception, such as when the controversy involves is a purely legal question, as in the present case.

We rule that the doctrine of exhaustion of administrative remedies is not applicable in the present case since what is involved is a purely legal question. The facts in this case are undisputed the question merely lies as to whether, on the given state of facts, petitioner is entitled to a Notice of Award and/or to Proceed.

The constitutional issues, i.e., unfair competition, deprivation of property without due process of law, and violation on the undue delegation of legislative powers, are issues which should not be threshed out in the present case.

The issues raised by SSTI as to whether SBMA delegated to petitioner its legislative power to fix tariff rates, or whether SBMA abdicated its legislative franchise in favor of petitioner as port operator, whether the JVA violated the constitutional prohibition on unfair competition and whether the JVA deprives existing property rights without due process are issues properly threshed out in a case for the declaration of the JVA as null and void. While SSTI already filed a case to declare the JVA null and void, such decision does not bind nor prejudice petitioner since the latter was not made a party to such case. It is well-settled that no man should be prejudiced by any proceeding to which he is a stranger.⁷

⁶ *Spouses Gonzales v. Marmaine Realty Corporation*, 778 Phil. 451 (2016).
⁷ *Muñoz v. Yabut, Jr.*, 665 Phil. 488 (2011).

Substantive Issues

Mandamus is a remedy granted by law when any tribunal, corporation, board, officer, or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use or enjoyment of a right or office to which such other is entitled.⁸ In a petition for *mandamus*, it is essential that the petitioner has a clear legal right to the thing demanded and it must be the imperative duty of the respondent to perform the act required. The burden is on the petitioner to show that there is such a clear legal right to the performance of the act, and a corresponding compelling duty on the part of the respondent to perform the act.⁹ Thus, whether petitioner is entitled to the writ, it is necessary to determine if petitioner has a clear legal right to the award of the project and whether the issuance of the Notice of Award and/or to Proceed is a ministerial duty of the SBMA.

NEDA is the country's premier socioeconomic planning body, and the authority in macroeconomic forecasting and policy analysis and research, providing high-level advice to policy-makers in Congress and the Executive Branch. It is mandated to formulate continuing, coordinated and integrated social and economic policies, plans and programs.

Executive Order No. 423 mandated the NEDA to issue guidelines regarding joint venture agreements with private entities.¹⁰ Accordingly, the NEDA promulgated the "Guidelines and Procedures for Entering into Joint Venture Agreements between Government and Private Entities," or the JV Guidelines.

Under the JV Guidelines, a JV is a contractual arrangement whereby a private sector entity or a group of private sector entities on one hand, and a Government Entity or a group of Government Entities on the other hand, contribute money/capital, services, assets (including equipment, land or intellectual property), or a combination of any or all of the foregoing.¹¹

The JV Guidelines provides for two modes of selecting a private sector JV partner: by competitive selection or through negotiated agreements. Competitive selection involves a selection process based on transparent criteria, which should not constrain or limit competition, and is open to participation by any interested and qualified private entity. Under par. 5.9 of the JV Guidelines, negotiated projects refers to:

5.9. Negotiated Projects. **Refer to instances where the desired project is the result of an unsolicited proposal from a private sector proponent** or, if the government has failed to identify an eligible private sector partner for a desired activity after subjecting the same to a competitive

⁸ *Pacilla v. Congress of the Philippines*, 814 Phil. 344 (2017).

⁹ *Umali v. Judicial and Bar Council*, 814 Phil. 253 (2017).

¹⁰ Executive Order 423, Section 8.

¹¹ Clause 5.4 of the JV Guidelines.

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selection. (Emphasis supplied)

Also, paragraph 7.3(b) of the JV Guidelines, negotiated agreements may be entered under the following circumstances:

b. Negotiated Agreements – Negotiated agreements may be entered under the following circumstances:

- i. When a Government Entity receives an unsolicited proposal;
- ii. When there is failure of competition when no proposals are received or no private sector participant is found qualified and the Government Entity decides to seek out a JV partner; and
- iii. When there is failure of competition, i.e., there is only a single interested party remaining as defined under VIII(6) of Annex A.

Thus, negotiated agreements arose from the submission and acceptance of an unsolicited proposal.¹² It comes about as an end result of an unsolicited proposal from a private sector proponent, or if the government has failed to identify an eligible private sector partner for a desired activity after subjecting the same to a competitive selection.¹³

Item III, Annex “C” Detailed Guidelines For Competitive Challenge Procedure For Public-Private Joint Ventures (Detailed Guidelines) of the JV Guidelines, where the Swiss Challenge format is tucked in, maps out a three-stage framework, to which Negotiated JV Agreements are to be mandatorily subjected.¹⁴ A Swiss challenge is "a hybrid mechanism between the direct negotiation approach and the competitive bidding route."¹⁵

Stage One involves the submission, evaluation and the acceptance or rejection of the unsolicited proposal from private entities. An acceptance though does 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.

Stage Two entails negotiation on the terms and conditions of the JV activity, including legal, technical, and financial aspects of the JV activity and the eligibility of the private sector entity to participate therein. If successful, the government entity head and the representative of the private sector entity shall issue a signed certification of successful negotiation indicating among others that an agreement has been reached. Thereafter, the contract documents, including the selection documents for the competitive challenge, are prepared.

¹² *SM Land Inc. v. Bases Conversion and Development Authority*, 741 Phil. 269, 287 (2014).

¹³ *Id.*

¹⁴ *Id.* at 289.

¹⁵ *Alyansa Para sa Bagong Pilipinas, Inc., v. Energy Regulatory Commission*, G.R. No. 227670, May 3, 2019.

Upon the successful completion of the detailed negotiation phase, Stage Three comes in where the JV activity shall be subjected to a competitive challenge, where interested parties are essentially given the right to match the terms offered by the original proponent. The Detailed Guidelines specifically provide that where there is no challenger during the Swiss challenge or if there is a challenger and the original proponent was able to match the offer of the challenger the JV activity shall be immediately awarded to the original private sector proponent.¹⁶

Petitioner claimed that the issuance of a Notice of Award and Notice to Proceed are ministerial acts of the SBMA since it already has a vested right on the project. Respondents, on the other hand, alleged that petitioner has no vested rights to the award of the project since the JVA was not a perfected contract and that the same is a mere proposal.

After a perusal of the records of the case, petitioner has clearly failed to demonstrate that it has a clear and unmistakable right to the writ of *mandamus*.

The JVA is not a perfected contract.
The parties meant the JVA to still be
subject to the Swiss Challenge and is
a mere offer or proposal.

A vested right is one that is absolute, complete and unconditional and no obstacle exists to its exercise. It is immediate and perfect in itself and not dependent upon any contingency.¹⁷ It is some right or interest in property that had become fixed and established, and is no longer open to doubt or controversy.¹⁸

It is undisputed that petitioner submitted an unsolicited proposal for the development, operation and management of the joint venture areas. Upon initial evaluation, the SBMA-JVSP recommended the approval of the unsolicited proposal. Thus, on November 20, 2009, the SBMA Board accepted

¹⁶ Annex C, paragraph III Stage 3 (4) of the JV Guidelines – 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.** (Emphasis supplied)

¹⁷ Campos v. Ortega, Sr., 734 Phil. 585 (2014).

¹⁸ Director of Lands v. Court of Appeals, 260 Phil. 477 (1990).

in principle the unsolicited proposal of petitioner. Thereafter, a series of in-depth negotiations took place on the terms, conditions, and scope, as well as the legal, technical and financial aspects of petitioner's proposal. On February 5, 2010, the SBMA-JVSP presented to SBMA Board the Terms of Reference for the solicitation of comparative proposals. To formalize the approval of the Terms of Reference, the SBMA Board executed on February 24, 2010, the JVA together with the Terms of Reference. Then, on March 5, 2010, the proposal of petitioner was advertised for competitive challenge. After undergoing the Swiss Challenge, there was no challenger to the proposal of petitioner. Thus, on April 22, 2010, the SBMA-JVSP recommended the award of the project to petitioner. On May 7, 2010, the SBMA Board issued Resolution No. 10-05-3646 adopting the recommendation of SBMA-JVSP and thereby awarding the development, operation and management of the joint venture areas to herein petitioner subject to: (1) the COMELEC Exemption; and (2) the favorable opinion of the OGCC.

A perusal of the JVA would show that the same is still not a final and executory contract since the same is subject to numerous conditions, such as (1) the conduct of the Swiss Challenge; (2) the fact that there must be no challenger during the Swiss challenge; (3) the COMELEC exemption; (4) the favorable opinion of the OGCC; and (5) the approval of NEDA.

The JVA was executed by the parties with the intention that the same was not readily final and executory but is a mere offer or proposal to develop the joint venture areas, as evidenced by the Whereas clauses of the agreement, to wit:

x x x x

WHEREAS, in order to formalize the agreements reached between the parties pending the result of the challenge process under the JV Guidelines issued by the NEDA, the parties have agreed to execute this Agreement;

WHEREAS, pursuant to the JV Guidelines issued by the NEDA, **the proposal of HCPTI** will then be advertised for challenge by SBMA;

WHEREAS, **if no bidder will challenge the proposal of HCPTI within the prescribed period, then this Agreement shall become the final contract of SBMA and HCPTI** for the Development, Management and Operation of the Joint Venture Areas;

x x x x

NOW, THEREFORE, **HCPTI hereby submits this Agreement with SBMA as its offer and proposal to develop, manage, and operate the Joint Venture Areas, and SBMA agrees to accept the same subject to challenge pursuant to the JV Guidelines** issued by the NEDA.¹⁹

¹⁹ *Rollo*, p. 715.

(Emphasis supplied)

Since the JVA was not a final contract and was still subject to certain conditions, petitioner did not acquire any vested right to the joint venture project, nor does petitioner acquired a vested right to the issuance of a Notice of Award and/or Notice to Proceed from the mere fact that there was no challenger during the Swiss challenge, since SBMA is still given the discretion as to whether it will approve or reject the recommendation of the SBMA-JVSP to award the project to petitioner.

Petitioner cites the case of *SM Land Inc., v. BCDA*,²⁰ the said case however is not on all fours in the present case. For one, the *SM Land* case seeks to enjoin Bases Conversion and Development Authority (BCDA) to conduct the Swiss Challenge. In that case, selection committee created by the BCDA approved the detailed negotiations between the latter and SM Land. BCDA then committed itself to commence the Swiss challenge. In that case, the conduct of the Swiss challenge after the successful negotiations of the terms and conditions of the project is mandated by the 2008 JV Guidelines and even by the BOT Law. The conduct of the Swiss challenge is not a matter of discretion since BCDA is duty bound to commence the same upon successful negotiations of the terms and conditions of the project. Whereas in the present case, Harbour sought to enjoin SBMA to award the contract to the former. Undeniably, the decision to award or not to award a contract or a project is an exercise of discretion.

The conditions contained in Resolution No. 10-05-3646 had not been complied with NEDA's withdrawal of its endorsement effectively forestalled the joint venture project.

SBMA Board Resolution No. 10-05-3646 which approved and adopted the recommendation of the JVSP-SBMA to award the joint venture project to petitioner was not couched in terms that unconditionally awards the joint venture project to petitioner, to wit:

Resolution No. 10-05-3646

Resolve, as it is hereby resolved, upon the recommendation of Management, and without prejudice to COA regulations and pertinent laws on the matter, the Board hereby approves the Resolution adopted by the Joint Venture Selection Panel (JVSP) on 22 April 2010 awarding the Joint Venture Agreement for the Development, Operation and Management of the NSD Area, Boton, Alava, Rivera and Bravo Wharfs/Ports in favor of Harbour Centre Port Terminal, Inc. (HCPTI) **without prejudice to whatsoever action the Commission on Elections (COMELEC) may**

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SM Land Inc., v. Bases Conversion and Development Authority, supra note 12.

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take on the SBMA's request for the exemption from the ban in awarding contracts during the election period and subject to the favorable opinion of the Office of the Government Corporate Counsel (OGCC) on the legality and propriety of said Joint Venture Agreement.²¹
(Emphasis supplied)

SBMA Board Resolution No 10-05-3646 awarding the project to petitioner is subjected to two conditions, *i.e.*, (i) COMELEC's grant of exemption in SBMA's favor; and (ii) the favorable opinion of the OGCC. The first condition indisputably became *functus officio* upon the lapse of the election period without the project being awarded to petitioner. The second condition which is the favorable opinion of the OGCC, while the latter at first rendered a favorable opinion when it issued its Opinion No. 131, series of 2011, dated June 2, 2011, the OGCC however later withdrew the said favorable opinion and recommended the suspension of the issuance of the Notice of Award in light of NEDA's withdrawal of its endorsement of the project. Therefore, with the OGCC's recommendation to suspend the issuance of the Notice of Award, the second condition had not been complied with.

NEDA withdrew its endorsement because: (1) there was no COMELEC exemption; (2) the JVA was executed as early as the second stage of the Swiss challenge; (3) inadequate amount of the bid security;²² and (4) material deviation from the parameters and terms and conditions set forth in the proposal and/or tender documents. As cited by NEDA in its letter dated July 5, 2011, there is a change to the total cost of the joint venture activity from US\$16.584 million (or ₱763.029 million at ₱46.01 exchange rate as of March 2010) to ₱5.537 billion after the competitive challenge was held.²³ NEDA explained that a change in the total cost of the JV activity is not allowed if it will materially affect the substance of the competitive selection.

Be it noted that the COMELEC exemption has been rendered *functus officio* upon the lapse of the election period without the project being awarded to petitioner.

As to the reason of NEDA in withdrawing its endorsement on the ground that the JVA was executed as early as Stage Two of the process, is inconsequential since the execution of a draft contract is expressly allowed by the JV Guidelines. As provided, after an agreement is reached by the parties, the contract documents, including the selection documents for the competitive challenge are prepared.²⁴ Then, in Annex A, paragraph II of the JV Guidelines,

²¹ *Rollo*, p. 506.

²² *Id.* at 502-503.

²³ *Id.* at 305-306.

²⁴ x x x 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:

1. 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.
2. 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.
3. Negotiations shall comply with the process, requirements and conditions as stipulated under

the selection/tender documents for competitive challenge shall include the draft contract reflecting the terms and conditions in undertaking the JV activity.²⁵ The government entity is even given wide latitude to determine the form of contract that it will execute that will be subjected to a competitive challenge, it is given full discretion to select the appropriate provisions as they assess suitable for a particular contract/project. Further, as ruled upon earlier, the JVA was not meant to be a final and executory contract, since the same is still subject to the Swiss Challenge.

However, as regards the material change of the project cost and the insufficiency of the bid security, SBMA was not able to clarify and answer the same. Petitioner also failed to answer the material change in the total cost of the project, nor particularly proved that NEDA's approval of the project is not necessary for the award of the joint venture project.

Under paragraph 7.4²⁶ of the 2008 JV Guidelines, it is provided that the government entity, SBMA in the present case, shall not proceed with the award and signing of the contract if there are material deviations in the JV

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.

4. After an agreement is reached, the contract documents, including the selection documents for the competitive challenge are prepared. (Emphasis supplied)


²⁵ II. Selection/Tender Documents 1. Selection/Tender Documents. The Government Entity concerned shall prepare the selection/tender documents, which shall include the following:

- a. Instructions to Private Sector Participants;
- b. Minimum Design, Performance Standards/Specifications, and other Financial and Economic Parameters, where applicable, among others;
- c. Feasibility Study or a Business Case/Pre-feasibility Study of the Project;
- d. **Draft Contract reflecting the terms and conditions in undertaking the JV activity, including, among others, the contractual obligations of the contracting parties;**
- e. Selection Form reflecting the required information to properly evaluate the technical and financial proposal;
- f. Forms of technical and financial proposals and performance securities;
- g. Current applicable rules and regulations of the BSP, as applicable;
- h. Other documents as may be required by the Government Entity concerned.

The documents enumerated above are just for guidance/reference. The Government Entity concerned is given full discretion to select the appropriate provisions as they assess suitable for a particular contract/project. (Emphasis supplied)

²⁶ 7.4 Deviations and Amendments to the JV Agreement. **The concerned Government Entity shall not proceed with the award and signing of the contract if there are material deviations from the parameters and terms and conditions set forth in the proposal/tender documents that tend to increase the financial exposure, liabilities, and risks of government or any other factors that would cause disadvantage to government and any deviation that will cause prejudice to losing private sector participants. Said material deviations and amendments shall be subjected to the approval requirements under Sections 7.1 and 7.2 hereof. The Head of the Government Entity concerned shall be responsible for compliance with this policy. Violation of this provision shall render the award and/or the signed JV Agreement invalid.**

Any amendment to a JV Agreement after award and signing of contract, which does not materially affect the substance of the competitive selection, shall be subjected to the requirements stipulated under Sections 7.1 and 7.2 hereof. Non-compliance with the corresponding approval process stated shall render the amendment null and void. (Emphasis supplied)



activity. In this case, SBMA is duty bound to suspend the award and signing of the contract in view of the material change in the total contact cost of the project. As pointed out by NEDA, the total cost of the joint venture activity changed from US\$16.584 million (or ₱763.029 million at ₱46.01 exchange rate as of March 2010) to ₱5.537 billion after the competitive challenge was held.²⁷ To note, this was never refuted by petitioner. The substantial change in the total contract cost of at least ₱4 billion undeniably materially affects the substance of the competitive challenge.

Further, under the Implementing Rules and Regulations of the BOT Law,²⁸ the approval of the projects under the said law shall be as follows:

a. National Projects - The projects must be part of the Agency's development programs, and shall be approved as follows:

- i. projects costing up to PhP 300 million, shall be submitted to ICC for approval;
- ii. projects costing more than PhP 300 million, shall be submitted to the NEDA Board for approval upon the recommendation of ICC.; and
- iii. regardless of amount, negotiated projects shall be submitted to the NEDA Board for approval upon recommendation by the ICC.

b. Local Projects - Local projects to be implemented by the LGUs shall be submitted by the concerned LGU for confirmation, as follows:

- i. to the municipal development council for projects costing up to PhP 20 million;
- ii. to the provincial development council for those costing above PhP 20 million up to PhP 50 million;
- iii. to the city development council for those costing up to PhP 50 million;
- iv. to the regional development council or, in the case of Metro Manila projects, the Regional Development Council for Metropolitan Manila, for those costing above PhP 50 million up to PhP 200 million; and
- v. to the ICC for those costing above PhP 200 million.

Final approval of projects classified under b.i to b.iv of this section is vested on the Local Sanggunians per provisions of the Local Government Code.

Thus, NEDA's approval is required in national projects wherein: (1) the project costs up to ₱300 million, the same shall be submitted to the Investment Coordination Committee (ICC) of NEDA; (2) projects costing more than

²⁷ Id. at 305-306.

²⁸ R.A. No. 6957, as amended by R.A. No. 7718. An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector and for Other Purposes.

Php300 Million shall be submitted to the NEDA Board for approval upon the recommendation of the ICC; and (3) regardless of the amount, negotiated projects shall be submitted to the NEDA Board for approval upon recommendation of the ICC.²⁹

It is undisputed that negotiated agreements arose from the submission and acceptance of an unsolicited proposal from a private sector entity³⁰, such as in this case. Therefore, regardless of the amount of the project cost, NEDA Board's approval upon the recommendation of the ICC is necessary. The argument of petitioner therefore that NEDA's withdrawal does not affect the award of the project to petitioner is untenable. Precisely, it is NEDA's approval of the contract that is necessary before the joint venture project can be validly awarded to petitioner.

Mandamus cannot be availed by petitioner to command SBMA to issue a Notice of Award and/or to Proceed, as the same is not the ministerial duty of SBMA.

According to respondents, *mandamus* is unavailing in this case because the issuance of a Notice of Award and/or Notice to Proceed is actually discretionary and not ministerial on the part of SBMA.

The provision in the JV Guidelines relied upon by respondents read:

VIII. Award and Approval of Contract

1. Recommendation to Award. Within seven (7) calendar days from the date the evaluation procedure adopted is completed, the JV-SC shall submit the recommendation of award to the Head of the Government Entity concerned. The JVSC shall include as part of its recommendation, a detailed evaluation/assessment report on its decision regarding the evaluation of the proposals, and explain in clear terms the basis of its recommendations.

2. Decision to Award. **Within seven (7) calendar days from the submission by [Joint Venture Selection Committee] of the recommendation to award, the Head of the Government Entity shall approve or reject the same.** The approval shall be manifested by signing and issuing the "Notice of Award" to the winning private sector participant within seven (7) calendar days from approval thereof.

The issuance of SBMA Resolution No. 10-05-3646 has not reduced the issuance of a Notice of Award and/or to Proceed to a ministerial function. The SMBA Resolution merely approved and adopted the recommendation of the

²⁹ Section 2.6 of the Implementing Rules and Regulations of R.A. 6957, as amended by R.A. 7718.
³⁰ Section 7.3(b) of the 2008 JV Guidelines.

JVSP-SBMA to award the project to petitioner. Be it noted that the same is not immediately executory since the same is conditional to the favorable opinion of the OGCC and the approval of the NEDA Board based on R.A. No. 6957, as amended by R.A. No. 7718.

To reiterate, the writ of *mandamus* is employed to compel the performance, when refused, of a ministerial duty and not a discretionary duty. When a decision has been reached in a matter involving discretion, a writ of *mandamus* may not be availed of to review or correct it.³¹ In the present case, SBMA cannot be compelled to issue a Notice of Award and/or Notice to Proceed to petitioner since the same is discretionary on the part of SBMA. Also, when SBMA exercised its discretion to suspend the issuance of the Notice of Award in view of NEDA's withdrawal of its endorsement, petitioner cannot also avail of a writ of *mandamus* to compel SBMA to change its decision.

Further, *mandamus* cannot be used to enforce purely private contractual obligations.³² Thus, petitioner cannot compel SBMA to enter into a joint venture partnership with the former and enforce the JVA since entering into a contract or joint venture partnership with petitioner is not mandated by law.

ACCORDINGLY, I vote to **DENY** the instant petition and to **AFFIRM** the Decision dated August 8, 2013 of the Court of Appeals in CA-G.R. SP No. 125330. The Petition for *Mandamus* with prayer for Temporary Restraining Order and/or Writ of Preliminary Injunction and Writ of Preliminary Mandatory Injunction filed by petitioner Harbour Centre Port Terminal Inc., before the Regional Trial Court, Branch 72 of Olongapo City docketed as Civil Case No. 108-0-2011 should be **DISMISSED** for lack of merit.


ROSMARIE D. CARANDANG
Associate Justice

³¹ *Esquivel v. Ombudsman*, 437 Phil. 702 (2002).

³² *Star Special Watchman and Detective Agency, Inc. v. Hagedorn*, 733 Phil. 62 (2014).