



Republic of the Philippines
Sandiganbayan
Quezon City

SIXTH DIVISION

PEOPLE OF THE PHILIPPINES,
Plaintiff,

SB-15-CRM-0087

For: Violation of Section 3(e) of
Republic Act No. 3019, as
amended

- versus -

SB-15-CRM-0088

For: Malversation of Public Funds

LORETO LEO S. OCAMPOS
and **FOAD AKHAVAN,**
Accused.

Present:

FERNANDEZ, SJ, J.
Chairperson
MIRANDA, J. and
VIVERO, J.

Promulgated:

FEB 01 2019

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RESOLUTION

VIVERO, J.:

This resolves the *Joint Motion for Partial Reconsideration (Of the Decision Promulgated on 5 December 2018*¹) which was filed seasonably by accused conformably with A.M. No. 13-7-05-SB, otherwise known as the 2018 Revised Internal Rules of the Sandiganbayan.² Accused-movants impugn in part the correctness

¹ Records, Vol. V, pp. 200 – 266.

² These Rules, which took effect on November 16, 2018, provide that the motion for reconsideration should be filed within fifteen (15) calendar days from notice of the judgment (Rule X, Section 1).

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of this Court's Decision.³ They assailed this Court's verdict on the following grounds, to wit:

I.

"... HOLDING THAT THE CONTRACT BETWEEN THE PROVINCIAL GOVERNMENT OF MISAMIS OCCIDENTAL (THE 'SUBJECT CONTRACT') IS A BUILD-OPERATE-TRANSFER ('BOT') CONTRACT. THE PROFIT-SHARING PROVISION THEREIN ALONE ALREADY TAKE (sic) THE CONTRACT OUT OF THE PURVIEW OF THE BOT LAW.

II.

"... HOLDING THAT MR. OCAMPOS IS GUILTY OF MANIFEST PARTIALITY AND GROSS INEXCUSABLE NEGLIGENCE IN AWARDING THE CONTRACT TO MR. AKHAVAN WITHOUT THE BENEFIT OF A PUBLIC BIDDING INASAMUCH AS THE CONTRACT ENTERED INTO WAS A JOINT VENTURE, NO PUBLIC BIDDING WAS REQUIRED.

III.

"... HOLDING THAT UNWARRANTED BENEFITS, ADVANTAGE AND/OR PREFERENCE WERE CONFERRED ON MR. AKHAVAN AND/OR THAT UNDUE INJURY WAS CAUSED TO THE PROVINCIAL GOVERNMENT OF MISAMIS OCCIDENTAL."⁴

Contrariwise, the prosecution, thru its *Comment/Opposition*,⁵ asserted that it had discharged its burden of proving the following:

1. The *Amended Investment Contract* is, for all intents and purposes, a build-operate-transfer (BOT) agreement as defined under Republic Act No. 6957, as amended by R. A. No. 7718.⁶

³ Decision dated December 5, 2018, pp. 1 – 57 (Records, Vol. V, pp. 122 – 178)

⁴ Joint Motion for Partial Reconsideration (Of the Decision promulgated on 5 December 2018) dated December 5, 2018), p. 2 (Records, Vol. V, p. 201).

⁵ Comment/ Opposition (to Accused's Joint Motion for Partial Reconsideration [of the Decision Promulgated on 5 December 2018]), dated January 8, 2018, pp. 1 – 6 (Records, Vol. V, 268 - 273).

⁶ *Id.*, p. 2.

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2. Manifest partiality and gross inexcusable negligence of accused Ocampos were evident not only in his act of bypassing public bidding, but also in his act of awarding the subject contract to an unlicensed and unqualified private contractor.⁷
3. Unwarranted benefits were extended to accused Akhavan, an unqualified private contractor who exercised complete control – both operational and financial – over the subject project.⁸
4. The provincial government suffered undue injury to its pecuniary interests on account of the payment by the local government unit (LGU), instead of accused Akhavan, of the salaries of workers stationed at Dolphin Island.⁹

On January 22, 2019, accused-movants filed a *Manifestation with Motion to Admit Reply*,¹⁰ including their *Reply*.¹¹ Considering, however, that a reply is explicitly disallowed by A.M. No. 13-7-05-SB,¹² it shall merely be noted.

The Court now resolves.

I. The subject contract and corresponding project are governed by the Build-Operate-Transfer (BOT) Law.

The “*Amended Investment Contract*”¹³ between the Provincial Government of Misamis Occidental and accused Akhavan, is a

⁷ *Id.*, at p. 3.

⁸ *Op. cit.*, pp. 3 – 4.

⁹ *Loc. cit.*, p. 4.

¹⁰ *Manifestation with Motion to Admit Reply (of the Decision Promulgated on 5 December 2018)*, dated January 22, 2019, pp. 1 – 3.

¹¹ Reply dated January 15, 2019, pp. 1 – 12.

¹² Rule VII, Section 4 of the Revised Internal Rules of the Sandiganbayan.

¹³ Amended Investment Contract dated January 2007, pp. 1 – 4; EXHIBITS “F”, “6”.

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Build-Operate-Transfer Law Scheme.¹⁴ In *Tatad, et. al. v. Garcia, Jr. and EDSA LRT Corporation, Ltd.*,¹⁵ the Supreme Court succinctly explained its nature, to wit:

“The BOT scheme is expressly defined as one where the contractor undertakes the construction and financing in infrastructure facility, and operates and maintains the same. The contractor operates the facility for a fixed period during which it may recover its expenses and investment in the project plus a reasonable rate of return thereon. After the expiration of the agreed term, the contractor transfers the ownership and operation of the project to the government.

“x x x

“Emphasis must be made that under the BOT scheme, the owner of the infrastructure facility must comply with the citizenship requirement of the Constitution on the operation of a public utility.

x x x.”¹⁶

A plain reading of the provisions of the “*Amended Investment Contract*,” the concession agreement, shows that it fully conforms with the BOT concept.¹⁷ By its express terms, Accused Akhavan has “*absolute management*,” as well as beneficial ownership of the project, including the machineries and equipment used, subject only to the transfer of these properties without cost to the Provincial Government after the lapse of the period agreed upon. Moreover, Akhavan’s possession and use of the Dolphin Island project, including the facilities and equipment therein, are actual, direct, and immediate.

BOT is a form of public-private partnership (PPP).¹⁸ The government, in the exercise of its ministrant function,¹⁹ is thru legal

¹⁴ Department of Interior and Local Government (DILG) Memorandum Circular (MC) No. 2016-120 dated September 7, 2016.

¹⁵ G.R. No. 114222, April 6, 1995 [313 Phil. 296, 323].

¹⁶ *NAPOCOR v. Central Board of Assessment Appeals (CBAA)*, G.R. No. 171470, January 30, 2009 [57 SCRA 418, 434-437].

¹⁷ *National Power Corporation (NAPOCOR) v Province of Quezon and Municipality of Pagbilao*, G.R. No. 171586, January 25, 2010.

¹⁸ Dennis A. Rondinelli, “Public-Private Partnerships,” in Colin Kirkpatrick, Ronald Clarke and Charles Polidano (eds.) *Handbook on Development Policy and Management*, Cheltenham, England: Edward Elgar Publishing Ltd., 2002): 381-388.

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fiat, given the prerogative to outsource projects. The Public-Private Partnership Center (PPPC), by virtue of the Executive Order No. 8 series of 2010, as amended by Executive Order No. 136 series of 2013, is mandated to facilitate the implementation of the country's PPP Program and Projects. It serves as the central coordinating and monitoring agency for all PPP projects in the Philippines. Therewithal, it characterizes Public-Private Partnership (PPP) in this wise:

x x x It is a mechanism to distribute project risks to both public and private sector. PPP is geared for both sectors to gain improved efficiency and project implementation processes in delivering services to the public. Most importantly, PPP emphasizes Value for Money²⁰ – focusing on reduced costs, better risk allocation, faster implementation, improved services and possible generation of additional revenue.”²¹

Accused-movants maintain that the “*Amended Memorandum of Agreement*,” on account of its “profit-sharing scheme” is a joint venture (JV), not a BOT, contract.²² Ergo, said MOA is not subject to the public bidding requirement under the BOT Law.²³

Accused-movants’ hasty deduction is palpably wrong and misleading.

Public-Private Partnership Governing Board (PPPGB) Resolution No. 2018-03-05,²⁴ “Framework on PPP Center’s Assistance on Joint Venture Agreements,” mandates that:

¹⁹ *Bacani v. National Coconut Corporation (NACOCO)*, G.R. No. L-9657, November 29, 1956 [53 O.G. p. 2800]; *The Agricultural Credit and Cooperative Financing Administration (ACCFA) v. ACCFA Workers’ Association, et. al.*, G.R. No. L-21484, November 29, 1969.

²⁰ Value for money (VfM) is achieved when the government obtains the maximum benefit from the goods and services it both acquires and provides. It is the best available outcome after taking into account all the benefits, costs, and risks over the entire project life, which may not necessarily be the lowest cost or price. (<https://ppp.gov.ph/ppp-program/what-is-ppp/>)

²¹ <https://ppp.gov.ph/ppp-program/what-is-ppp/>.

²² *Supra*, Note 4, pp. 3 – 4.

²³ *Id.*, p. 5.

²⁴ This took effect on March 22, 2018.

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“Government Entities shall undertake JVs in accordance with the guiding principles as provided in relevant issuances, rules, and guidelines, such as the 2013 NEDA Joint Venture Guidelines and **DILG MC No. 2016-120**.”²⁵ (Italics and Underscoring Supplied.)

Under PPPGB Resolution No. 2018-03-05, “government entities” include local government units (LGUs), such as but not limited to, the province of Misamis Occidental.²⁶ Also, DILG MC No. 2016-120²⁷ (Guidelines for the Implementation of PPP for the People Initiative for Local Governments [LGU P4]) provides:

“Public-Private Partnership for the People Initiative for Local Governments (LGU P4) shall be defined in two levels, i.e. policy and project. At the **policy level**, LGU P4 is a developmental, innovative, change and partnership strategy aimed at promoting the general welfare, inclusive growth and better quality of life for Filipinos.

“At the **project level**, LGU P4 is a contractual arrangement between the LGU and the private sector to deliver public infrastructure and/or public services where each party assumes specified functions, bears certain risks, provides contribution, performs particular obligations, and earns benefits and revenues.”²⁸ (Emphasis and Underscoring Supplied.)

DILG MC No. 2016-120 considers **both** build-operate-transfer (BOT) and joint venture (JV) as **BOT Law variants or LGU P4 modalities**.²⁹ More importantly, the LGU is required to -

“employ a competitive procurement process, undertaken through open, fair and legitimate competitive bidding upon a common standard and basis, and upon the same thing, subject matter and undertaking, and, . . . ensuring both transparency and economically efficient outcome”³⁰ (Emphasis and Underscoring Supplied.)

²⁵ Section 3.1 of PPPGB Resolution No. 2018-03-05.

²⁶ Republic Act No. 7160, otherwise known as the Local Government Code of 1991.

²⁷ DILG MC No. 2016-120 took effect on September 7, 2016.

²⁸ *Id.*, at Section 5.1.

²⁹ *Id.*, at Section 5.3, nos. 3, 14.

³⁰ *Id.*, at Section 5.4, (a), (vi).

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Prescinding from the foregoing, there is no gainsaying that accused Ocampos should have complied strictly with procurement procedures. Needless to say, strict observance of the rules of the bidding process is the only safeguard to a fair, honest and competitive public bidding.³¹ Resort to alternative methods of procurement under Republic Act No. 9184 is allowed only in highly exceptional cases in the light of an immediate and compelling justification.³²

**II. Manifest partiality and gross
inexcusable negligence of
accused Ocampos had been
proven**

Accused-movants insist that neither manifest partiality nor gross inexcusable negligence on the part of accused Ocampos is extant. This is plain sophistry.

In the fairly recent case of *People v. Dr. Hermes Frias, et. al.*,³³ this Court adjudged that the local chief executive's act of transacting with an unlicensed supplier bears the *indicia* of manifest partiality, gross inexcusable negligence and evident bad faith. *In pari passu*, accused Ocampos transacted directly with an illegitimate investor, and a foreigner at that. Further, he turned a blind eye to R.A. No. 6957 as amended by R.A. No. 7718, which requires that a BOT project be awarded to the bidder who has satisfied the minimum requirements, and met the technical, financial, organizational and legal standards. As a matter of fact, the procurement process was ignored altogether. Instead, the project – lock, stock and barrel – was handed on a silver platter to the Governor's anointed proprietor, accused Akhavan.



³¹ *Office of the Ombudsman – Mindanao v. Martel*, G.R. No. 221134, March 1, 2017.

³² *Nava v. Palattaa*, G.R. No. 160211, August 28, 2006 [499 SCRA 745]; *Maglaya-De Guzman v. Ombudsman and Bestforms, Incorporated*, G.R. No. 229256, November 22, 2017.

³³ Criminal Case Nos. SB-08-CRM-0392 to 0393; SB-08-CRM-0403, 0406, 0407, January 18, 2019.

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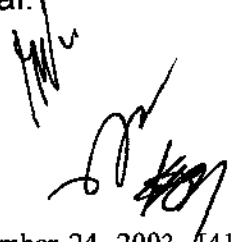
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The essence of competition in public bidding is that the bidders are placed on equal footing.³⁴ In the award of government contracts, including BOT agreements, the law requires a competitive public bidding. This is reasonable because competitive public bidding aims to protect the public interest by giving the public the best possible advantages thru open competition. It is a mechanism that enables the government agency to avoid or preclude anomalies in the execution of public contracts.³⁵ In *Efren L. Alvarez v. People*,³⁶ the Supreme Court convicted the Mayor of the Municipality (now Science City) of Muñoz, Nueva Ecija for awarding to the private sector proponent (PSP) the contract for the construction of the Wag-Wag Shopping Mall under the BOT scheme despite the fact that it was not a licensed contractor and does not have the experience and financial qualifications to undertake such costly project, among others, to the damage and prejudice of the public service.

More. R. A. No. 3019 requires that the public officer's negligence must be both gross and inexcusable.³⁷ In the contemporaneous case of *People v. Sandiganbayan [First Division], Enrico R. Echiverri, et. al.*,³⁸ the Supreme Court held that strict adherence to the means, method and manner of procurement under the applicable law effectively eliminates the possibility that the subject project was entered into by respondents with manifest partiality or with gross inexcusable negligence, and/or that it resulted in undue injury to the local government unit. Conversely, bypassing nonchalantly the tedious procurement process, as in the instant case, is tantamount to gross inexcusable negligence.³⁹ Needless to say, it is irregular and illegal.



³⁴ *JG Summit Holdings, Inc. v. Court of Appeals*, G.R. No. 124293, September 24, 2003 [412 SCRA 10, 33].

³⁵ *Garcia v. Burgos*, G.R. No. 124130, June 29, 1998 [291 SCRA 546, 576].

³⁶ G.R. No. 192591. June 29, 2011.

³⁷ *Constantino v. Sandiganbayan (First Division) and People*, G.R. No. 140656, September 13, 2007; *People v. Aphrodite D. Maala*, Crim. Case No. SB-10-CRM-0035, July 20, 2016.

³⁸ G.R. No. 241103 – 04, October 1, 2018.

³⁹ *People v. Wenceslao B. Trinidad, et. al.*, SB-11-CRM-0249 & 0250, November 26, 2015; *People v. Constantino H. Navarro, Jr., et. al.*, SB Crim. Case Nos. 27796 to 27801, 27083 to 27805, January 16, 2014.

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III. Undue injury to the zone of interests of the province had been proven

Undue injury, within the contemplation of Section 3(e) of R.A. No. 3019, must be quantifiable, demonstrable and proven to the point of moral certainty.⁴⁰ Here, the delictual act of the accused caused actual damage to the zone of interests – pecuniary and proprietary – of the province.⁴¹ Competent and credible evidence undergird these.⁴² Truth to tell, the government suffered undue injury in this case as a consequence of the payment of workers' salaries at the Dolphin Island by the Province, thereby causing undue injury to the government amounting to at least P 559,925.00.⁴³

In a nutshell, the Court described the residual effect of accused's misfeasance, viz:

“ . . . [T]he Amended Investment Contract had placed Mr. Akhavan at an arbitrary position where he can do as he pleases without being accountable to the Provincial Government in any way whatsoever. True enough, when Mr. Akhavan was in dire straits on account of ‘no net income,’ and closed down, the province found itself at extreme disadvantage without recourse to a performance security. As the cliché goes, Mr. Akhavan had his cake and ate it too, while the provincial government got the raw end of the deal. Suffice it to say that the undue injury to the pecuniary interests of the Provincial Government Misamis Occidental was the inevitable, logical and necessary consequence of accused Ocampos' gross and inexcusable negligence.”⁴⁴
(Emphasis and Underscoring Supplied.)

⁴⁰ *Pecho v. Sandiganbayan*, G.R. No. 111399, November 14, 1994; *People v. Juliet Ngo-Fiel, et. al.*, SB-15-CRM-0145, February 23, 2018; *People v. Eugenio L. Famor, et. al.*, SB-10-CRM-0148 to 0161, February 2, 2018.

⁴¹ *Cabrera v. Sandiganbayan*, G.R. No. 162314 – 17, October 25, 2004 [441 SCRA 377]; *People v. Rufino A. Tongson, Jr.*, Crim. Case No. 23668, June 15, 2011.

⁴² *Caugma v. People*, G.R. No. 167048, April 7, 2006; Noel G. Villaroman, *LAWS AND JURISPRUDENCE ON GRAFT AND CORRUPTION*, 3rd Edition, 2010, citing *People v. Santos*, G.R. No. 161877, March 23, 2006; *People v. Vladimir Binondo De los Trino*, SB Crim. Case Nos. 28233 & 28234, November 29, 2016.

⁴³ Prosecution's Memorandum dated July 20, 2018, p. 16 of 19 (Records, Vol. V, p. 61).

⁴⁴ Decision, p. 45 of 57 (Records, Vol. V, p. 166).

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Consistent with jurisprudential precedents, the undue injury herein -

- a. Is perceived to be substantial enough;⁴⁵ and
- b. constitutes actual damage,⁴⁶ in the context of Philippine Civil Law.⁴⁷

All things considered, the facts duly proven point to the inescapable conclusion that the acts of the accused transgressed Section 3(e) of Republic Act No. 3019. No compelling reason can persuade this Court to rule otherwise. After all, the presence of the elements of the crime has been proven after a full-blown trial on the merits.⁴⁸ Finally, considering that accused's *Joint Motion for Partial Reconsideration* merely rehashes the issues previously put forward, the Court, having already passed upon such issues with finality, finds no need to discuss these at length to avoid repetition and redundancy.

WHEREFORE, premises considered, the Court **DENIES** the *Joint Motion for Partial Reconsideration* filed by accused **Loreto Leo S. Ocampos** and **Foad Akhavan** for lack of merit.

No further pleadings or submissions by any party shall be entertained.

SO ORDERED.

⁴⁵ *Fonacier v. Sandiganbayan*, G.R. Nos. 50691, 52263, 52766, 52821, 53350 & 53397, December 5, 1994, [238 SCRA 655, 688]; *Soriques v. Sandiganbayan*, G.R. No. 153526, October 25, 2005 [474 SCRA 222, 230].

⁴⁶ *Santos v. People*, G.R. No. 161877, March 23, 2006, 485 SCRA 185, 197, citing *Llorente, Jr. v. Sandiganbayan*, 350 Phil. 820, 838 (1998).

⁴⁷ Article 2199 of the Civil Code provides that *except as provided by law or by stipulation*, one is entitled to an adequate compensation only for such pecuniary loss suffered by a party as he has duly proved. Liquidated damages, on the other hand, are those agreed upon by the parties to a contract, to be paid in case of a breach thereof (Art. 2226, Civil Code).

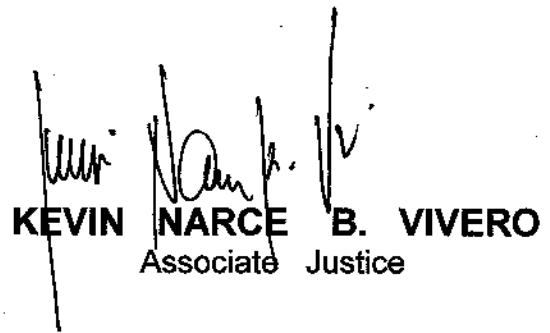
⁴⁸ *Go v. Sandiganbayan [Fifth Division] and the Office of the Special Prosecutor, Office of the Ombudsman*, G.R. No. 172602, April 13, 2007; *Andres v. Cuevas*, G.R. No. 150869, June 9, 2005 [460 SCRA 38].

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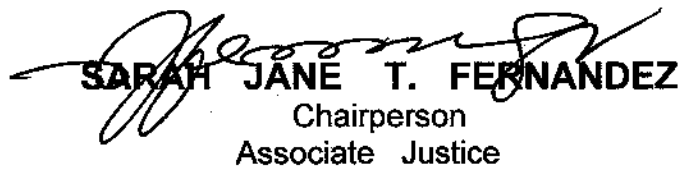
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KEVIN NARCE **B. VIVERO**
Associate Justice

We concur:



SARAH JANE T. FERNANDEZ
Chairperson
Associate Justice



KARL B. MIRANDA
Associate Justice