

SPECIAL THIRD DIVISION

NOV 06 2015

G.R. No. 203655 – SM LAND, INC. (SMLI), Petitioner, v. BASES
 CONVERSION AND DEVELOPMENT AUTHORITY, ET AL.,
 Respondents.

Promulgated:

September 7, 2015

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DISSENTING OPINION

LEONEN, J.:

Bases Conversion and Development Authority's Second Motion for Reconsideration¹ cannot be summarily denied on the ground that judgment had already been entered and had already become final and executory on March 18, 2015.

Bases Conversion and Development Authority's first Motion for Reconsideration was denied on March 18, 2015.² Based on the Entry of Judgment³ prepared on April 14, 2015, the August 13, 2014 Decision⁴ in this case was declared final and executory on the same date—March 18, 2015.

Bases Conversion and Development Authority (BCDA) received the March 18, 2015 Resolution only on April 20, 2015.⁵ The immediate Entry of Judgment deprived BCDA of its 15-day period from notice to file its Second Motion for Reconsideration.⁶ It deprived SM Land, Inc. the opportunity to show the higher interest involved in this case.

The Entry of Judgment is procedurally infirm and should be vacated.

Our decision in this case impacts not only properties entrusted to BCDA but also properties of the whole government whenever it deals with private entities. It also impacts the status of our national defense and security.

¹ *Rollo*, pp. 1464–1496.

² Id. at 1425, Resolution; *SM Land, Inc. v. Bases Conversion and Development Authority*, G.R. No. 203655, March 18, 2015 <<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/march2015/203655.pdf>> 12 [Per J. Velasco, Jr., Special Third Division].

³ *Rollo*, pp. 1439–1440.

⁴ *SM Land, Inc. v. Bases Conversion and Development Authority*, G.R. No. 203655, August 13, 2014, 733 SCRA 68 [Per J. Velasco, Jr., Third Division].

⁵ *Rollo*, p. 1447, BCDA's Motion for Leave to File Second Motion for Reconsideration and to Admit the Attached Second Motion for Reconsideration, and p. 1464, BCDA's Second Motion for Reconsideration.

⁶ RULES OF COURT, Rule 51, sec. 10 and Rule 52, sec. 1; S.CT. INT. RULES, Rule 16, secs. 1 and 3.

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This case involves BCDA's issuance of Supplemental Notice No. 5⁷ on August 6, 2012. It terminated the "Competitive Challenge for the Selection of BCDA's Private Sector Partner" for the privatization of BCDA's 33.1-hectare property in Fort Bonifacio.⁸

SM Land, Inc., having been declared the Original Proponent, wants to annul Supplemental Notice No. 5 for allegedly violating its rights.⁹ SM Land, Inc. claims that it has the right to a completed competitive challenge, with its latest offer of ₱38,500.00 per square meter of the Fort Bonifacio property.¹⁰

BCDA, however, claims that SM Land, Inc.'s offer is below the market value. Acceptance of SM Land, Inc.'s offer may reduce the benefits received by statutory beneficiaries of the proceeds of the disposition of BCDA-administered properties.¹¹

Our internal rules mandate this court En Banc to act on matters that may have an effect on businesses or community welfare, or on matters that merit this court En Banc's attention.¹²

Further, the Motion for Leave to File Second Motion for Reconsideration and to Admit the Attached Second Motion for Reconsideration contained a "Motion for the Court *en banc* to Take Cognizance of this Case and/or to Set the Case for Oral Argument Before the Court *en banc*."¹³ Based on their captions, both the Motion for Leave to File Second Motion for Reconsideration¹⁴ and the Second Motion for Reconsideration¹⁵ were addressed to this court En Banc and not to the Third Division.

For these reasons, Bases Conversion and Development Authority's Second Motion for Reconsideration should be referred to this court En Banc. The En Banc should be allowed to determine for itself whether a case involves matters that are of sufficient importance to require the participation of a full court.

⁷ *Rollo*, p. 63.

⁸ *Id.*

⁹ *Id.* at 55, Petition.

¹⁰ *Id.* at 3–59.

¹¹ *Id.* at 1023–1078, BCDA's Motion to Resolve with Motion for Reconsideration.

¹² S.C.T. INT. RULES, Rule 2, sec. 3(k) and 3(m).

(k) Division cases where the subject matter has a huge financial impact on businesses or affects the welfare of a community;

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(m) cases that the Court en banc deems of sufficient importance to merit its attention[.]

¹³ *Rollo*, p. 1446, BCDA's Motion for Leave to File Second Motion for Reconsideration and to Admit the Attached Second Motion for Reconsideration.

¹⁴ *Id.* at 1446.

¹⁵ *Id.* at 1464.

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In the alternative, at the very least, SM Land, Inc. should be ordered to file its Comment.

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The competitive challenge process can be terminated upon finding that it is inconsistent with national policies and public interest.

In this case, the declaration of SM Land, Inc. as the Original Proponent was filled with governance, commercial, and financial issues.

Particularly, the Joint Venture Selection Committee's and the outgoing BCDA Board's decisions and actions showed that the disposition must be assessed further in terms of consistency with the country's best interests.

BCDA points to the Minutes of BCDA's April 28, 2010 Board Meeting¹⁶ showing that before SM Land, Inc. was declared as the Original Proponent, there had been a concern within the BCDA Board regarding the choice of disposition process:

5.1.3 Vice Chairman Abaya expressed concern that BCDA might be questioned later on why it opted to go via Annex 'C' and not the Annex 'A' mode of disposition. In order to justify BCDA going via Annex 'C' mode, it should be made clear to the interested proponents that there are already offers higher than the JUSMAG property[.]¹⁷ (Citation omitted)

The first developer that submitted a proposal for the development of BCDA's property was Robinsons Land Corporation and not SM Land, Inc. Robinsons Land Corporation had submitted as early as October 8, 2009¹⁸ its initial proposal of ₱14,000.00 per square meter for the development of the property.¹⁹ This was at least two (2) months before SM Land, Inc. submitted its initial proposal of ₱16,350.00 per square meter on December 11, 2009.²⁰

¹⁶ *Rollo*, pp. 1094–1123.

¹⁷ Id. at 1040, BCDA's Motion to Resolve with Motion for Reconsideration, and p. 1481, BCDA's Second Motion for Reconsideration.

¹⁸ Id. at 1480, BCDA's Second Motion for Reconsideration.

¹⁹ Id. at 1091–1093, Robinsons Land Corporation Technical and Financial Proposal.

²⁰ Id. at 1048, BCDA's Motion to Resolve with Motion for Reconsideration.

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On April 29, 2010, BCDA rejected both proposals for failing to conform to “BCDA’s policies on the disposition of its properties[.]”²¹ The competitive challenge was not terminated.²²

Instead, the Joint Venture Selection Committee actively solicited proposals from Robinsons Land Corporation and SM Land, Inc.²³

In BCDA’s May 4, 2010 Minutes of the Board Meeting,²⁴ the BCDA Board of Directors was informed that Robinsons Land Corporation and SM Land, Inc. were allowed to submit another proposal to determine which among them submitted first.²⁵ This was despite the two-month gap between Robinsons Land Corporation’s and SM Land, Inc.’s submissions.²⁶ Thus:

5.2.4 The JV-SC informed both entities that the rejection of their proposals does not preclude them from submitting another proposal. To be able to let BCDA fairly and equitably name the original proponent under the JV Guidelines, the JV-SC would like to adopt a process wherein both PSEs shall submit a much improved proposal simultaneously. This would determine which between the two entities shall be subjected for evaluation as the original proponent. This would also resolve the issue of which entity submits first. The determination of the original proponent shall be based on the content of their respective proposals, compared against BCDA’s pre-approved minimum parameters for the disposition of the subject property.

5.2.5 The JV-SC informed the proponents that they may submit their respective proposals, if any, on 04 May 2010, 9:00 am at the BCDA Corporate Center.²⁷

According to BCDA, this gave Robinsons Land Corporation and SM Land, Inc. “an unfair advantage over all other developers as it effectively limited the selection process to the two invitees.”²⁸

On the same day, May 4, 2010, at 9:00 a.m., SM Land, Inc. submitted its revised proposal. Robinsons Land Corporation suddenly backed out from submitting its new proposal.²⁹

²¹ Id. at 1124–1125, BCDA’s letters to Robinsons Land Corporation and to SM Land Incorporation, respectively.

²² Id. at 1482, BCDA’s Second Motion for Reconsideration.

²³ Id. at 1041.

²⁴ Id. at 1126–1141.

²⁵ Id. at 1136.

²⁶ Id. at 1048, BCDA’s Motion to Resolve with Motion for Reconsideration.

²⁷ Id. at 1136, BCDA Board Meeting dated May 4, 2010.

²⁸ Id. at 1483, BCDA’s Second Motion for Reconsideration.

²⁹ Id. at 1482.

BCDA perceives: (1) the failure to terminate the competitive challenge proceeding when none of the participants were found to have met the parameters for disposition;³⁰ (2) the decision to solicit improved offers even after rejection of proposals;³¹ (3) Robinsons Land Corporation's sudden decision not to participate in the competitive challenge;³² and (4) the "need to determine 'which entity submit(ted) first,' despite the glaring variance in the actual date that BCDA received the proposals of [Robinsons Land Corporation] and [SM Land, Inc.]"³³ as an indication of an advantage given to SM Land, Inc.³⁴

BCDA also implies that the apparent urgency in evaluating and coming up with a recommendation on SM Land Inc.'s unsolicited proposal was an irregularity:

On 4 May 2010, merely six days before the Presidential Elections, SMLI submitted its 3 May 2010 Unsolicited Proposal to BCDA. This Unsolicited Proposal was opened at 9:00 a.m. during the BCDA Business Development Board Committee Meeting in the presence of SMLI representatives. The 3 May 2010 Unsolicited Proposal was thereafter forwarded to BCDA's Reception Desk where it was stamped as having been received at 9:25 a.m. and then endorsed for inclusion in the Agenda of the BCDA Board Meeting set at 12:00 noon of the same day.

In a span of about three hours, the JV-SC received, opened, evaluated and recommended the acceptance of SMLI's Unsolicited Proposal for the privatization and development of the 33.1 hectare subject Property for Php32,501/sq. m. in Net Present Value (NPV) using a 10% discount rate; and the pursuit of detailed negotiations on the terms and conditions of the Joint Venture under Annex "C" of the NEDA JV Guidelines. This circumstance was not lost to some BCDA Directors. As reflected in the Minutes of the Board Meeting:

5.2.23. Director Sangil said that the Board was only given a few hours to evaluate the revised proposal by SLI, considering that copies of the same were given only shortly before the Board Meeting started. As such, the Board may not be able to come up with a wise decision on the matter.³⁵ (Emphasis and underscoring in the original, citations omitted)

³⁰ Id.

³¹ Id.

³² Id. at 1482.

³³ Id. at 1483.

³⁴ Id.

³⁵ Id. at 1042, BCDA's Motion to Resolve with Motion for Reconsideration

BCDA also points to an apparent disregard of Ayala Land, Inc.'s ₱36,880.00 per square meter offer made before the issuance of a Certification of Successful Negotiation.³⁶

This had not escaped the notice of Ayala Land, Inc. In its June 11, 2010 letter:³⁷

We refer to our meeting yesterday, June 10, and reiterate our concern over the decision of the Bases Conversion Development Authority (BCDA) to accept an offer to purchase the subject parcel of land at a price below our offer of PHP36,880.00 per square meter and even as you confirmed that our offer is superior to previous offers you have received.

We now formally request that you reconsider your decision and conduct a public bidding for the property consistent with the precedent set by BCDA for the South Bonifacio lots with its disposition of the JUSMAG site in February on account of its receipt of a number of offers from various proponents including ourselves. We believe that BCDA should pursue the best price for the property to uphold public interest and avoid the loss of public funds and revenues. The sudden change in BCDA's disposition mode as our government transitions to a new administration might also be questionable.³⁸

Ayala Land, Inc.'s offer was not acted upon. Instead, the Joint Venture Selection Committee asked SM Land, Inc. to improve Ayala Land, Inc.'s offer.³⁹ SM Land, Inc. increased its offer to ₱36,900.00.⁴⁰ SM Land, Inc.'s proposal was later improved to ₱38,500.00.⁴¹

Further, BCDA's July 20, 2010⁴² and July 28, 2010⁴³ Board Meetings before the issuance of a Certification of Successful Negotiation indicate concerns by some of the BCDA Directors over the disposition's alignment with the President's policies. Some of BCDA's Board Members knew that BCDA's actions must be aligned with the President's policies.

During the July 20, 2010 Board Meeting:

4.4.31. Director Valencia recalled that in the disposition of the JUSMAG property, the Board could not decide on whether or not to declare ALI as the original proponent. However,

³⁶ Id. at 1484, BCDA's Second Motion for Reconsideration.

³⁷ Id. at 1145.

³⁸ Id.

³⁹ Id. at 1488, BCDA's Second Motion for Reconsideration.

⁴⁰ Id.

⁴¹ Id. at 1492.

⁴² Id. at 1146–1170.

⁴³ Id. at 1171–1206.

subsequent proposals came along which compelled BCDA to dispose of the property through public bidding over a period of two years. Given this example, he suggested that the Board could perhaps defer its decision on the matter until such time that the new administration appoints new BCDA Board Members. He also expressed his concern about the ALI letter which alleges that the BCDA's mode of disposition might be questionable[.]

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4.4.40 Director Valencia said that the ALI offer for the subject property was reduced to its present value, same with the SMLI offer. Regardless of the underlying assumptions for the offers, the value of the property is the same and the peso represented today is the same as that being represented by other proponents. Given this fact, it is prudent for BCDA to wait until new BCDA Directors are appointed by the new administration to avoid the suspicion that BCDA is rushing the disposition of the subject property.

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4.4.52 Director Seno suggested the possibility of elevating the matter to the Office of the President (OP) as far as the Board's decision is concerned, explaining the process involved and the actions of the Board every step of the way. The professionalism of the BCDA Board will be questioned if it does not exercise prudence on the matter.⁴⁴ (Underscoring in the original, citation omitted)

On July 28, 2010:

5.10.9. For the record, Director Sangil asked whether BCDA considered President Aquino's State of the Nation (SONA) speech *vis-à-vis* the discussions in BCDA and read on a portion of the SONA, to wit:

'May nagmungkahi sa atin, ito ang proposisyon, uupahan po nila ang Headquarters ng Navy sa Roxas Boulevard at Navy Station sa Fort Bonifacio. Sagot po nila ang paglipat ng Navy Headquarters sa Camp Aguinaldo. Agaran bibigyan tayo ng isang milyon dolyar, at dagdag pa sa lahat na iyan, magsusumi[te] pa sila sa atin ng kita mula sa mga negosyong itatayo nila sa uupahan nilang lupa. Marami na pong nag alok at nagmungkahi sa atin, mula local hanggang dayuhang negosyante, na nagpuno ng iba't ibang pangangailangan.'

⁴⁴ Id. at 1043–1045, BCDA's Motion to Resolve with Motion for Reconsideration.

- 5.10.10. Vice Chairman Abaya said that subsequent interviews of the Philippine Navy spokesperson identified Lot 1, which is on the other side of the Fort Bonifacio. Director Sangil, on the other hand, expressed concern that the President put emphasis on the term *uupahan* or lease instead of a joint venture.

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- 5.10.14. Director Sangil wanted to place on record that BCDA has considered the policy statement of the President after his SONA. He opined that when BCDA comes up with certain policies, the policy of the President should be considered as part of the framework of a development plan for the agency.

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- 5.10.20. x x x Director Sangil deems whatever concession, agreements, directions that may be done in the past of BCDA may be superseded by a policy statement of the President.⁴⁵ (Emphasis in the original, citation omitted)

Upon recommendation of the Joint Venture Selection Committee, the BCDA Board of Directors declared SM Land, Inc. as the Original Proponent.⁴⁶ One Board Member refused to participate and insisted that a decision be made under the new administration and with the new Board that would be appointed by the elected President.⁴⁷

The above circumstances of disposition affect perception on the conduct of present and future government transactions.

As shown by Ayala Land, Inc.'s letter, investors are aware of the government disposition process. Other private entities may be interested in participating in government disposition processes. However, a perception that one participant is favored reduces the government's credibility whenever it transacts with private entities.

Perception that a government property disposition procedure is rigged or favoring a particular interest will discourage investors to participate not only in this specific disposition process but also in future disposition processes or transactions involving government.

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⁴⁵ Id. at 1045–1046, BCDA's Motion to Resolve with Motion for Reconsideration, and 1484, BCDA's Second Motion for Reconsideration.

⁴⁶ Id. at 1046, BCDA's Motion to Resolve with Motion for Reconsideration, and 1488, BCDA's Second Motion for Reconsideration.

⁴⁷ Id. at 1488, BCDA's Second Motion for Reconsideration.

The President, as Chief Executive, must ensure the faithful execution of laws.⁴⁸ He took an oath to “consecrate [himself] to the service of the Nation.”⁴⁹ As such, part of his job is to maintain or improve the credibility of government transactions. Government transactions must be consistent with public interest.

The President also controls and supervises executive departments, bureaus, and offices including BCDA.⁵⁰ He is expected to correct errors by and irregularities in the processes of departments, bureaus, and offices under his control whenever they come to his knowledge.

Thus, after the President had been elected in 2010 under a platform of good governance, his new administration saw the need to conduct a due diligence on existing government projects. Among the projects reviewed were the disposition of the Food Terminal, Inc. Complex, the Subic-Clark-Tarlac Expressway concession, and the disposition of the 33.1-hectare property in Fort Bonifacio.⁵¹ The disposition process of the Fort Bonifacio property was deferred for a policy review.

In the letter⁵² dated September 14, 2010, Undersecretary Christian M. Castillo of the Office of the Chief Presidential Legal Counsel requested documents relating to the privatization and development of the 33.1-hectare property in Fort Bonifacio.

In the letter⁵³ dated September 27, 2010, Assistant Director Clemencia A. Cabugayan of the Presidential Management Staff Politico-Security Policy Office requested a copy of the Bonifacio South Master Development Plan.

BCDA justified the disposition process.⁵⁴ In its November 8, 2010 and November 30, 2010 Memoranda submitted to the President, BCDA recommended to proceed with the privatization of the Fort Bonifacio property through competitive challenge.⁵⁵

In the letter⁵⁶ dated April 20, 2011, Director May Jean A. Narne of the Economic Policy Office of the Presidential Management Staff referred to the President’s directive to meet regarding the Department of Justice’s opinion

⁴⁸ CONST., art. VII, sec. 17.

⁴⁹ CONST., art. VII, sec. 5.

⁵⁰ CONST., art. VII, sec. 17.

⁵¹ *Rollo*, p. 1479, BCDA’s Second Motion for Reconsideration.

⁵² *Id.* at 574.

⁵³ *Id.* at 1081.

⁵⁴ *Id.* at 1479, BCDA’s Second Motion for Reconsideration.

⁵⁵ *Id.* at 1479–1480.

⁵⁶ *Id.* at 1082.

that it was still possible for government not to proceed with the disposition of the property and the pending policy decision on the property's disposition. Director May Jean A. Narne asked for BCDA's comments on the Department of Justice's opinion.⁵⁷

BCDA later found that SM Land, Inc.'s proposal would not yield the best value for government. SM Land, Inc.'s proposal of ₱38,500.00 was below the market value of the property. BCDA claims that the property was already appraised at ₱78,000.00 to ₱500,000.00 by Cuervo Appraisers, the Bureau of Internal Revenue, and the Government Service Insurance System. Compelling government to dispose the property at ₱38,500.00 would entail a loss of about ₱13 billion.⁵⁸

BCDA recommended that the competitive challenge process be terminated and to proceed with public bidding.⁵⁹

As a result of the President's policy review and BCDA's re-evaluation of its recommendations, Supplemental Notice No. 5 was issued, terminating the competitive challenge.

This court's Decision of August 13, 2014 and Resolutions of March 18, 2015 and September 7, 2015 disregarded that the termination of the competitive challenge was a policy decision by the President. This court, through the Third Division, overruled that, in violation of the principle of separation of powers.

Under the Constitution, government powers are divided into three branches, such that none of these branches may interfere with or exercise powers vested in the other branches. The executive power is vested in the President.⁶⁰ The exercise of executive power may entail policy decisions, with which the judiciary may not interfere. Policy decisions entail evaluation of actions in relation to government policies.

Judicial review should be exercised with great "deliberation, care, and caution"⁶¹ such that we do not "unduly transgress into the province of the other departments."⁶² The judiciary's power is to interpret the law and/or determine the consistency of the other government branches' acts with the Constitution or if those acts are attended by grave abuse of discretion amounting to lack or excess of jurisdiction. This court only "sits to ensure

⁵⁷ Id.

⁵⁸ Id. at 1048–1050, BCDA's Motion to Resolve with Motion for Reconsideration.

⁵⁹ Id. at 635, BCDA's Memorandum for H.E. The President dated February 13, 2012.

⁶⁰ CONST., art. VII, sec. 1.

⁶¹ J. Leonen, Concurring Opinion in *Araullo v. Aquino III*, G.R. No. 209287, July 1, 2014, 728 SCRA 1, 403 [Per J. Bersamin, En Banc].

⁶² Id.

that political departments exercise their discretions within the boundaries set by the [C]onstitution and our laws.”⁶³ It has no power to question policy decisions by the executive or the legislative branches unless there is a clear showing of constitutional violation or grave abuse of discretion. Whether canceling a disposition process is in accordance with the policies is a matter where this court should exercise deference.

What I have said of judicial review in *Araullo v. Aquino*⁶⁴ vis-à-vis statutory interpretation also applies to other government acts such as in this case:

Judicial review should take a more deferential temperament when the interpretation of a statutory provision involves political choices. At the very least, these questions should be deferred until parties in the proper case using the appropriate remedy are able to lay down the ambient *facts that can show* that one interpretation adopted by government respondents *clearly and categorically runs afoul of any law or constitutional provision*. In my separate opinion in *Umali v. Commission on Elections*, I noted:

Our power to strike down an act of co-equal constitutional organs is not unlimited. *When we nullify a governmental act, we are required “to determine whether there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.”*

No less than three constitutional organs have interpreted the law and the relevant provision of the Constitution. I am of the view that our power to strike down that interpretation should not be on the basis of the interpretation we prefer. Rather, Governor Umali should bear the burden of proving that the interpretation of the law and the Constitution in the actual controversy it presents is not unreasonable and not attended by any proven clear and convincing democratic deficit. *We should wield the awesome power of judicial review awash with respectful deference that the other constitutional organs are equally conscious of the mandate of our people through our Constitution.*

When judicial review is being applied to check on the powers of other constitutional departments or organs, it should require deference as a constitutional duty. This proceeds from the idea that the Constitution, as a fundamental legal document, contains norms that should also be interpreted by other public officers as they discharge their functions within

⁶³ J. Leonen, Concurring Opinion in *Araullo v. Aquino III*, G.R. No. 209287, February 3, 2015, <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/february2015/209287_leonen.pdf> 3 [Per J. Bersamin, En Banc].

⁶⁴ G.R. No. 209287, February 3, 2015, <<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/february2015/209287.pdf>> [Per J. Bersamin, En Banc].

the framework of their constitutional powers.⁶⁵ (Emphasis supplied, citation omitted)

The policy involved in this case relates to the enhancement of benefits derived from properties administered by BCDA.⁶⁶ BCDA-administered properties should be disposed to the end that the use of military camps would be maximized.⁶⁷ Revenues obtained from disposition of BCDA-administered properties are, based on Section 8⁶⁸ of Republic Act No. 7227, intended for the modernization of the Armed Forces of the Philippines. They are also intended for housing loan programs and other projects that will impact public security and community welfare.⁶⁹

Maximizing benefits derived from BCDA-administered properties hardly means allowing a floor price that is below market value. Indeed, the floor price may not necessarily be the final price, but competitive challenge does not guarantee that the property will be bidded out at a price that is equivalent to the property's market value. Government has processes that allow it to set a minimum contract price.⁷⁰ These processes ensure that the disposition of BCDA-administered properties is consistent with the policy to maximize benefits and revenues derived from them.

⁶⁵ J. Leonen, Concurring Opinion in *Araullo v. Aquino III*, G.R. No. 209287, February 3, 2015, <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/february2015/209287_leonen.pdf> 21 [Per J. Bersamin, En Banc].

⁶⁶ Rep. Act No. No. 7227 (1992), sec. 2 provides:
Sec. 2. Declaration of Policies. – It is hereby declared the policy of the Government to accelerate the sound and balanced conversion into alternative productive uses of the Clark and Subic military reservations and their extensions (John Hay Station, Wallace Air Station, O'Donnell Transmitter Station, San Miguel Naval Communications Station and Capas Relay Station), to raise funds by the sale of portions of Metro Manila military camps, and to apply said funds as provided herein for the development and conversion to productive civilian use of the lands covered under the 1947 Military Bases Agreement between the Philippines and the United States of America, as amended.
It is likewise the declared policy of the Government to enhance the benefits to be derived from said properties in order to promote the economic and social development of Central Luzon in particular and the country in general.

⁶⁷ Exec. Order No. 62 (1993), sec. 1.4 provides:
SECTION 1. Policy Framework - The BCDA shall be guided by the following policy framework in its conversion program:

....
1.4 The BCDA shall plan and implement fund generating projects which will maximize the use of the military camps in Metro Manila that shall be sold pursuant to Section 8 of the Act with the funds generated therefrom to be strictly utilized as provided for in the Act; and

⁶⁸ Rep. Act No. No. 7227 (1992), sec. 8 provides:
Sec. 8 . . .

....
. . . The proceeds from any sale, after deducting all expenses related to the sale, of portions of Metro Manila military camps as authorized under this Act, shall be used for the following purposes with their corresponding percent shares of proceeds:

1. Thirty-two and five-tenths percent (32.5%) - To finance the transfer of the AFP military camps and the construction of new camps, the self-reliance and modernization program of the AFP, the concessional and long-term housing loan assistance and livelihood assistance to AFP officers and enlisted men and their families, and the rehabilitation and expansion of the AFP's medical facilities[.]

⁶⁹ Rep. Act No. No. 7227 (1992), sec. 8.

⁷⁰ J. Leonen, Dissenting Opinion in *SM Land, Inc. v. Bases Conversion and Development Authority*, G.R. No. 203655, August 13, 2014, 733 SCRA 68, 123–124 [Per J. Velasco, Jr., Third Division].

The importance of maximizing revenues is emphasized by the Department of National Defense and Armed Forces of the Philippines' attempt to intervene in this case.

On February 21, 2013, the Department of National Defense and Armed Forces of the Philippines filed their Motion for Leave to File Comment-in-Intervention⁷¹ and their Comment-in-Intervention.⁷² They explained the import of the decision in this case on their purpose as guardians of national peace and security, which we cannot ignore. Thus:

The DND is mandated to maximize its effectiveness for guarding against external and internal threats to national peace and security and provide support for social and economic development. The DND is the primary government agency which supervises the Armed Forces of the Philippines (AFP). It functions, among others, as the lead line agency and authority in formulating the national defense-security policies, plans and programs on defense and security; the monitor and evaluator of the implementation of policies, plans and programs on defense and security; an innovator of new strategies on defense and security issues, including and pursuant to the national defense plan; and the implementor of the country's national defense and security commitments based on defense and security treaties, cooperation agreements, international covenants, protocols and other similar arrangements.

The AFP is composed of a citizen armed force that shall undergo military training and respond to the call to military service, organized and maintained in a manner that shall render it capable of rapid expansion from a peacetime organization to a wartime or emergency organization, a Standing Force composed of regular officers and enlisted personnel; reservists called to active duty; draftees; trainees and government-sponsored Filipino cadets enrolled in local or foreign military schools and a Citizen Armed Force that shall be composed of all reservists, and officers and enlisted men on inactive status that are all tasked with the duty to uphold sovereignty, support the Constitution, and defend the territory of the Republic of the Philippines against all enemies, foreign and domestic; promote and advance the national aims, goals, interests and policies; plan, organize, maintain, develop and deploy its regular and citizen reserve forces for national security; and perform such other functions as may be provided by law or assigned by higher authorities.

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The succeeding years saw the decline in the state of the AFP while the threats to national security in the region increased, leaving the AFP seriously wanting in its capacity to defend the Philippines from external and internal threats.

⁷¹ *Rollo*, pp. 764-770.

⁷² *Id.* at 771-782.

The government saw the need to address this problem and enacted the AFP Modernization Act on 23 February 1995. The Act has given the Armed Forces of the Philippines a fresh mandate for the development of its capabilities as it prepares for the 21st Century.

The AFP Modernization Program entails the development and employment of certain capabilities that can address assessed threats. The objectives of the program include the development and transformation of the AFP into a multi-mission oriented force capable of effectively addressing internal and external security threats.

The AFP Modernization Program is dependent on funds appropriated for that purpose under the National Budget and from revenues generated from the development or disposition of military reservations. . . .

.....

The AFP Modernization Program necessitates a procurement program that includes multi-year contracts which are supported by multi-year obligational authorities from the Department of Budget and Management (DBM). This will require planned expenses anchored on a budget guaranteed by annual revenue streams such as those provided by leases or joint-venture agreements over military camps provided under RA 7227.

Under the Revised AFP Modernization Act, the AFP must set priorities and schedules and map out the average cost of each modernization project. The law directs the AFP, together with the senior leaders of the defense and military establishments, to deliberately plan and determine the major defense equipment needed by the services of the AFP to enable them to perform their mandate.

The painstaking process of planning the much needed upgrade and improvement of the AFP's defense equipment is mainly dependent on budget availability. For the next five (5) years alone, the AFP will need at least Php15 billion per annum to upgrade its capabilities and provide the country with a minimum credible defense posture.

The Bases Conversion and Development Authority (BCDA) remits Php2 billion every year, on the average, to the Bureau of Treasury (BTr) for the AFP modernization fund. The remittance is raised from the proceeds and from the recurring revenues from the disposition, leases and joint ventures executed by BCDA pursuant to RA 7227. The remittances provide a sustained income of approximately thirteen percent (13%) of the estimated Php15 billion annual budgetary requirement of the AFP Modernization Program.

The AFP Modernization Program relies on the disposition of the Metro Manila Camps for its Modernization Fund. . . .

.....

. . . The AFP stands to receive at least fifty percent (50%) from the proceeds from bidding for the Joint Partnership in the development of a 33.1-hectare prime property in Fort Bonifacio. . . .

According to information supplied by BCDA, DND and AFP shall receive fifty percent (50%) of the cash payment that the private sector partner is expected to pay. . . [T]he cash payment will amount to, at the minimum, Php7 billion of which intervenors expect to receive or at least Php3.5 billion for this year alone, if the bidding pushes through. This is on top of the Php2 billion that is expected to be remitted by respondent BCDA for the AFP Modernization Fund.

. . . .

The intervention of DND and AFP becomes especially significant in the instant case since this Honorable Court has recently issued and granted petitioner SM Land, Inc.'s (SMLI) prayer for Temporary Restraining Order (TRO) enjoining BCDA from proceeding with the bidding of the Bonifacio South Pointe property. The issuance of a TRO directly and materially affects the interest of the DND and AFP, they being the elected statutory beneficiary of the proceeds to be derived from the disposition.⁷³ (Citations omitted)

The issuance of Supplemental Notice No. 5 was also in consideration of our policy in favor of public bidding. Executive Order No. 423⁷⁴ provides that public bidding is the preferred mode of awarding government contracts:

Section 1. Policy Requiring Public Bidding. It is the policy of this Administration that all Government contracts of Government Agencies shall be awarded through open and competitive public bidding, save in exceptional cases provided by law and applicable rules and regulations. . .

Executive Order No. 62 provides that public bidding is the general rule in privatization of BCDA-administered properties:

SECTION 4. PRIVATIZATION. The BCDA hereby adopts the following policy guidelines in pursuing privatization, commercialization or divestment projects:

4.1. Privatization shall be the basic thrust of the conversion and development of the baselands. Privatization modes shall include, among others, leasing, joint ventures, management contract, build-operate-transfer (BOT) and its variants;

⁷³ Id. at 772-777.

⁷⁴ Exec. Order No. 423 was executed on April 30, 2005.

.....

4.3. As a general rule, the privatization process should be conducted through public bidding. However, in the exigency of public service and national interest, and consonant with existing laws, rules and regulations on negotiated contracts, simplified bidding through sealed canvass of at least three (3) pre-qualified investors, or direct negotiation, may be resorted to. The process of selecting the prospective lessees and private investors shall be transparent, where procedures and selection process adapted are made public through newspaper advertisements and similar other means[.]

Public bidding does away with preferential treatments given to any one private entity. It provides interested private entities with equal opportunity to participate in government disposition processes. It fosters competition and allows government to obtain the best value for the properties it chooses to dispose. Being the general rule, public bidding should be the first resort among all disposition processes. Other modes of disposition may not be used without showing that they will be more advantageous to the government.


The President conducted a policy review. There were irregularities found in the disposition process that may be inconsistent with government policies and may affect government's credibility. While the President holds an enormous power affecting the whole nation and its citizens, he is not in a position to resort to inaction when faced with irregularities in disposition procedures, financial and commercial issues, and possible government losses. The President's decision to suspend or stop government acts that are marred by irregularities is not grave abuse of discretion. It is in keeping with the oath he took when he assumed office.⁷⁵ This is one of the cases requiring this court's deference.

Not only was the policy decision of the executive disregarded in this court's August 13, 2014 Decision and March 18, 2015 and September 7, 2015 Resolutions; public interest concerns, such as business and community welfare, governance, financial, and public security issues were also either denied or insufficiently addressed by this court. In this court's September 7, 2015 Resolution, the Department of National Defense's and Armed Forces of the Philippines' rights to and interest in the proceeds of the disposition—which would eventually redound to the public's benefit—were dismissed as

⁷⁵ CONST., art. VII, sec. 5 provides:

SECTION 5. Before they enter on the execution of their office, the President, the Vice-President, or the Acting President shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully and conscientiously fulfill my duties as President (or Vice-President or Acting President) of the Philippines, preserve and defend its Constitution, execute its laws, do justice to every man, and consecrate myself to the service of the Nation. So help me God." (In case of affirmation, last sentence will be omitted.)



merely “inchoate”⁷⁶ and insufficient, rendering them unqualified to participate in the matter.⁷⁷

Moreover, despite this case’s impact on government’s credibility, public security, businesses and public welfare, despite the irregularities that hounded the whole disposition process, and despite signals that this case may merit the attention of a full court, this court decided to keep the issues within the purview of a five-member Division.

Our internal rules mandate this court En Banc to act on matters that may have an impact on businesses or community welfare, or on matters that merit this court En Banc’s attention.⁷⁸ Cases involving these matters should be referred to this court En Banc. They should not be confined to the consciousness of a five-member Division. This court En Banc should be given an opportunity to determine for itself whether a case is of sufficient importance to merit the full court’s consideration.

III

SM Land, Inc. has no right to a completed competitive challenge procedure. BCDA’s acceptance of SM Land, Inc.’s unsolicited proposal, the Certification of Successful Negotiation,⁷⁹ the Terms of Reference,⁸⁰ and the joint venture guidelines did not limit the selection process to a competitive challenge. Neither was there any provision in these documents showing that SM Land, Inc. was given the right to a completed competitive challenge.

BCDA’s May 12, 2010 letter⁸¹ to SM Land, Inc. categorically stated that the acceptance “shall mean only that authorization is given to proceed with detailed negotiations on the terms and conditions of the JV activity and shall not bind BCDA to enter into a JV agreement, nor to the terms of your unsolicited proposal.”⁸²

A review of the terms of the Certification of Successful Negotiation and of the Terms of Reference shows that there was no commitment to enter into a joint venture agreement or to subject any proposal to a completed competitive challenge.

⁷⁶ Ponencia, p. 10.

⁷⁷ Id.

⁷⁸ S.C.T. INT. RULES, Rule 2, sec. 3(k) and 3(m).

(k) Division cases where the subject matter has a huge financial impact on businesses or affects the welfare of a community;

.....

(m) cases that the Court en banc deems of sufficient importance to merit its attention[.]

⁷⁹ *Rollo*, pp. 64–72

⁸⁰ Id. at 74–88.

⁸¹ Id. at 351–352.

⁸² Id. at 351.

The issuance of a Certification of Successful Negotiation comprises only a part of the whole disposition process. The terms of the Certificate were crafted under the premise that the disposition process has not changed. Its effectivity should be read in light of the whole disposition process. The Certification of Successful Negotiation cannot be interpreted as a consummated agreement that is separate from BCDA's intent to proceed with the disposition of the property.

The terms and conditions under the Certification are preparatory terms and conditions for a future joint venture activity. Meanwhile, the Terms of Reference merely describe the procedural aspects of a competitive challenge. Their application is still contingent upon a decision to proceed with the property's disposition and the property's disposition process. In other words, the Certification of Successful Negotiation and the Terms of Reference give no right to any participant unless BCDA decides to proceed with the disposition process.⁸³

Further, the Terms of Reference contain a qualification, thus:

VIII. QUALIFICATIONS AND WAIVERS

....

3. BCDA further reserves the right to call off *this disposition* prior to acceptance of the proposal(s) and call for a new disposition process under amended rules, and without any liability whatsoever to any or all the PSEs, except the obligation to return the Proposal Security.⁸⁴ (Emphasis supplied)

The existence of this reservation indicates that BCDA may reconsider or terminate the disposition process unilaterally.

In this court's March 18, 2015 Resolution, this reservation was dismissed as inapplicable to the original proponent and applicable only to private sector entities other than the original proponent and the process of finding comparative proposals.⁸⁵

⁸³ Id. at 64–71, Certification of Successful Negotiations.

⁸⁴ Id. at 86–87.

⁸⁵ Id. at 1419–1422, Resolution; *SM Land, Inc. v. Bases Conversion and Development Authority*, G.R. No. 203655, March 18, 2015 <<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/march2015/203655.pdf>> 6–9 [Per J. Velasco, Jr., Special Third Division].

The Terms of Reference “describe the procedures that shall be followed in connection with the disposition of the . . . 33.1-hectare [property of BCDA.]”⁸⁶ The clause “call off this disposition”⁸⁷ refers to the whole disposition process. As I explained in my August 13, 2014 Dissenting Opinion in this case:

For clarity, however, the term “disposition” cannot be interpreted as anything other than the entire competitive challenge process. The terms of reference define “privatization” as “the disposition of the Property through joint venture.” In the context of SMLI and BCDA’s dealings, the object of disposition is always the 33.1-hectare property of BCDA in Fort Bonifacio, and the disposition of that property is privatization. Privatization is an entire process that starts from selection and ends with the actual transfer of ownership of property.⁸⁸ (Citations omitted)

Accordingly, this will affect not only comparative proponents, but also the original proponent.

The extent of protection given to original proponents is limited to its right to match subsequent proposals from other private sector entities.⁸⁹ The rights of an original proponent, therefore, take effect only if other private sector entities submit their proposals. Private sector entities other than the original proponent may submit their proposals if BCDA decides to proceed with the disposition or disposition process.⁹⁰ In effect, a choice to stop the process of finding comparative proposals in accordance with the qualifications and waivers also stops the whole competitive challenge process. There can be no valid competitive challenge if no private entity other than the original proponent is allowed to submit a comparative proposal. A contrary view would be uncompetitive and, therefore, would go against our policies relating to government procurement and joint venture agreements.⁹¹

⁸⁶ *Rollo*, p. 74.

⁸⁷ *Id.* at 87, Terms of Reference VIII.3.

⁸⁸ J. Leonen, Dissenting Opinion in *SM Land, Inc. v. Bases Conversion and Development Authority*, G.R. No. 203655, August 13, 2014, 733 SCRA 68, 131 [Per J. Velasco, Jr., Third Division].

⁸⁹ *Rollo*, pp. 74–75, Terms of Reference, and p. 374, NEDA Joint Venture Guidelines, Annex C, III, Stage Three, 4.

⁹⁰ *Id.* at 374, NEDA Joint Venture Guidelines, Annex C, III, Stage Three, 4; *Cf.* Exec. Order No. 62 (1993).

⁹¹ *See* Exec. Order No. 423 (2005), sec. 8 provides:

Section 8. Joint Venture Agreements. The NEDA, in consultation with the GPPB, shall issue guidelines regarding joint venture agreements with private entities with the objective of promoting transparency, competitiveness, and accountability in government transactions, and, where applicable, complying with the requirements of an open and competitive public bidding.

See also Rep. Act No. 9184 (2002), sec. 3 provides:

SEC. 3. Governing Principles on Government Procurement. – All procurement of the national government, its departments, bureaus, offices and agencies, including state universities and colleges, government-owned and/or -controlled corporations, government financial institutions and local government units, shall, in all cases, be governed by these principles:

. . . .
(b) Competitiveness by extending equal opportunity to enable private contracting parties who are eligible and qualified to participate in public bidding.

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IV

The ponencia denies that there is a high interest of justice involved in this case since proceeding with the competitive challenge does not necessarily entail the award of the project.⁹² Further, the ponencia emphasizes the existence of safeguards that will “ensure that the government will not be in the losing end of the agreement[.]”⁹³

Indeed, the Detailed Guidelines for Competitive Challenge Procedure for Public-Private Joint Ventures⁹⁴ provide that the awarding of a joint venture contract to a private sector entity is still subject to approval by the Head of the concerned government entity.⁹⁵ The Detailed Guidelines for Competitive Challenge Procedure for Public-Private Joint Ventures provides:

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

....

5. Within seven (7) calendar days from the date of completion of the Competitive Challenge, the JV-SC shall submit the recommendation of award to the Head of the Government Entity. *Succeeding activities shall be in accordance with Sections VIII. (Award and Approval of Contract) and X (Final Approval) of Annex A hereof.*⁹⁶ (Emphasis supplied)

Annex “A” or the Detailed Guidelines and Procedures for Competitive Selection for Public-Private Joint Ventures provides:⁹⁷

VIII. Award and Approval of Contract

....

2. Decision to Award. Within seven (7) calendar days from the submission by JV-SC 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

⁹² Ponencia, p. 6.

⁹³ Id. at 11.

⁹⁴ Id. at 373–375.

⁹⁵ Id. at 373.

⁹⁶ Id. at 374–375.

⁹⁷ Id. at 360–370.

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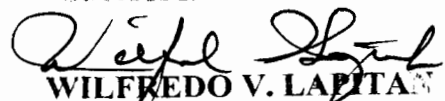
Award” to the winning private sector participant within seven (7) calendar days from approval thereof.

All participating private sector participants shall be informed of the award in writing. Such decision shall be made available to the public upon request.⁹⁸ (Underscoring in the original)

These provisions in the Guidelines only indicate that there is no consummated contract yet between the parties prior to the approval of the Head of government entity. The government entity concerned may still approve or disapprove the proposal of the successful proponent regardless of the completion of the competitive challenge procedure. In other words, the above provisions provide government with a procedural exit through the Head of the government entity’s rejection of the proposal even after the issuance of a Certification of Successful Negotiation. There is no reason why this cannot be done before an original proponent’s proposal is subjected to a completed competitive challenge. Insisting on the completion of the competitive challenge procedure will only be a costly exercise of futility if the government entity has, in the middle of the process, already decided to terminate the procedure. It will only unduly delay the disposition process and the receipt of intended benefits by the beneficiaries.

In view of these, SM Land, Inc.’s Second Motion for Reconsideration should be elevated to this court En Banc. Had this case been elevated to this court En Banc, the Second Motion for Reconsideration could have been granted.


MARVIC M.V.F. LEONEN
Associate Justice

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WILFREDO V. LAPIDAN
Division Clerk of Court
Third Division
NOV 06 2015

⁹⁸ Id. at 368.