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July 23, 2014

SECURITIES & EXCHANGE COMMISSION

SEC Building, Mandaluyong City

Attention: DIRECTOR JUSTINA F. CALLANGAN
Corporation and Finance Department

PHILIPPINE STOCK EXCHANGE, INC.

2/F, Tower One & Exchange Plaza
Ayala Avenue, Makati City

Attention: MS. JANET A. ENCARNACION
Head, Disclosure Department

PHILIPPINE DEALING & EXCHANGE CORPORATION

37/F, Tower 1, The Enterprise Center
6766 Ayala Avenue,
Makati City

Attention: Ms. VINA VANESSA S. SALONGA
Head, Issuer Compliance and Disclosure Department

Mesdames/Gentlemen:

Copy of Team Orion's Comment on Optimal's Memorandum on Appeal filed with the Office of the President in relation to Optimal's disqualification from the bidding of the CALAX Project

Further to our disclosure dated July 21, 2014, we are attaching a copy of the Comment in the interest of full and accurate disclosure of material information under applicable rules.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Solomon M. Hermosura'.

SOLOMON M. HERMOSURA

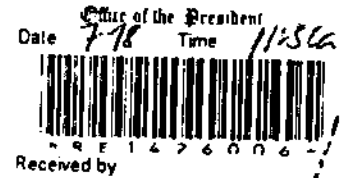
General Counsel and Corporate Secretary

REPUBLIC OF THE PHILIPPINES
OFFICE OF THE PRESIDENT
Malacañan Palace
Manila

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OPTIMAL INFRASTRUCTURE
DEVELOPMENT, INC.

Appellant,



-versus-

O.P. Case No. 14-G-129

DEPARTMENT OF PUBLIC WORKS
AND HIGHWAYS, et al.,
Appellees.

X-----X

**MOTION TO ADMIT
ATTACHED COMMENT**

AC Infrastructure Holdings Corporation and Aboitiz Land, Inc. (collectively, "**Team Orion**"), by counsel, respectfully state:

1. On July 8, 2014, Team Orion filed its Motion to Intervene, asking that it be allowed to intervene in this case, that it be furnished with copies of the pleadings filed by the appellant, and that it be allowed to file a Comment or other appropriate pleading.

2. This Honorable Office has not yet issued any order or resolution regarding Team Orion's Motion to Intervene. In the meantime, however, Team Orion has been able to obtain copies of the appellant's pleadings.

3. Accordingly, Team Orion hereby reiterates its Motion to Intervene and further prays that this Honorable Office admit the attached Comment on the appellant's Memorandum on Appeal.

Prayer

WHEREFORE, it is respectfully prayed that this Honorable Office:

1. ALLOW Team Orion to intervene as a party to this case; and
2. ADMIT the attached Comment on the appellant's Memorandum on Appeal.

Other just and equitable reliefs are likewise prayed for.

Makati for Manila, July 18, 2014.

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Admitted to the Philippine Bar on April 29, 2013

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Hon. Eugenio R. Pipo, Jr.
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PPP Center Executive Director
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Explanation for Service by Registered Mail

Due to time constraints, the distances involved and the lack of adequate messengerial services, this Motion shall be served by registered mail.


ANDREA E. KATIPUNAN

REPUBLIC OF THE PHILIPPINES
OFFICE OF THE PRESIDENT
Malacañang Palace
Manila

OPTIMAL INFRASTRUCTURE
DEVELOPMENT, INC.

Appellant,

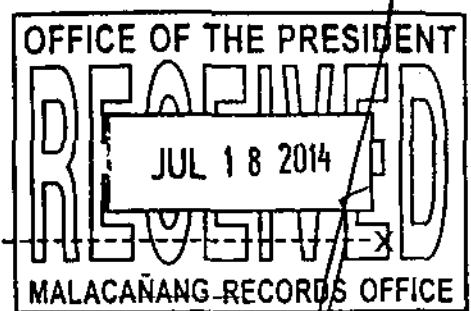
-versus-

O.P. Case No. 14-G-129

DEPARTMENT OF PUBLIC WORKS
AND HIGHWAYS, et al.,

Appellees.

X-----



COMMENT
(on Memorandum on Appeal)

AC Infrastructure Holdings Corporation and Aboitiz Land, Inc. (collectively, "**Team Orion**"), by counsel, respectfully submit this Comment on the Memorandum on Appeal of Optimal Infrastructure Development Inc. (the "**Disqualified Bidder**" or "**Appellant**") and state:

The Facts

1. In its Memorandum on Appeal, Appellant acknowledged an "error" and a "defect" in its bid for the Cavite-Laguna Expressway Project (the "**CALAX Project**").¹ Simply stated, Appellant did not follow the bid rules or the Instructions to Bidders (the "**ITB**").

2. As a result of the "error" and "defect" in the bid (Envelope 1) of Appellant, the Special Bids and Awards Committee (the "**SBAC**") issued on June 11, 2014 a Resolution (the "**Resolution**") which held that Appellant's bid was "not in compliance with the requirements, particularly with the required Bid Security Expiry Date" and

¹ Memorandum on Appeal, at p. 2.

disqualified Appellant, which was directed to retrieve its unopened Envelope 2 (the "**Technical Bid**") and Envelope 3 (the "**Financial Bid**") on June 13, 2014.

3. Appellant thereafter issued a press statement complaining about its disqualification, and threatening to pursue "all legal remedies."² It cited the objective to "give the Filipino people the best possible deal" as the reason why its disqualification was an error.³

4. But then again, Appellant did not follow the rules to have its disqualification reviewed and overturned either. Appellant should have, pursuant to the Implementing Rules and Regulations of Republic Act 6957 (the "**BOT Law**", and the Rules, the "**BOT Law IRR**"), appealed its disqualification prior to its implementation.⁴

5. However, Appellant waited for June 13, 2014, when the Financial Bids of the qualified bidders were to be opened and the unopened Financial Bid and Technical Bid of Appellant were to be returned, without taking any steps to appeal the Resolution in the meantime. And, on June 13, 2014, Appellant appeared before the SBAC and accepted its unopened Technical Bid and Financial Bid in compliance with the Resolution. The SBAC then proceeded to open the Financial Bids of all the qualified bidders.

6. Thereafter, Appellant again acted outside the rules and again brought the matter of its disqualification to the media. From the offices of the SBAC, Appellant proceeded to the Manila Hotel and purportedly opened its alleged Financial Bid before the media.⁵ Appellant thus spoiled its Financial Bid as evidence instead of preserving it, thereby eliminating any credible proof of its real Financial Bid.

7. Appellant's plan must have been to win the bidding by the force of public opinion, hoping perhaps that, with help from media, public opinion could pressure the

² <http://www.rappler.com/business/industries/208-infrastructure/60414-san-miguel-disqualified-cavite-laguna-expressway>

³ *Id.*

⁴ See Section 5.5 of the BOT Law IRR.

⁵ See <http://ppp.gov.ph/?p=22811>.

SBAC into reversing its disqualification and overlooking its "error" and "defect" in its Bid Security Expiry Date. Thus, at a gathering organized for media at the Manila Hotel, Appellant declared that its bid was allegedly ₱20.105 Billion (the "**Ghost Bid**"), ₱9 Billion more than the highest compliant bid. Out of its legally non-existent bid — a bid that was returned unopened and that was, in a manner of speaking, officially dead, especially after Appellant spoiled it as evidence — Appellant has created the Ghost Bid in an attempt to marshal public opinion and thereby pressure the Government into reversing the bidding process and gifting it with the CALAX Project.

8. However, as of June 26, 2014, thirteen days after Appellant announced the Ghost Bid that would allegedly "give the Filipino people" ₱9 Billion more, public opinion has not caused or led to the reversal of the bidding process and of Appellant's disqualification. No doubt, our nation remains faithful to "the rule of law" and to the ideals of a "regime of truth,"⁶ and the SBAC remained firm with its Resolution and stayed true to Government's commitment and promise to the private sector of rules that are fair, clear and equally applied to all. Thus, on that day, Appellant filed its three-page Notice of Appeal with this Honorable Office. By this time, however, the other bidders' envelopes had already been opened and evaluated by the SBAC, and the bidding process had been practically completed.

9. On June 27, 2014, the day after it filed its Notice of Appeal, the Appellant filed its 37-page Memorandum on Appeal, confirming that the Appellant, if it wanted to, had adequate time to appeal the Resolution of June 11, 2014 prior to its implementation on June 13, 2011.

10. In its Memorandum on Appeal, Appellant asks this Honorable Office to "accept" the Ghost Bid "by judicial notice", because the highest qualified bid is "Php 9 billion less" than the Ghost Bid and, if the Ghost Bid is not accepted, "the Filipino people stands to lose the almost Php 9 billion"⁷ difference between the highest qualified bid and the Ghost Bid.

⁶ Preamble, 1987 Constitution

⁷ Memorandum on Appeal, at p. 2.

11. However, and as the Supreme Court has held, the Government “should not be allowed to speculate” in the application of bidding requirements and rules, as acting on the basis of speculation “would open doors to abuse and defeat the very purpose of public bidding.”⁸ The Court also added that “[s]trict observance of the rules, regulations, and guidelines of the bidding process is the only safeguard to a fair, honest and competitive public bidding.”⁹

12. In fact, once before, a Philippine President described how we, as a nation, value playing by the rules and sticking to our covenants with these words: “Still, we fought for honor, and, if only for honor, we shall pay.”¹⁰

Grounds to Deny or Dismiss the Appeal

I. Appellant cannot be allowed to undermine and reset the bidding process by its self-serving announcement of the Ghost Bid.

13. The Disqualified Bidder’s appeal for the reversal of the Resolution is anchored on an extraneous factor, namely, the alleged amount of its financial bid — which was returned to the Appellant unopened and simply cannot be verified and confirmed.

14. However, the Ghost Bid simply does not, as a matter of law, exist. The Disqualified Bidder’s Financial Bid (Envelope 3) was never opened by the SBAC. On the other hand, the Disqualified Bidder’s self-serving declarations before the media at the Manila Hotel on June 13, 2014 were not part of the bidding process and, as such, cannot be allowed to affect the results of the bidding which has already been concluded.

15. Indeed, if Appellant’s mere announcement of the Ghost Bid would reverse the bidding process or result in the acceptance of the Ghost Bid, the predictability, stability and

⁸ *Agan v. Philippine International Air Terminals, Co.*, G.R. No. 155001, May 5, 2003..

⁹ *Id.*

¹⁰ Speech of Her Excellency Corazon C. Aquino, President of the Philippines, During the Joint Session of the United States Congress, September 18, 1986.

integrity of public biddings would all be torn asunder. To be sure, no rational person would ever participate in any public bidding again if any disqualified bidder could, after being disqualified and after the bidding has already been concluded, disturb the results by running to the media and simply proclaiming what its bid purportedly would have been.

16. In fact, the multi-staged bidding process was designed precisely to avoid the very situation which the Disqualified Bidder now seeks to create — namely, government agencies being influenced or swayed by the (alleged) amount of financial bids into disregarding defective bids.

17. The BOT Law, the BOT Law IRR and the ITB all provide for a multi-staged system in the evaluation of bids. If a bidder fails to comply with any of the requirements for Envelopes 1 and 2, its financial proposal (Envelope 3) should be returned unopened.¹¹ It is disqualified from further participating in the bidding, regardless of whatever its bid amount might be. The winner in a public bidding is not the bidder with the highest bid amount, but rather the bidder with the highest complying bid.

18. The purpose of having a multi-staged process is to assist government agencies in determining the best available bid and to prevent their judgment from being clouded by financial considerations. If the procuring agency were to know the bid amount of bidders while evaluating their Envelopes 1 and 2, its tendency may be to be less strict in applying the rules and more tolerant of mistakes and irregularities, simply to favor the bidder with the highest bid amount. The multi-staged system insulates the agency from this natural tendency and helps ensure that the agency's decision is not tainted with favoritism, which, as

¹¹ Section 7.3(c), ITB. See also Rule 7, Section 7.4 of the BOT Law IRR (on the Evaluation of Qualification Requirements or Envelope 1), which provides that "[t]he qualification documents will be first evaluated prior to the opening of the technical proposal. The Agency/LGU shall inform bidders whether they are qualified or disqualified, and for the latter, the reasons for the disqualification, within ten (10) calendar days. Only qualified bidders shall be allowed to participate in the bid evaluation. Disqualified bidders shall be informed of the grounds of disqualification and their technical and financial proposals returned unopened."

the Supreme Court has noted, is the "self-evident purpose of public bidding."¹²

19. In this case, Appellant's argument for reversing the Resolution is that its alleged, unproven and legally non-existent bid will "give the Filipino people" ₱9 Billion more, and should thus retroactively justify a deviation from the strict and mandatory rules prescribed by the ITB. **However, this argument is exactly what a multi-staged system seeks to prevent.** The BOT Law IRR and the ITB require that the envelopes of disqualified bidders be returned unopened precisely to avoid being tempted or influenced by, to prevent misplaced regret over, the amounts offered by disqualified bidders.

20. To be sure, if the amounts of financial bids should not be allowed to influence the results of a public bidding **while the bidding process is being conducted**, much less should these amounts be allowed to **retroactively** disturb the results of a bidding **after it has already been concluded**.

21. In seeking to reverse the bidding process through the Ghost Bid, the Disqualified Bidder is effectively asking the Government to review its actions based on pure speculations of what might (or might not) have been, rather than on the basis of the bids which were actually submitted to and opened by the SBAC at the time of the bidding. In this regard, the Supreme Court has held:

Further, the determination of whether or not a bidder is pre-qualified to undertake the project requires an evaluation of the financial capacity of the said bidder **at the time the bid is submitted based on the required documents presented by the bidder. The PBAC should not be allowed to speculate** on the future financial ability of the bidder to undertake the project on the basis of documents submitted. **This would open doors to abuse and defeat the very purpose of a public bidding.** xxx. **A restrictive and conservative application of the rules and procedures of public bidding is necessary** not only to protect the impartiality and regularity of the proceedings but also to ensure the

¹² *Capalla v. COMELEC*, G.R. Nos. 201112, 201121, 201127 & 201413, June 13, 2012.

financial and technical reliability of the project. It has been held that: xxx **Strict observance of the rules, regulations, and guidelines of the bidding process is the only safeguard to a fair, honest and competitive public bidding.**¹³

II. Public policy and the dictates of transparency and good governance demand strict compliance with bidding rules.

22. Competitive public bidding is the preferred mode of awarding government contracts and the procurement of materials, supply and equipment.¹⁴ This is to ensure that the public gets the best possible advantages from these contracts and to prevent corruption in the grant of these contracts.¹⁵

23. Thus, the rules on public bidding must be **strictly** applied and complied with to eliminate (or at least minimize) discretion on the part of procuring agencies, and protect the public from bad deals and corrupt transactions, and avoid suspicions of favoritism or partiality. As the Supreme Court has held:

The rationale behind the requirement of a public bidding, as a mode of awarding government contracts, is to ensure that the people get maximum benefits and quality services from the contracts. More significantly, **the strict compliance with the requirements of a public bidding echoes the call for transparency in government transactions and accountability of public officers.** Public biddings are intended to **minimize occasions for corruption and temptations to abuse of discretion** on the part of government authorities in awarding contracts.¹⁶

Consequently, the provision in the "Instruction to Bidders" stating that no award of the contract shall be made to a bidder whose bid price is lower than the allowable

¹³ *Agan v. Philippine International Air Terminals, Co.*, G.R. No. 155001, May 5, 2003; *underscoring and emphasis supplied; citations omitted.*

¹⁴ *See Manila International Airport Authority, et al. v. Olongapo Maintenance Services, Inc., et al.*, G.R. Nos. 146184-85, 161117, 167827, January 31, 2008, 546 SCRA 269.

¹⁵ *Id.*

¹⁶ *Id.*; *emphasis supplied.*

government estimate (AGE) or AAE is not valid. The rule on the matter is clear. The PSC-BAC is obliged to observe and enforce the same in the procurement of goods and services for the project. **The law on public bidding is not an empty formality. A strict adherence to the principles, rules and regulations on public bidding must be sustained if only to preserve the integrity and the faith of the general public on the procedure.**¹⁷

24. Accordingly, in *Republic v. Capulong*,¹⁸ the Supreme Court upheld the actions of the bid committee in disqualifying a bidder that inadvertently failed to include the Form of Bid Letter. The Supreme Court held that the bid committee acted there correctly in strictly applying the bidding rules:

We are unconvinced. PBAC was guided by the rules, regulations or guidelines existing before the bid proposals were opened on November 10, 1989. **The basic rule in public bidding is that bids should be evaluated based on the required documents submitted before and not after the opening of bids.** Otherwise, the foundation of a fair and competitive public bidding would be defeated. **Strict observance of the rules, regulations, and guidelines of the bidding process is the only safeguard to a fair, honest and competitive public bidding.**

In underscoring **the Court's strict application of the pertinent rules, regulations and guidelines of the public bidding process**[,] [w]e have ruled in *C & C Commercial vs. Menor* (L-28360, January 27, 1983, 120 SCRA 112), that Nawasa properly rejected a bid of C & C Commercial to supply asbestos cement pressure which bid did not include a tax clearance certificate as required by Administrative Order No. 66 dated June 26, 1967. In *Caltex (Phil.) Inc., et. al. vs. Delgado Brothers, Inc. et. al.*, (96 Phil. 368, 375), We stressed that public biddings are held for the protection of the public and the public should be given the best possible advantages by means of open competition among the bidders.

Basically, the purpose of the statute requiring competitive bidding is that each bidder, actual or possible, shall be put upon the same footing. **Therefore, authorities should not be permitted to waive any substantial variance between the conditions under which bids are invited**

¹⁷ *Philippine Sports Commission v. Dear John Services, Inc.*, 675 SCRA 712, 726-727 (2012); *underscoring and emphasis supplied*.

¹⁸ 199 SCRA 134 (1991).

and the proposal submitted. If one bidder is relieved from conforming to the conditions which impose some duty upon him, or lay the ground for holding him to a strict performance of his contract, that bidder is not contracting in fair competition with those bidders who propose to be bound by all the conditions (*Case vs. Inhabitants of Treton*, 76 N.J.L. 696, 74 A. 672; *Lupter et. al. vs. Atlantic County*, et, al., 87 N.J. Eq. 491, 100 A. 927, cited in Cobacha and Lucenario, *Law on Public Bidding and Government Contracts*, p. 7).¹⁹

25. Similarly, in the following cases, bidders/bids were disqualified (or, as held by the Supreme Court, should have been disqualified), thus:

(a) Because the bidder failed to submit a copy of (and in fact did not have) a license to operate, which was one of the documents required in the bidding;²⁰

(b) Because the bidder failed to comply with its obligations under a previous contract, with the Supreme Court noting that the government could reject the bid even if the bidder's reasons for not complying with its obligations were valid or due to force majeure;²¹

(c) Because the technical proposal did not contain "the automated weather observation system (AWOS)", as required under the bidding rules;²²

(d) Because the bidder's authorized representative did not sign some of the pages of the narrative construction method;²³

(e) Because the bidder's authorized representative did not sign the tax returns;²⁴

¹⁹ *Emphasis supplied; italics in the original.* See also *Commission on Audit v. Link Worth International, Inc.*, G.R. No. 182559, March 13, 2009, 518 SCRA 501.

²⁰ See *Public Estates Authority v. Bolinao Security and Investigation Service, Inc.* G.R. No. 158812, October 5, 2005.

²¹ See *Napocor v. Philipp Brothers Oceanic, Inc.*, G.R. No. 126204, November 20, 2001.

²² See *First United Constructors Corporation v. Poro Point Management Corporation*, G.R. No. 178799, January 19, 2009.

²³ *Id.*

²⁴ *Id.*

(f) Because the bidder violated the conflict of interest rules under the bidding rules;²⁵

(g) Because the bidder failed to submit a bid bond, as required under the applicable bidding rules;²⁶

(h) Because the bidder forgot to submit the bid letter, as required under the applicable bidding rules;²⁷

(i) Because the bidder failed to submit a Philippine Contractors Accreditation Board license, as required under the applicable bidding rules;²⁸

(j) Because the bidder failed to file the requisite number of copies of the bid documents, filing only one complete set rather than three, as required under the bidding rules;²⁹

(k) Because the bidder failed to submit a copy of its tax clearance certificate, as required under the applicable bidding rules;³⁰

(l) Because the bidder's Contract Proposal was not signed;³¹

(m) Because the Project Description was not filled out;³²

(n) Because the Certificate of Site Inspection was not signed;³³

²⁵ See *A.C. Esguerra and Sons v. Aytona*, G.R. No. L-18751, April 28, 1962.

²⁶ See *Surigao Mineral Reservation Board v. Cloribel*, G.R. No. L-27072, July 31, 1968; see also *Padilla v. Zaldivar*, G.R. No. L-22789, October 30, 1964.

²⁷ See *Republic v. Capulong*, G.R. No. 93359, July 12, 1991.

²⁸ See *WT Construction v. DPWH*, G.R. No. 163352, July 31, 2007.

²⁹ See *Republic v. Silerio*, G.R. No. 108869, May 6, 1997.

³⁰ See *C&C Commercial Corporation v. Menor*, G.R. No. L-28360, January 27, 1983.

³¹ See *Desierto v. Ocampo*, G.R. No. 155419, March 4, 2005.

³² *Id.*

³³ *Id.*

(o) Because the Contractor's Confidential Prequalification Requirement was unsigned, undated, but nevertheless notarized;³⁴

(p) Because the Contractor's Confidential Prequalification Statement (i) did not indicate the name and address of the owner of the contracting company, (ii) was not signed by the contractor/owner, and (iii) was not notarized;³⁵

(q) Because the Affidavit of the Equipment Lessor (i) was signed by the wrong person, (ii) was not notarized, (iii) was not dated, and (iv) did not indicate what equipment was leased to the bidder;³⁶

(r) Because the Affidavit of the Civil Engineer to be employed by the contractor (i) did not indicate the Professional License Number of the engineer, (ii) did not indicate projects of a similar nature which the civil engineer had previously supervised, and (iii) was not notarized;³⁷

(s) Because the Foreman's Certificate of Employment (i) was not notarized, (ii) was not dated, and (iii) did not indicate the projects previously supervised by the foreman.³⁸

26. In fact, a company related to one of Team Orion's members — namely, AC Energy Holdings, Inc. ("**ACEHI**") — was disqualified in the bidding for the proposed sale of the 153.1 MW Naga Power Plant located in Barangay Colon, Naga, Cebu, since the Tax Clearance Certificate which ACEHI submitted had a validity date of until March 25, 2014, and the Power Sector Assets and Liabilities Management Corporation (which was conducting the bidding) held that this Tax Clearance Certificate, although valid when it was submitted on March 12, 2014, fell short of the March 31, 2014 Bid Submission Date.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

27. As the foregoing shows, bidding rules are “not an empty formality” and they must be applied strictly — for this is the only way of ensuring that the bidding process is not tainted by the slightest hint of irregularity and of “minimiz[ing] occasions for corruption and temptations to abuse of discretion on the part of government authorities in awarding contracts.”

28. This is precisely what the SBAC did in this case: it applied the bidding rules strictly, so as to preclude even any suspicion of favoritism, in keeping with the requirements of the law and, indeed, the avowed objectives of this Administration.

29. In turn, it should be stressed that **the bid security or bid bond is a vital, crucial and indispensable** component of any bid. As the Supreme Court has held:

*** In fact, **the bidder’s proposal bond in a public bidding is deemed to be an indispensable requirement for the validation of a bid proposal.** This is **no idle requirement.** Indeed, its purpose “is to insure the good faith of the bidders and bind them to enter into a contract with the Government should their proposal be accepted ... The bond is **the only hold which the Government has on a bidder.** xxx” (Decision of the Auditor General dated March 18, 1957, quoted by the Cobacha and Lucenario, Law on Public Bidding and Government Contracts, p. 79) and to this effect, the Invitation to Bid contains the following proviso: ***³⁹

There is no question that **the Bid Bond is an indispensable requirement for the validation of a bid proposal.** The bond insures good faith of the bidders and binds them to enter into a contract with the Government should their proposal be accepted (see *Padilla v. Zaldivar*, L-22789, October 30, 1964, 12 SCRA 260). ***.⁴⁰

30. Given the “indispensable” nature of the bid security and that it is “no trifling requirement”,⁴¹ the SBAC

³⁹ *Padilla v. Zaldivar*, G.R. No. L-22789, October 30, 1964; *underscoring and emphasis supplied; citations omitted.*

⁴⁰ *Republic v. Capulong*, *supra*.

⁴¹ *Padilla v. Zaldivar*, *supra*.

and the DPWH had the right, and were duty-bound, to subject any defects therein to the utmost scrutiny and the most exacting standards, as it is "the only hold which the Government has on a bidder."⁴²

31. Therefore, the DPWH and the SBAC cannot be faulted when all that they did was to act in strict accordance with the law and bidding rules — and thereby avoid any suspicion or semblance of irregularity — when they rejected and disqualified the defective bid. Team Orion thus respectfully pleads that their unflinching commitment to the rule of law be sustained.

32. In its Memorandum of Appeal, the Disqualified Bidder harps on the "clarification" allegedly given by its issuing bank, Australia and New Zealand Banking Group Limited ("**ANZ**"), on the purported true expiration date of its bid security.

33. Significantly, however, this correction was made by ANZ only **after** the deadline for submission of all final bids on June 2, 2014.

34. Moreover, all the bidders (including the Appellant) bound themselves to execute Annex BL-3 **without modification** and acknowledged that **any modification thereof results in the automatic and mandatory disqualification of their bids.**⁴³

35. Furthermore, the clarification that is allowed under Section 7.3(f) of the ITB only refers, or is limited, to those defects that do not result in the mandatory and automatic disqualification of the bidder's proposal in the first place notwithstanding that these are not strictly compliant with the requirements established for their submission (*i.e.*, documents other than Annex BL-3). To interpret these provisions in any other way will render nugatory, inutile and meaningless Sections 5.1 and 6.1 of the ITB, for this would mean that any error or defect may be characterized as minor or mere typographical error (subject to clarification).

⁴² *Id.*

⁴³ See Sec. 7.3(a), ITB and Rule 7, Sec. 7.5, BOT Law IRR.

Indeed, there would have been no need for Sections 5.1 and 6.1 to expressly and specifically require Annex BL-3 to be executed without modification, if that were the case.

36. In addition, while the SBAC is permitted to obtain clarification from bidders under Section 7.3(f) of the ITB, the same section clearly provides that any clarification submitted by a bidder “shall **not ... modify** any aspect of its Bid Proposal.” This is consistent with what the Supreme Court has held “that bids should be evaluated based on the required documents submitted **before** and **not after** the **opening of the bids**. Otherwise, the foundation of a fair and competitive public bidding would be defeated. **Strict observance** of the rules, regulations, and guidelines of the bidding process is the **only safeguard** to a fair, honest and competitive public bidding.”⁴⁴

37. Indeed, to “clarify” means “to make (something) easier to understand,”⁴⁵ whereas to “modify” means “to change some parts of (something) while not changing other parts.”⁴⁶ Certainly, “correcting” and replacing “November **25**, 2014” in the bid security with “November **29**, 2014” is a **modification** rather than a mere clarification. As such, it is expressly prohibited by, and cannot be justified under, Section 7.3(f) of the ITB.

38. To be sure, the success of Public-Private Partnership (“**PPP**”) projects is heavily reliant on strict compliance with the rules. Given the considerable effort and expense necessary to prepare a bid, prospective bidders and participants need to be assured that the rules will not be changed in the middle or, worse, towards the end, of the game.

39. In any event, even assuming that the error in indicating a different period in a bid security is only a minor defect (although it is not), it is well settled that a bid can be

⁴⁴ *Republic v. Capulong, supra*; emphasis supplied.

⁴⁵ <http://www.merriam-webster.com/dictionary/clarify>.

⁴⁶ <http://www.merriam-webster.com/dictionary/modify>.

disqualified even for minor defects and on mere technicalities.⁴⁷

III. The sanctity and integrity of the PPP framework and bidding process must be protected, lest confidence in the process is undermined.

40. Team Orion respectfully pleads to this Honorable Office to respect and uphold the SBAC's and the DPWH's determinations and actions, so that this would further boost investor confidence in the current administration's policies and its commitment to fairness and transparency, and affirm that the Philippines is a prime investment destination which is ready and willing to abide by its own rules.

41. In fact, Appellant itself purports to caution this Honorable Office that it "should consider that similar actions from state agencies and instrumentalities engaged in public procurement may lead to a heightened perception that partnership with the government can, without warning, be strained by arbitrary reversal".⁴⁸

42. **However, an "arbitrary reversal" is precisely what Appellant is asking this Honorable Office to do:** an "arbitrary reversal" of the already-concluded public bidding, and unwinding of an implemented official action involving the rights of third parties. This, in turn, would give the **strongest possible disincentive against participating in any future public bidding for vital public projects** — to the ultimate detriment of this Republic — for no rational person would ever voluntarily subject himself to the considerable rigors and expense of participating in a public bidding if he cannot expect that the rules will not be changed in the middle (much less, near the conclusion) of the game.

43. The country can afford to "lose" the hypothetical and imaginary ₱9 Billion which Appellant claims is the

⁴⁷ See *Public Estates Authority v. Bolinao Security and Investigation Service, Inc.*, G.R. No. 158812, October 5, 2005, 472 SCRA 165 and *Republic v. Silerio*, G.R. No. 108869, May 6, 1997, 272 SCRA 280.

⁴⁸ Memorandum on Appeal, at par. 73; *underscoring and italics supplied*.

difference between the Ghost Bid and the highest compliant bid. However, the country cannot afford to lose credibility or the faith and confidence of the private sector (upon which the success of PPPs depends). After all, ***confidence, once lost, is irretrievable.***

IV. Appellant forfeited its right to question the Resolution by its failure to appeal prior to its implementation and by its compliance with the Resolution through its appearance before the SBAC and acceptance of its Technical Bid and Financial Bid in compliance with the Resolution.

44. Appellant forfeited its right to question its disqualification as a result of its own acts and omissions. Instead of, or in addition to, going to the media, Appellant could have availed itself of the appeal process prescribed by the BOT Law IRR, and thereby prevented the opening of the other bidders' financial proposals, but it did not. Appellant could have filed its three-page Notice of Appeal immediately after it received the Resolution on June 11, 2014,⁴⁹ instead of waiting for June 26, 2014 (or a full 13 days after all the bidders' financial proposals were opened), but it did not. Finally, Appellant could have exercised restraint and respected the process it had voluntarily submitted itself to, but it did not and instead tampered with its Financial Bid — upon the purported amount of which its appeal is now (improperly) anchored — and chose to open its purported Financial Bid before the media.

45. Appellant now invokes Administrative Order No. 22 ("**AO 22**") to stop its implemented disqualification and subvert the bidding process for the CALAX Project. Again, this is a violation of the bidding rules as set forth in the ITB. In compliance with the ITB, Appellant submitted an undertaking (in the form of Annex BL-1 of the ITB) where it committed that it "**waives any right to and shall not seek or obtain any restraining order, writ of injunction**

⁴⁹ Appellant admits to having received a copy of the Resolution, through email, on June 11, 2014 (see Memorandum of Appeal, at par. 1.1)

or prohibition or any other form of coercive judicial, quasi-judicial or administrative writ, process or issuance against the DPWH to restrain, prevent, suspend, or in any manner forestall, hinder or render inconvenient the Bidding Process, the award of the contract to the Winning Bidder, and the implementation of the Concession Agreement."

46. Worse, Appellant proposes an application of AO 22 that would make governance impossible. Appellant seeks a review of its disqualification after it has been implemented, and a stay and resetting of a bidding process that has already concluded. Governance would be impossible, and disorder and chaos would ensue, if government actions could still be unwound after the fact (or, alternatively, if government agencies would have to wait for the 15-day appeal period under AO 22 to lapse before implementing their decisions). In addition, the public would not be able to rely on government actions and representations (regardless of however lawful or proper these may have been), if these could still be revoked or reversed even after they have already produced consequences which can no longer be undone.

47. Indeed, the President may reverse the acts of his alter egos, such as the DPWH Secretary, and AO 22 allows this Honorable Office to entertain appeals, particularly in cases where the law so allows.⁵⁰ However, AO 22 does not

⁵⁰ See, for example, Section 1 of Presidential Decree 1344 (in relation to Executive Order 648, Series of 1981 and Executive Order 90, Series of 1986) which allows an appeal to the Office of the President from decisions of the Housing and Land Use Regulatory Board on cases involving unsound real estate business practice, claims involving refund filed against project owners, developers, dealers, brokers or salesmen, and cases of specific performance; Article 26 of Executive Order 226, as amended, or the Omnibus Investment Code, which allows an appeal to the Office of the President from any order or decision of the Board of Investment; Section 4 of Presidential Decree 1986, as amended, which allows an appeal to the Office of the President of a decision of the Movie and Television Review and Classification Board prohibiting the release of motion picture or television program in its entirety; Section 3(d) of Presidential Decree 1112, or the Toll Operation Decree, which allows an appeal to the Office of the President from a decision of the Toll Regulatory Board on increases of toll rates; Section 16 of Republic Act 6938, as amended, or the Cooperative Code of the Philippines, which allows an appeal to the Office of the President from a decision of the Cooperative Development Authority denying the registration of a cooperative; Section 9 of Republic Act 9335, or the Attrition Act of 2005, which allows an appeal to the Office of the President for officials and employees of the Bureau of Customs and Bureau of Internal Revenue who are terminated for failing to reach their revenue targets in accordance with the act and its implementing rules.

and should not give Appellant the power to impose upon the President the burden of reviewing every executive action, and to thereby paralyze the Executive Department with a right to appeal that could unwind or reset consummated government processes and thus make effective, responsive and decisive governance impossible. This is especially true here, where the Appellant itself forfeited whatever right it might have had to appeal by its own acts and omissions — by resorting to media, instead of immediately and seasonably appealing under the procedure prescribed by the BOT Law IRR, and by itself spoiling the only evidence of what its financial bid truly was, all the while allowing the Resolution to be implemented and the public bidding to be concluded.

Prayer

WHEREFORE, it is respectfully prayed that this Honorable Office:

1. Immediately LIFT and DISSOLVE the Stay Order issued on June 30, 2014; and

2. DISMISS the appeal of Optimal Infrastructure Development Inc. and AFFIRM the June 11, 2014 Resolution disqualifying it as a bidder for the CALAX Project.

Other just and equitable reliefs are likewise prayed for.

Makati for Manila, July 18, 2014.

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**Explanation for
Service by Registered Mail**

Due to time constraints, the distances involved and the lack of adequate messengerial services, this Comment shall be served by registered mail.


ANDREA E. KATIPUNAN

AFFIDAVIT OF SERVICE

I, JONATHAN V. SANTOS, Filipino, after being duly sworn, depose and say:

1. I am a messenger in the law firm Gatmaytan Yap Patacsil Gutierrez & Protacio (formerly Caguioa & Gatmaytan). My duties include the filing and service of pleadings and other documents.

2. On July 18, 2014 I served copies of the following pleading/paper:

- (1) MOTION TO ADMIT ATTACHED COMMENT**
and
- (2) COMMENT (on Memorandum on Appeal)**

In O.P. Case No. 14-G-129 "OPTIMAL INFRASTRUCTURE DEVELOPMENT, INC. vs. DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS, et al.", all pursuant to Sections 3, 4, 5 and 10 of Rule 13 of the Rules of Court,

by registered mail to:

Office of the Secretary
Department of Public Works and Highways
Bonifacio Drive, Port Area, Manila

Atty. Michael Angelo O. Lopez
11th Floor, San Miguel Properties Center
No. 7 St. Francis Street
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Hon. Rafael C. Yabut
Hon. Eugenio R. Pipo, Jr.
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Hon. Cosette V. Canilao
PPP Center Executive Director
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by depositing copies of the said **MOTION TO ADMIT ATTACHED COMMENT and COMMENT (on Memorandum on Appeal)** on July 18, 2014 in the Manila Central Post Office, as evidenced by Registry Receipt(s) No.(s) 1411855393481, 1411855393482, 1411855393496, 1411855393505, and 1411855393509 indicated after the name(s) of the addressee(s), and with instructions to the postmaster and return the mail to the sender after ten (10) days if undelivered.

IN WITNESS WHEREOF, I have executed this Affidavit this 18th day of July in the City of Makati.


JONATHAN V. SANTOS
Affiant

REPUBLIC OF THE PHILIPPINES)
Makati City) S.S.

Before me, a Notary Public in and for the City named above, personally appeared Jonathan V. Santos, with Community Tax Certificate No. 35438133 issued on February 3, 2014, SSS ID with No. 33-2510828-6 and Tax Identification No. 213-894-915 who is personally known to me, and who presented the Affidavit of Service and signed the instrument in my presence, and who took his oath before me as to such instrument.

Witness my hand and seal this 18th day of July 2014.

Doc. No. 30;
Page No. 1;
Book No. I;
Series of 2014.


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