

Republic of the Philippines
SUPREME COURT
Manila

EN BANC

G.R. No. 93359 July 12, 1991

REPUBLIC OF THE PHILIPPINES, represented by the AIR TRANSPORTATION OFFICE and its PRE-QUALIFICATION, BIDDING and AWARD COMMITTEE of the DEPARTMENT OF TRANSPORTATION AND COMMUNICATION, petitioners,

vs.

HONORABLE IGNACIO C. CAPULONG, Presiding Judge, RTC, NCJR, Branch 134, Makati, and INTER TECHNICAL PACIFIC PHIL., INC., respondents.

Vicente T. Verdadero for private respondent.

MEDIALDEA, J.:p

This petition for review on *certiorari* seeks to reverse the (a) Decision dated April 17, 1990 (pp. 72-76, *Rollo*) of respondent Judge Ignacio C. Capulong, in Civil Case No. 90-173, directing the Air Transportation Office (ATO) and its Pre-qualification, Bidding and Award Committee (PBAC) to immediately convene or reconvene and to read and consider the Inter Technical Pacific Phil., Inc.'s bid to furnish the necessary goods and services for works under the Nationwide Air Navigation Facilities Modernization Project Phase II of the Air Transportation Office of the Department of Transportation and Communications; (b) the Order dated May 22, 1990 (p. 77, *Rollo*) which denied petitioner's motion for reconsideration of the said decision; and (c) Order dated February 12, 1990 (pp. 78-80, *Rollo*) which earlier granted Inter Technical Pacific Inc.'s petition for the issuance of a writ of preliminary injunction.

The facts are as follows:

On July 26, 1989, the Air Transportation Office (ATO, for short) and its Pre-qualification, Bidding and Award Committee (PBAC, for short) publicly invited prequalified bidders to furnish the necessary goods and services for works under the Nationwide Air Navigation Facilities Modernization Project Phase II, a government infrastructure project financed from proceeds of a loan (PH-P72) from the Overseas Economic Cooperation Fund of Japan (pp. 81-88, *Rollo*). Inter Technical Pacific, Inc. (INTER TECHNICAL for short), a Filipino contractor, prequalified as a bidder and submitted its sealed bidding documents contained in a set of one (1) original and eight (8) copies in bookbound form in six (6) volumes.

The bidding was conducted by the PBAC on November 10, 1989. The PBAC informed the public that only four (4) prequalified bidders had submitted their bids and then announced that the approved government agency estimate for the project was Eight Hundred Fifty Nine Million Four Hundred Seventy Two Thousand Seventy Four Pesos and Fifty Centavos (P859,472,074.50). After the opening, examination and evaluation of the bids, the PBAC read the bids of the prequalified bidders (p. 73, *Rollo*) as follows:

BRITISHIAL P916,731,100.42

ISRAELI KOORTRADE P954,536,621.05

JAPANESE TOYO MENKA P776,915.886.45

When INTER TECHNICAL's bidding documents were opened and examined, it was discovered that the entire set of bidding documents and eight copies thereof did not contain a Form of Bid (*see copy pp. 186-187, Rollo*). The PBAC allegedly upon the advice of the assisting Japanese consultants in the committee, refused to read INTER TECHNICAL's bid and rejected the same as "non complying."

INTER TECHNICAL protested the action of the PBAC, explaining that the Form of Bid was inadvertently left in the office; that its bid price was clearly spelled out in the bidding documents; that its bid was accompanied by a bid bond attached to the documents; that it complied with all the requirements and that the "Form of Bid" was a mere formality which can be rectified through cursory reading of the bidding documents it submitted; that it is willing to accomplish right then and there the "Form of Bid" and fill in the data required without varying the data or figures already declared in the bidding documents submitted.

INTER TECHNICAL's authorized representative then publicly informed PBAC that its bid was Six Hundred Seven Million One Hundred Sixty Nine Thousand and Four Hundred FORTY-FOUR PESOS and FIFTY CENTAVOS (P607,169,444.50).

Despite INTER TECHNICAL's plea, the PBAC adjourned the proceedings. INTER TECHNICAL appealed for reconsideration to the ATO, PBAC and the Secretary of Transportation and Communications, attaching in its letters of appeal the duly accomplished "Form of Bid," but all were not acted upon.

ATO, for its part, referred the matter to the Department of Justice which in its Opinion dated January 10, 1990 (pp. 87-89, *Rollo*) ruled that INTER TECHNICAL's bid was invalid because the Form of Bid is an essential bidding requirement embodying vital provisions, namely: 1) an agreement to be bound by his bid; 2) the obligation to submit a performance guarantee; 3) the amounts of his bid bond, performance bond, and amount of third party insurance; 4) respective periods of commencement of works, maintenance and completion; and 5) authority of the person signing. As legal basis for the ruling, the Secretary of Justice cited paragraph 12.2 of the "Instructions to Bidders" which states: "Bids not fully complying with all the requirements shall

be disqualified," and Rule IB 2.8 of the Implementing Rules of Presidential Decree No. 1594 which provides that a Bid Form is part of the contract for the project.

On January 22, 1990, INTER TECHNICAL filed a complaint for specific performance mandatory and prohibitory injunction with prayer for preliminary injunction and restraining order against ATO and PBAC before the Regional Trial Court, NCJR, Branch 134, Makati, docketed as Civil Case No. 90-173, seeking the issuance of a writ of preliminary injunction to enjoin PBAC from awarding the subject contract and prayed that after trial, judgment be rendered ordering ATO and PBAC to read and consider the bid of plaintiff and making the injunction, both prohibitory and mandatory, permanent. Upon filing of the complaint, the court issued a temporary restraining order prayed for.

In their answer filed on February 13, 1990, ATO and PBAC alleged that the Form of Bid is an indispensable bid document which is confirmed by the Department of Justice; that due to the importance of this Form of Bid, the failure to enclose this document in the set of submitted bidding documents will nullify the bid as non-complying and it is as if no bid was submitted to be considered or read. By way of Special and Affirmative Defenses, ATO and PBAC cited Presidential Decree No. 1818 which deprives courts of jurisdiction to issue restraining orders, preliminary prohibitory and mandatory injunctions in cases or controversies involving infrastructure projects of the government; that the acceptance or rejection of bids is within the sole discretion of PBAC and, therefore, may not be enjoined by prohibitory or mandatory injunction, and finally, that INTER TECHNICAL's complaint does not state a cause of action.

After hearing INTER TECHNICAL's petition for the issuance of a writ of preliminary injunction on January 29 and February 2, 1990, respondent Judge Capulong issued an Order dated February 12, 1990 granting the issuance of a writ of preliminary injunction, thus, enjoining ATO and PBAC from awarding the contract to the "second lowest bidder or whomsoever" until further orders from the court. Respondent Judge ruled that INTER TECHNICAL submitted a bid bond and bidder's bond which are indispensable to the validation of a bid proposal; that the bid price was spelled out in the INTER TECHNICAL's Summary of Schedule Proposal; and that the tender of INTER TECHNICAL was the lowest and appeared to be the most beneficial to the government; that the government of the Philippines will save P252,302,630.00 with INTER TECHNICAL's supposed bid, and that not to read such bid will work injustice to INTER TECHNICAL (p. 78, *Rollo*).

On March 16, 1990, the Republic of the Philippines, represented by the ATO and PBAC of the Department of Transportation and Communications, filed with the Court of Appeals a petition for *certiorari* and prohibition to nullify the Order dated February 12, 1990 issued by respondent judge granting the petition of INTER TECHNICAL for the issuance of a writ of preliminary injunction. A supplemental petition for injunction was thereafter filed on April 4, 1990 to enjoin respondent judge from exercising jurisdiction in Civil Case No. 90-173 as it involves an infrastructure project covered by P.D. 1818 and that the action in Civil Case No. 90-173 is in fact an action *formandamus* and *mandamus* does not lie against discretionary acts of petitioner.

While the petition of the Republic was pending before the Court of Appeals, respondent Judge rendered a decision dated April 17, 1990 in Civil Case No. 90-173 directing ATO and PBAC to immediately convene or reconvene and to read and consider INTER TECHNICAL's bid (P. 72, *Rollo*).

INTER TECHNICAL, on the other hand, filed a manifestation/motion dated April 26, 1990 informing the Court of Appeals that the Republic's petition had become moot and academic in view of the decision dated April 17, 1990 in Civil Case No. 90-173.

After filing on May 2, 1990 its motion for reconsideration of the decision of April 17, 1990 in Civil Case No. 90-173 before the RTC of Makati, Branch 134, the Republic filed on May 4, 1990 before the Court of Appeals an urgent motion reiterating its prayer for the issuance of a restraining order and writ of preliminary prohibitory injunction as to respondent judge. This was followed on May 18, 1990 by another urgent motion for issuance of restraining order and writ of preliminary prohibitory injunction stating therein that respondent judge's decision of April 17, 1990 had not yet become final. Both were not favorably acted upon by the Court of Appeals.

On May 22, 1990, respondent judge denied the motion for reconsideration filed by the Republic in Civil Case No. 90-173.

The Republic then filed a motion to withdraw petition for *certiorari* and supplemental petition with the Court of Appeals pursuant to its commitment in its motion for extension of time within which to file petition for review *oncertiorari* with this Court. Such motion was granted by the Court of Appeals on July 29, 1990.

Hence, this petition.

After the required pleadings were filed by the parties, this Court, in the resolution of October 23, 1990 (p. 257-A, *Rollo*), gave due course to the petition for review *on certiorari* and required the parties to submit their respective memoranda. In compliance therewith, the Republic filed its memorandum on December 4, 1990, and INTER TECHNICAL, on January 10, 1991. The case was then submitted for deliberation. On April 26, 1991, the Solicitor General filed an Urgent Motion for Early Resolution (p. 381, *Rollo*), manifesting that Acting Secretary Pete Nicomedes Prado of the Department of Transportation and Communications urged him in a letter (p. 384, *Rollo*) to seek early resolution of the case because the final disbursement by the Overseas Economic Cooperation Fund (OECF) of Japan which is financing the Nationwide Air Navigation Facilities Modernization Project Phase II, subject this case, cannot be made later than May 30, 1991, after which no other disbursement therefrom can be made; that the government is exerting efforts to secure an extension of the disbursement period for the loan agreement and thus, save the project but that it foresees a considerable resistance from the lending institution; and that construction of a new domestic terminal building can not commence unless the Nationwide Air Navigation Facilities Modernization Project Phase II materializes. Such motion was noted in the resolution of April 30, 1991.

Considering that We already have deliberated on the petition and have reached a consensus on its merits favorable to the petitioner as well as have assigned to this writer the task of making the opinion of the Court and in order that the project of the government would not be prejudiced as time is of the essence in this case. We issued a resolution dated May 30, 1991. In this resolution, We granted the petition, without prejudice to rendering an extended opinion in due course, and annulled and set aside the respondent Judge's Order dated February 12, 1990, his decision dated April 17, 1990, his Order dated May 22, 1990 in Civil Case No. 90-173 as well as allowed the petitioner to proceed with the awarding of the contract (p. 387, *Rollo*).

Indeed, a careful and in-depth study of the records constrains Us to reverse the judgment and orders of the respondent court.

In this case, a controversy exists whether the failure of INTER TECHNICAL to enclose in its bidding documents the duly accomplished and signed Form of Bid is, under the circumstances of the case, a valid ground for the PBAC of ATO to reject its bid to furnish the necessary goods and services for works under the Nationwide Air Navigation Facilities Modernization Project Phase II of the Air Transportation Office, Department of Transportation and Communication. The controversy gave rise to the next question: may the respondent court step into the controversy by ordering the award and bidding committee to reconvene and read INTER TECHNICAL's bid when the discretion to determine whether or not a bidder complies with the bidding requirements lies with the said bidding committee.

Petitioner asserts that the Form of Bid is the central unifying document containing the substantial legal requirements of the bid while the other documents, like the summary of bid or the bid bond, merely support the Form of Bid; that the Form of Bid is the document which authenticates and summarizes the amounts on the Summary of Schedule Proposals; that in view of the absence of a Form of Bid, INTER TECHNICAL in effect has not submitted a bid, thus since there is no bid, there is no basis for claiming that INTER TECHNICAL is the lowest bidder.

In support of its contention that the Form of Bid is a principal document, petitioner cited the stipulations contained therein which the bidder agrees to do and undertake, thus:

1. To undertake the work complete in conformity with the abovementioned documents (Conditions of Contract, Technical Specifications, Bid Schedule and Drawings) for the specified sum (in foreign currency and peso);
2. If bid is accepted, to commence the work within 30 days (mobilization period) after receipt of the Employer's Notice to Commence Work and to complete and deliver the whole of the Works comprised in the contract within 600 calendar days calculated from the last day of the aforesaid period in which the Works are to be commenced;
3. If bid is accepted, to submit a Performance Guarantee with effectivity period to be specified in a written advice to be made by ATO and PBAC or, in the event

that this guarantee is deemed insufficient, sureties acceptable to ATO and PBAC from a bank to be jointly and severally bound, for the faithful and satisfactory performance of the contract.

4. To abide by this Bid for a period of 120 calendar days from the date set for the opening of Bids and it shall remain binding upon the (bidder) and may be accepted at any time before the expiration of that period;

5. Unless and until a formal Agreement is prepared and executed, this Bid, together with the (agency's) acceptance thereof, shall constitute a binding contract between them;

6. The understanding that the agency is not bound to accept the lowest or any Bid the agency may receive. (*see Annex 1, Form of Bid, p. 186, Rollo*)

Without a duly accomplished Form of Bid submitted before the opening of bids, petitioner argues that a prospective bidder will not be bound by the foregoing stipulations. Consequently, for lack of a Form of Bid, INTER TECHNICAL was not bound to complete the project for a specific compensation.

The arguments set forth by the petitioner are persuasive. The Form of Bid, as technically used in this case, contains the offer to undertake the works for a specified sum of money expressed in foreign currency and Philippine peso and, it stipulates the terms and conditions in the call for bid which the bidder, thru its duly authorized signing representative, agrees to undertake and abide once the bid is accepted by the PBAC. Specifically, it is a standard form made available to prequalified bidders; containing the bidder's "offer to undertake the work complete in conformity with the above-mentioned documents" — to wit: Conditions of Contract, Technical Specifications, Bid Schedule and Drawings" — for specified sum of money, one in foreign currency and the other in Philippine pesos. In essence, a duly accomplished and signed Form of Bid submitted to the bidding committee together with the written acceptance by the government agency constitutes a binding preliminary contract governing the relationship between the bidder and the government agency concerned during the examination and evaluation period of the bid proposal until the Notice of Award is given to and the Project Contract is executed by the winning bidder. If there is no duly accomplished and signed Form of Bid submitted to the bidding committee, there is nothing to accept on the part of the government agency.

Under Section 5 of Presidential Decree No. 1594 (June 11, 1978), the law which prescribes the policies, guidelines, rules and regulations for government infrastructure contracts, the contract may be awarded to the lowest bidder whose bid as evaluated complies with all the terms and conditions in the call for bid, thus:

Sec. 5. Award and Contract. — The contract may be awarded to the lowest pre-qualified bidder whose bid as evaluated *complies with all the terms and conditions in the call for bid* and is the most advantageous to the Government.

To guarantee the faithful performance of the contractor, he shall, prior to the award, post a performance bond, in an amount to be established in accordance with the rules and regulations to be promulgated under Section 12 of this Decree.

All awards and contracts duly executed in accordance with the provisions of this Decree shall be subject to the approval of the Minister of Public Works, Transportation and Communications, the Minister of Public Highways, or the Minister of Energy, as the case may be.

It is not disputed by petitioner that INTER TECHNICAL submitted a Bid Bond in the form of an Irrevocable Domestic Standby Letter of Credit No. SFM-L-027-89 in the amount not exceeding the Philippine peso equivalent of US\$800,000.00 issued on behalf of INTER TECHNICAL by the Philippine National Bank in favor of ATO and PBAC. However, a careful examination of the records of the case reveals that the filing of said Bid Bond together with the other bid documents does not constitute substantial compliance with the stipulations contained in the Form of Bid under Presidential Decree No. 1594 and its Rules and Regulations and, more particularly, the Instructions to Bidders made available to prequalified bidders in the instant case.

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). Yet, there is nothing in the Bid Bond submitted in the instant case which guarantees that INTER TECHNICAL will commence the work within 30 days (mobilization period) after receipt of Employer's Notice to Commence Work and to complete and deliver the whole of the work within 600 days as provided in stipulation no. 2 of the Form of Bid. Nowhere in the Bid Bond does INTER TECHNICAL agree to abide by the bid for a period of 120 calendar days from the date set for the opening of the bid. Besides, the Bid Bond does not contain any undertaking that it shall remain binding upon INTER TECHNICAL and may be accepted at any time before the expiration of that period as provided in stipulation no. 4 of the Form of Bid. There is likewise no formal acknowledgment on the part of INTER TECHNICAL that the PBAC and ATO are not bound to accept the lowest or any bid they may receive as provided in stipulation no. 6 of the Form of Bid. Lastly, the Bid Bond does not even state the amount of the bid expressed in foreign currency and Philippine peso as clearly required in the Form of Bid.

The Irrevocable Domestic Standby Letter of Credit merely states that drafts shall be drawn under the letter of credit in the event INTER TECHNICAL withdraws its bid before the expiration of the specified period; or after being awarded the contract, INTER TECHNICAL refuses or fails to furnish the performance bond within the required period, thus:

This Credit is available by the Beneficiary's sight drafts ("Drafts") in duplicate drawn on us without recourse to the drawer. Drawing against this Credit shall be made by the beneficiary only upon failure of the Accountee to fulfill its obligation under the Bid.

Drafts drawn under this Credit must be accompanied by the following:

1. Original of this Credit

2. Beneficiary's certificate stating:

a) that the Accountee Inter-Technical Pacific Philippines, Inc. has withdrawn its bid before the expiration of the specified period; or

b) that after being awarded the contract, refuses or fails to furnish the performance bond within the required period.

In other words, the letter of credit merely guarantees that INTER TECHNICAL will not withdraw its bid before the expiration of the period specified by ATO and PBAC and that after being awarded the contract, it will furnish the performance bond within the period required by ATO and PBAC. Clearly then, the letter of credit standing alone does not guarantee that INTER TECHNICAL will enter into a contract under the terms and conditions stipulated in the Form of Bid.

It must be noted that prior to the opening of the bids on November 10, 1989, PBAC was guided by the existing rules and regulations formulated pursuant to Section 12 of P.D. 1594. In the evaluation of the bids, PBAC was guided by Rule IB 2.3 of the Implementing Rules and Regulations of P.D. 1594 which provides, thus:

IB 2.3 — *Evaluation of Bids.* A bid which does not comply with the conditions or requirements of the bid documents shall be rejected by the PBAC (or the Bid and Award Committee as the case may be) giving the reason or reasons for its rejection. The Government, however, in the evaluation of bids received, reserves the right to waive the consideration of minor deviations in the bids received which do not affect the substance and validity of the bids. (84 OG No. 23, p. 3350)

The PBAC was also guided by the following rules, among others, under the Instruction to Bidders, thus.

OPENING AND EXAMINATION OF BIDS

17.1 At the time, date and place advised in the Invitation to Bid, Bids will be publicly opened and witnessed for examination and evaluation of the

Prequalification, Bidding and Award Committee PBAC created for the purpose. Bidders or their authorized representatives are instructed to be present during the opening of bids.

17.2 Prior to the opening and reading of the separately sealed Bid Price of the Works, contents of the Individual Bid shall be examined as to their conformity and agreement with the Bidding requirements, and *Bids not fully complying with all requirements shall be disqualified.* (Emphasis supplied)

17.3 Only Bids considered satisfactory by the Committee will qualify for the opening and reading of the separately sealed Bid Price for the Works. Percentage deductions, contingent or otherwise quoted in accordance with the provisions of Clause B.13 hereof, will be publicly announced as component of the Bid. (p. 285, *Rollo*)

INTER TECHNICAL calls the attention of the Court that the Form of Bid is but a mere formality which does not affect the substance and validity of its bid. It asserts that it submitted a duly accomplished and signed Form of Bid the day after the bids were opened on November 10, 1989 and its intention to comply with its alleged bid is shown by the filing of the instant case before the RTC; and that the Form of Bid is only a surplusage which could be dispensed with as long as a bid bond is submitted. To bolster its argument, INTER TECHNICAL urges Us to consider an Opinion No. 142-A, Series of 1952 of the Secretary of Justice which stated that the failure of the lowest bidder to secure a license as a transportation operator at the time of the opening of the bids does not affect its bid. The Secretary of Justice at that time considered the following peculiar circumstances of the case: that the bidder then had a pending application for such license; that while he was not a licensed operator on the date the bids were opened, his application as a transportation operator was approved before an award of the contract was made to any of its him that there being no awards as yet, the bids are still under consideration; and that since he qualified prior to the date of the awarding of bids, his bid should be considered, otherwise the interests of the government would be sacrificed for a mere technicality.

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. We 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 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).

INTER TECHNICAL's failure to comply with what is perceived to be an elementary and customary practice in a public bidding process, that is, to enclose the Form of Bid in the original and eight separate copies of the bidding documents submitted to the bidding committee is fatal to its cause. All the four pre-qualified bidders which include INTER TECHNICAL were subject to Rule IB 2.1 of the Implementing Rules and Regulations of P.D. 1594 in the preparation of bids, bid bonds, and pre-qualification statement and Rule IB 2.8 which states that the Form of Bid, among others, shall form part of the contract. INTER TECHNICAL's explanation that its bid form was inadvertently left in the office (p. 6, Memorandum for Private Respondent, p. 355, *Rollo*) will not excuse compliance with such a simple and basic requirement in the public bidding process involving a multi-million project of the Government. There should be strict application of the pertinent public bidding rules, otherwise the essential requisites of fairness, good faith, and competitiveness in the public bidding process would be rendered meaningless.

The 1952 Opinion of the Secretary of Justice is not relevant to this present case. A meticulous examination of the opinion reveals that the invitation to bid issued by the Department of Agriculture and Natural Resources contained no requirement that the bidder must be a duly licensed transportation operator at the time of the opening of the bids. The invitation to bid expressly provided that a bid not conforming with the specifications therein contained will not be considered. The circumstances in the case at bar are exactly the opposite of the situation in the 1952 Opinion. In the Instruction to Bidders, notably 17.2 thereof (*supra*), copies of which were furnished to all the four prequalified bidders, it was categorically provided that bids not fully qualifying shall be disqualified. Furthermore, the Implementing Rules and Regulations of P.D. 1594, IB 2.3, emphasizes that a bid which does not comply with the conditions or requirements of the bid documents shall be rejected by the PBAC giving the reason or reasons for its rejection (*supra*). Such rule cannot be treated lightly in view of PD No. 1594, Sec. 12, which makes the implementing rules and regulations applicable to all contracts for infrastructure and other construction projects of all government agencies including government-owned or controlled corporations and other instrumentalities. Given such clear and manifest intention of the law, INTER TECHNICAL's plea cannot be heeded.

As stated earlier, the controversy in the instant case, arose from a complaint instituted by INTER TECHNICAL before the RTC of Makati to compel PBAC to read it's bid. On the face of the allegations in the complaint, it is clear that the complaint is actually one for *mandamus*.

As a rule, *mandamus* lies only to compel an officer to perform a ministerial duty and not a discretionary act. In *Meralco Securities Corporation v. Savellano* (L-36748, October 23, 1982, 117 SCRA 804, 812), We ruled that "(d)iscretion when applied to public functionaries, means a power or right conferred upon them by law of acting officially, under certain circumstances, uncontrolled by the judgment or conscience of others. A purely ministerial act or duty in contradiction to a discretionary act is one which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to or the exercise of his own judgment upon the propriety or impropriety of the act done. If the law imposes a duty upon a public officer and gives him the right to decide how or when the duty shall be performed, such duty is discretionary and not ministerial. The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion or judgment." As a general rule, a writ of *mandamus* will not issue to control or review the exercise of discretion of a public officer since it is his judgment that is to be exercised and not that of the court (*see Magtibay vs. Garcia*, G.R. No. L-28971, January 28, 1983, 120 SCRA 370). Thus, the courts will not interfere to modify, control or inquire into the exercise of this discretion unless it be alleged and proven that there has been an abuse or an excess of authority on the part of the officer concerned (*see Calvo v. de Gutierrez, et al.*, 4 Phil, 2033).

A perusal of INTER TECHNICAL's complaint shows that it is bereft of any allegation that ATO and PBAC committed grave abuse of discretion in rejecting its bid. It did not submit proof that ATO and PBAC acted arbitrarily, fraudulently and against the interest of the public when they rejected its bid. Apparently, INTER TECHNICAL's belated allegation of grave abuse of discretion in their comment on the herein petition for review on *certiorari* is a mere afterthought.

Under Rule IB 2.3 of the Rules implementing Presidential Decree No. 1594, and in the Invitation to Bid (p. 81,*Rollo*), the Government has expressly reserved the right to reject any or all bids. PBAC's authority to evaluate the bids during the opening and examination thereof clearly indicates its discretion to determine compliance or non-compliance with the bidding requirements. Consequently, when PBAC made a preliminary evaluation of the required documents and found INTER TECHNICAL's bid non-complying for lack of a Form of Bid, the former merely exercised its discretion under the law. In the absence of an allegation and proof that PBAC committed grave abuse of discretion, the respondent judge committed an error in directing and ordering ATO and PBAC to do an act which clearly involves the exercise of discretion on their part.

Finally, INTER TECHNICAL insinuates that the Japanese consultants of the project made the decision to reject INTER TECHNICAL's bidding documents. A careful review of the records indicates that this insinuation obviously seeks to confuse the issues submitted to this Court. On the contrary, We find the following un rebutted facts: that INTER TECHNICAL was given every opportunity before the ATO and PBAC to be heard and tender its explanation for not enclosing

the duly accomplished and signed Form of Bid; that the other bidders were even present and allowed to speak; that the PBAC's final decision to reject INTER TECHNICAL's bidding documents came only after the issues were extensively discussed not only by the PBAC members but the other bidders as well; and that the Japanese consultants were merely allowed to give their opinion on the matter and it was the PBAC which made the final decision. To that extent therefore, the fairness, good faith, competitiveness, and stability of the public bidding process were not undermined where, as in the instant case, a decision was reached after due deliberation in the presence of all parties concerned.

ACCORDINGLY, the petition is GRANTED. Respondent Judge's Order dated February 12, 1990, his decision dated April 17, 1990, as well as his Order dated May 22, 1990 in Civil Case No. 90-173 are hereby ANNULLED and SET ASIDE. As a consequence thereof, petitioner is allowed to proceed with the awarding of the bid contract.

SO ORDERED.

Narvasa, Melencio-Herrera, Cruz, Paras, Feliciano, Padilla, Bidin, Sarmiento, Griño-Aquino, Regalado and Davide, Jr., JJ., concur.

Gancayco, J., is on leave.

Separate Opinions

GUTIERREZ, JR., J., concurring:

I am disturbed by the implications of our decision where the inadvertent omission of only one requirement out of a long list of important items results in the disqualification of a Filipino firm and the award of a choice contract for public works to foreign competitors. In the light of the economic situation in our country, in the Filipinos being relegated to hewers of wood and carriers of water for supposedly superior alien firms, the decision strikes me as exemplifying a national tendency to be masochistic. Are we not overdoing things by being too literally precise and mechanical in our interpretation of bidding requirements?

The respondent contends that every single one of the commitments embodied in the Form of Bid is found in the other documents which it submitted. The Form of Bid was filed only a day later thus indicating that the respondent company had no intent to avoid it and that its

omission was pure inadvertence. The private respondent appears to be a competent firm with an excellent track record fully capable of undertaking the project.

I am not too sure that the Form of Bid is such an essential document that its absence during the day of bidding is a kiss of death and its subsequent submission only a day later can no longer cure the fatal omission.

I, however, abide by the more expert opinion of my peers who seem to be more qualified than myself when it comes to the mechanics of bidding. With the above reservations, I concur in the results of the Court's decision.

Fernan, C.J., concurs.

Separate Opinions

GUTIERREZ, JR., J., concurring:

I am disturbed by the implications of our decision where the inadvertent omission of only one requirement out of a long list of important items results in the disqualification of a Filipino firm and the award of a choice contract for public works to foreign competitors. In the light of the economic situation in our country, in the Filipinos being relegated to hewers of wood and carriers of water for supposedly superior alien firms, the decision strikes me as exemplifying a national tendency to be masochistic. Are we not overdoing things by being too literally precise and mechanical in our interpretation of bidding requirements?

The respondent contends that every single one of the commitments embodied in the Form of Bid is found in the other documents which it submitted. The Form of Bid was filed only a day later thus indicating that the respondent company had no intent to avoid it and that its omission was pure inadvertence. The private respondent appears to be a competent firm with an excellent track record fully capable of undertaking the project.

I am not too sure that the Form of Bid is such an essential document that its absence during the day of bidding is a kiss of death and its subsequent submission only a day later can no longer cure the fatal omission.

I, however, abide by the more expert opinion of my peers who seem to be more qualified than myself when it comes to the mechanics of bidding. With the above reservations, I concur in the results of the Court's decision.

Fernan, C.J., concurs.