Republic of the Philippines
SUPREME COURT
Manila

FIRST DIVISION

G.R. No. 176657 September 1, 2010

DEPARTMENT OF FOREIGN AFFAIRS and BANGKO SENTRAL NG PILIPINAS, Petitioners,
vs.
HON. FRANCO T. FALCON, IN HIS CAPACITY AS THE PRESIDING JUDGE OF BRANCH 71 OF THE REGIONAL TRIAL COURT IN PASIG CITY and BCA INTERNATIONAL CORPORATION, Respondents.

D E C I S I O N

LEONARDO-DE CASTRO, *J.:*

Before the Court is a Petition for *Certiorari* and prohibition under Rule 65 of the Rules of Court with a prayer for the issuance of a temporary restraining order and/or a writ of preliminary injunction filed by petitioners Department of Foreign Affairs (DFA) and Bangko Sentral ng Pilipinas (BSP). Petitioners pray that the Court declare as null and void the Order[1] dated February 14, 2007 of respondent Judge Franco T. Falcon (Judge Falcon) in Civil Case No. 71079, which granted the application for preliminary injunction filed by respondent BCA International Corporation (BCA). Likewise, petitioners seek to prevent respondent Judge Falcon from implementing the corresponding Writ of Preliminary Injunction dated February 23, 2007[2] issued pursuant to the aforesaid Order.

The facts of this case, as culled from the records, are as follows:

Being a member state of the International Civil Aviation Organization (ICAO),[3] the Philippines has to comply with the commitments and standards set forth in ICAO Document No. 9303[4] which requires the ICAO member states to issue machine readable travel documents (MRTDs)[5] by April 2010.

Thus, in line with the DFA's mandate to improve the passport and visa issuance system, as well as the storage and retrieval of its related application records, and pursuant to our government's ICAO commitments, the DFA secured the approval of the President of the Philippines, as Chairman of the Board of the National Economic and Development Authority (NEDA), for the implementation of the Machine Readable Passport and Visa Project (the MRP/V Project) under the Build-Operate-and-Transfer (BOT) scheme, provided for by Republic Act No. 6957, as amended by Republic Act No. 7718 (the BOT Law), and its Implementing Rules and Regulations (IRR). Thus, a Pre-qualification, Bids and Awards Committee (PBAC) published an invitation to pre-qualify and bid for the supply of the needed machine readable passports and visas, and conducted the public bidding for the MRP/V Project on January 10, 2000. Several bidders responded and BCA was among those that pre-qualified and submitted its technical and financial proposals. On June 29, 2000, the PBAC found BCA's bid to be the sole complying bid; hence, it permitted the DFA to engage in direct negotiations with BCA. On even date, the PBAC recommended to the DFA Secretary the award of the MRP/V Project to BCA on a BOT arrangement.

In compliance with the Notice of Award dated September 29, 2000 and Section 11.3, Rule 11 of the IRR of the BOT Law,[6] BCA incorporated a project company, the Philippine Passport Corporation (PPC) to undertake and implement the MRP/V Project.

On February 8, 2001, a Build-Operate-Transfer Agreement[7] (BOT Agreement) between the DFA and PPC was signed by DFA Acting Secretary Lauro L. Baja, Jr. and PPC President Bonifacio Sumbilla. Under the BOT Agreement, the MRP/V Project was defined as follows:

Section 1.02 MRP/V Project – refers to all the activities and services undertaken in the fulfillment of the Machine Readable Passport and Visa Project as defined in the Request for Proposals (RFP), a copy of which is hereto attached as Annex A, including but not limited to project financing, systems development, installation and maintenance in the Philippines and Foreign Service Posts (FSPs), training of DFA personnel, provision of all project consumables (related to the production of passports and visas, such as printer supplies, etc.), scanning of application and citizenship documents, creation of data bases, issuance of machine readable passports and visas, and site preparation in the Central Facility and Regional Consular Offices (RCOs) nationwide.[8]

On April 5, 2002, former DFA Secretary Teofisto T. Guingona and Bonifacio Sumbilla, this time as BCA President, signed an Amended BOT Agreement[9] in order to reflect the change in the designation of the parties and to harmonize Section 11.3 with Section 11.8[10] of the IRR of the BOT Law. The Amended BOT Agreement was entered into by the DFA and BCA with the conformity of PPC.

The two BOT Agreements (the original version signed on February 8, 2001 and the amended version signed April 5, 2002) contain substantially the same provisions except for seven additional paragraphs in the whereas clauses and two new provisions – Section 9.05 on Performance and Warranty Securities and Section 20.15 on Miscellaneous Provisions. The two additional provisions are quoted below:

Section 9.05. The PPC has posted in favor of the DFA the performance security required for Phase 1 of the MRP/V Project and shall be deemed, for all intents and purposes, to be full compliance by BCA with the provisions of this Article 9.

x x x x

Section 20.15 It is clearly and expressly understood that BCA may assign, cede and transfer all of its rights and obligations under this Amended BOT Agreement to PPC, as fully as if PPC is the original signatory to this Amended BOT Agreement, provided however that BCA shall nonetheless be jointly and severally liable with PPC for the performance of all the obligations and liabilities under this Amended BOT Agreement.[11]

Also modified in the Amended BOT Agreement was the Project Completion date of the MRP/V Project which set the completion of the implementation phase of the project within 18 to 23 months from the date of effectivity of the Amended BOT Agreement as opposed to the previous period found in the original BOT Agreement which set the completion within 18 to 23 months from receipt of the NTP (Notice to Proceed) in accordance with the Project Master Plan.

On April 12, 2002, an Assignment Agreement[12] was executed by BCA and PPC, whereby BCA assigned and ceded its rights, title, interest and benefits arising from the Amended BOT Agreement to PPC.

As set out in Article 8 of the original and the Amended BOT Agreement, the MRP/V Project was divided into six phases:

Phase 1. Project Planning Phase – The Project Proponent [BCA] shall prepare detailed plans and specifications in accordance with Annex A of this [Amended] BOT Agreement within three (3) months from issuance of the NTP (Notice to Proceed) [from the date of effectivity of this Amended BOT Agreement]. This phase shall be considered complete upon the review, acceptance and approval by the DFA of these plans and the resulting Master Plan, including the Master Schedule, the business process specifications, the acceptance criteria, among other plans.

x x x x

The DFA must approve all detailed plans as a condition precedent to the issuance of the CA [Certificate of Acceptance] for Phase 1.

Phase 2. Implementation of the MRP/V Project at the Central Facility – Within six (6) months from issuance of the CA for Phase 1, the PROJECT PROPONENT [BCA] shall complete the implementation of the MRP/V Project in the DFA Central Facility, and establish the network design between the DFA Central Facility, the ten (10) RCOs [Regional Consular Offices] and the eighty (80) FSPs [Foreign Service Posts].

x x x x

Phase 3. Implementation of the MRP/V Project at the Regional Consular Offices – This phase represents the replication of the systems as approved from the Central Facility to the RCOs throughout the country, as identified in the RFP [Request for Proposal]. The approved systems are those implemented, evaluated, and finally approved by DFA as described in Phase 1. The Project Proponent [BCA] will be permitted to begin site preparation and the scanning and database building operations in all offices as soon as the plans are agreed upon and accepted. This includes site preparation and database building operations in these Phase-3 offices.

Within six (6) months from issuance of CA for Phase 2, the Project Proponent [BCA] shall complete site preparation and implementation of the approved systems in the ten (10) RCOs, including a fully functional network connection between all equipment at the Central Facility and the RCOs.

Phase 4. Full Implementation, including all Foreign Service Posts – Within three (3) to eight (8) months from issuance of the CA for Phase-3, the Project Proponent [BCA] shall complete all preparations and fully implement the approved systems in the eighty (80) FSPs, including a fully functional network connection between all equipment at the Central Facility and the FSPs. Upon satisfactory completion of Phase 4, a CA shall be issued by the DFA.

Phase 5. In Service Phase – Operation and maintenance of the complete MRP/V Facility to provide machine readable passports and visas in all designated locations around the world.

Phase 6. Transition/Turnover – Transition/Turnover to the DFA of all operations and equipment, to include an orderly transfer of ownership of all hardware, application system software and its source code and/or licenses (subject to Section 5.02 [H]), peripherals, leasehold improvements, physical and computer security improvements, Automated Fingerprint Identification Systems, and all other MRP/V facilities shall commence at least six (6) months prior to the end of the [Amended] BOT Agreement. The transition will include the training of DFA personnel who will be taking over the responsibilities of system operation and maintenance

from the Project Proponent [BCA]. The Project Proponent [BCA] shall bear all costs related to this transfer.[13] (Words in brackets appear in the Amended BOT Agreement)

To place matters in the proper perspective, it should be pointed out that both the DFA and BCA impute breach of the Amended BOT Agreement against each other.

According to the DFA, delays in the completion of the phases permeated the MRP/V Project due to the submission of deficient documents as well as intervening issues regarding BCA/PPC's supposed financial incapacity to fully implement the project.

On the other hand, BCA contends that the DFA failed to perform its reciprocal obligation to issue to BCA a Certificate of Acceptance of Phase 1 within 14 working days of operation purportedly required by Section 14.04 of the Amended BOT Agreement. BCA bewailed that it took almost three years for the DFA to issue the said Certificate allegedly because every appointee to the position of DFA Secretary wanted to review the award of the project to BCA. BCA further alleged that it was the DFA's refusal to approve the location of the DFA Central Facility which prevented BCA from proceeding with Phase 2 of the MRP/V Project.

Later, the DFA sought the opinion of the Department of Finance (DOF) and the Department of Justice (DOJ) regarding the appropriate legal actions in connection with BCA's alleged delays in the completion of the MRP/V Project. In a Letter dated February 21, 2005,[14] the DOJ opined that the DFA should issue a final demand upon BCA to make good on its obligations, specifically on the warranties and responsibilities regarding the necessary capitalization and the required financing to carry out the MRP/V Project. The DOJ used as basis for said recommendation, the Letter dated April 19, 2004[15] of DOF Secretary Juanita Amatong to then DFA Secretary Delia Albert stating, among others, that BCA may not be able to infuse more capital into PPC to use for the completion of the MRP/V Project.

Thus, on February 22, 2005, DFA sent a letter[16] to BCA, through its project company PPC, invoking BCA's financial warranty under Section 5.02(A) of the Amended BOT Agreement.[17] The DFA required BCA to submit (a) proof of adequate capitalization (i.e., full or substantial payment of stock subscriptions); (b) a bank guarantee indicating the availability of a credit facility of ₱700 million; and (c) audited financial statements for the years 2001 to 2004.

In reply to DFA's letter, BCA, through PPC, informed the former of its position that its financial capacity was already passed upon during the prequalification process and that the Amended BOT Agreement did not call for any additional financial requirements for the implementation of the MRP/V Project. Nonetheless, BCA submitted its financial statements for the years 2001 and 2002 and requested for additional time within which to comply with the other financial requirements which the DFA insisted on.[18]

According to the DFA, BCA's financial warranty is a continuing warranty which requires that it shall have the necessary capitalization to finance the MRP/V Project in its entirety and not on a "per phase" basis as BCA contends. Only upon sufficient proof of its financial capability to complete and implement the whole project will the DFA's obligation to choose and approve the location of its Central Facility arise. The DFA asserted that its approval of a Central Facility site was not ministerial and upon its review, BCA's proposed site for the Central Facility was purportedly unacceptable in terms of security and facilities. Moreover, the DFA allegedly received conflicting official letters and notices[19] from BCA and PPC regarding the true ownership and control of PPC. The DFA implied that the disputes among the shareholders of PPC and between PPC and BCA appeared to be part of the reason for the hampered implementation of the MRP/V Project.

BCA, in turn, submitted various letters and documents to prove its financial capability to complete the MRP/V Project.[20] However, the DFA claimed these documents were unsatisfactory or of dubious authenticity. Then on August 1, 2005, BCA terminated its Assignment Agreement with PPC and notified the DFA that it would directly implement the MRP/V Project.[21] BCA further claims that the termination of the Assignment Agreement was upon the instance, or with the conformity, of the DFA, a claim which the DFA disputed.

On December 9, 2005, the DFA sent a Notice of Termination[22] to BCA and PPC due to their alleged failure to submit proof of financial capability to complete the entire MRP/V Project in accordance with the financial warranty under Section 5.02(A) of the Amended BOT Agreement. The Notice states:

After a careful evaluation and consideration of the matter, including the reasons cited in your letters dated March 3, May 3, and June 20, 2005, and upon the recommendation of the Office of the Solicitor General (OSG), the Department is of the view that your continuing default in complying with the requisite bank guarantee and/or credit facility, despite repeated notice and demand, is legally unjustified.

In light of the foregoing considerations and upon the instruction of the Secretary of Foreign Affairs, the Department hereby formally TERMINATE (sic) the Subject Amended BOT Agreement dated 5 April 2005 (sic)[23] effective 09 December 2005. Further, and as a consequence of this termination, the Department formally DEMAND (sic) that you pay within ten (10) days from receipt hereof, liquidated damages equivalent to the corresponding performance security bond that you had posted for the MRP/V Project.

Please be guided accordingly.

On December 14, 2005, BCA sent a letter[24] to the DFA demanding that it immediately reconsider and revoke its previous notice of termination, otherwise, BCA would be compelled to declare the DFA in default pursuant to the Amended BOT Agreement. When the DFA failed to respond to said letter, BCA issued its own Notice of Default dated December 22, 2005[25] against the DFA, stating that if the default is not remedied within 90 days, BCA will be constrained to terminate the MRP/V Project and hold the DFA liable for damages.

BCA's request for mutual discussion under Section 19.01 of the Amended BOT Agreement[26] was purportedly ignored by the DFA and left the dispute unresolved through amicable means within 90 days. Consequently, BCA filed its Request for Arbitration dated April 7, 2006[27] with the Philippine Dispute Resolution Center, Inc. (PDRCI), pursuant to Section 19.02 of the Amended BOT Agreement which provides:

Section 19.02 Failure to Settle Amicably – If the Dispute cannot be settled amicably within ninety (90) days by mutual discussion as contemplated under Section 19.01 herein, the Dispute shall be settled with finality by an arbitrage tribunal operating under International Law, hereinafter referred to as the "*Tribunal*", under the UNCITRAL Arbitration Rules contained in Resolution 31/98 adopted by the United Nations General Assembly on December 15, 1976, and entitled "*Arbitration Rules on the United Nations Commission on the International Trade Law*". The DFA and the BCA undertake to abide by and implement the arbitration award. The place of arbitration shall be Pasay City, Philippines, or such other place as may mutually be agreed upon by both parties. The arbitration proceeding shall be conducted in the English language.[28]

As alleged in BCA's Request for Arbitration, PDRCI is a non-stock, non-profit organization composed of independent arbitrators who operate under its own Administrative Guidelines and Rules of Arbitration as well as under the United Nations Commission on the International Trade Law (UNCITRAL) Model Law on

International Commercial Arbitration and other applicable laws and rules. According to BCA, PDRCI can act as an arbitration center from whose pool of accredited arbitrators both the DFA and BCA may select their own nominee to become a member of the arbitral tribunal which will render the arbitration award.

BCA's Request for Arbitration filed with the PDRCI sought the following reliefs:

> 1. A judgment nullifying and setting aside the Notice of Termination dated December 9, 2005 of Respondent [DFA], including its demand to Claimant [BCA] to pay liquidated damages equivalent to the corresponding performance security bond posted by Claimant [BCA];
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> 2. A judgment (a) confirming the Notice of Default dated December 22, 2005 issued by Claimant [BCA] to Respondent [DFA]; and (b) ordering Respondent [DFA] to perform its obligation under the Amended BOT Agreement dated April 5, 2002 by approving the site of the Central Facility at the Star Mall Complex on Shaw Boulevard, Mandaluyong City, within five days from receipt of the Arbitral Award; and
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> 3. A judgment ordering respondent [DFA] to pay damages to Claimant [BCA], reasonably estimated at ₱50,000,000.00 as of this date, representing lost business opportunities; financing fees, costs and commissions; travel expenses; legal fees and expenses; and costs of arbitration, including the fees of the arbitrator/s.[29]

PDRCI, through a letter dated April 26, 2006,[30] invited the DFA to submit its Answer to the Request for Arbitration within 30 days from receipt of said letter and also requested both the DFA and BCA to nominate their chosen arbitrator within the same period of time.

Initially, the DFA, through a letter dated May 22, 2006,[31] requested for an extension of time to file its answer, "without prejudice to jurisdictional and other defenses and objections available to it under the law." Subsequently, however, in a letter dated May 29, 2006,[32] the DFA declined the request for arbitration before the PDRCI. While it expressed its willingness to resort to arbitration, the DFA pointed out that under Section 19.02 of the Amended BOT Agreement, there is no mention of a specific body or institution that was previously authorized by the parties to settle their dispute. The DFA further claimed that the arbitration of the dispute should be had before an *ad hoc* arbitration body, and not before the PDRCI which has as its accredited arbitrators, two of BCA's counsels of record. Likewise, the DFA insisted that PPC, allegedly an indispensable party in the instant case, should also participate in the arbitration.

The DFA then sought the opinion of the DOJ on the Notice of Termination dated December 9, 2005 that it sent to BCA with regard to the MRP/V Project.

In DOJ Opinion No. 35 (2006) dated May 31, 2006,[33] the DOJ concurred with the steps taken by the DFA, stating that there was basis in law and in fact for the termination of the MRP/V Project. Moreover, the DOJ recommended the immediate implementation of the project (presumably by a different contractor) at the soonest possible time.

Thereafter, the DFA and the BSP entered into a Memorandum of Agreement for the latter to provide the former passports compliant with international standards. The BSP then solicited bids for the supply, delivery, installation and commissioning of a system for the production of Electronic Passport Booklets or e-Passports.[34]

For BCA, the BSP's invitation to bid for the supply and purchase of e-Passports (the e-Passport Project) would only further delay the arbitration it requested from the DFA. Moreover, this new e-Passport Project by the BSP and the DFA would render BCA's remedies moot inasmuch as the e-Passport Project would then be replacing the MRP/V Project which BCA was carrying out for the DFA.

Thus, BCA filed a Petition for Interim Relief[35] under Section 28 of the Alternative Dispute Resolution Act of 2004 (R.A. No. 9285),[36] with the Regional Trial Court (RTC) of Pasig City, Branch 71, presided over by respondent Judge Falcon. In that RTC petition, BCA prayed for the following:

WHEREFORE, BCA respectfully prays that this Honorable Court, before the constitution of the arbitral tribunal in PDRCI Case No. 30-2006/BGF, grant petitioner interim relief in the following manner:

> (a) upon filing of this Petition, immediately issue an order temporarily restraining Respondents [DFA and BSP], their agents, representatives, awardees, suppliers and assigns (i) from awarding a new contract to implement the Project, or any similar electronic passport or visa project; or (ii) if such contract has been awarded, from implementing such Project or similar projects until further orders from this Honorable Court;
>
> (b) after notice and hearing, issue a writ of preliminary injunction ordering Respondents [DFA and BSP], their agents, representatives, awardees, suppliers and assigns to desist (i) from awarding a new contract to implement the Project or any similar electronic passport or visa project; or (ii) if such contract has been awarded, from implementing such Project or similar projects, and to maintain the status quo ante pending the resolution on the merits of BCA's Request for Arbitration; and
>
> (c) render judgment affirming the interim relief granted to BCA until the dispute between the parties shall have been resolved with finality.

BCA also prays for such other relief, just and equitable under the premises.[37]

BCA alleged, in support for its application for a Temporary Restraining Order (TRO), that unless the DFA and the BSP were immediately restrained, they would proceed to undertake the project together with a third party to defeat the reliefs BCA sought in its Request for Arbitration, thus causing BCA to suffer grave and irreparable injury from the loss of substantial investments in connection with the implementation of the MRP/V Project.

Thereafter, the DFA filed an Opposition (to the Application for Temporary Restraining Order and/or Writ of Preliminary Injunction) dated January 18, 2007,[38] alleging that BCA has no cause of action against it as the contract between them is for machine readable passports and visas which is not the same as the contract it has with the BSP for the supply of electronic passports. The DFA also pointed out that the Filipino people and the government's international standing would suffer great damage if a TRO would be issued to stop the e-Passport Project. The DFA mainly anchored its opposition on Republic Act No. 8975, which prohibits trial courts from issuing a TRO, preliminary injunction or mandatory injunction against the bidding or awarding of a contract or project of the national government.

On January 23, 2007, after summarily hearing the parties' oral arguments on BCA's application for the issuance of a TRO, the trial court ordered the issuance of a TRO restraining the DFA and the BSP, their agents, representatives, awardees, suppliers and assigns from awarding a new contract to implement the

Project or any similar electronic passport or visa project, or if such contract has been awarded, from implementing such or similar projects.[39] The trial court also set for hearing BCA's application for preliminary injunction.

Consequently, the DFA filed a Motion for Reconsideration[40] of the January 23, 2007 Order. The BSP, in turn, also sought to lift the TRO and to dismiss the petition. In its Urgent Omnibus Motion dated February 1, 2007,[41] the BSP asserted that BCA is not entitled to an injunction, as it does not have a clear right which ought to be protected, and that the trial court has no jurisdiction to enjoin the implementation of the e-Passport Project which, the BSP alleged, is a national government project under Republic Act No. 8975.

In the hearings set for BCA's application for preliminary injunction, BCA presented as witnesses, Mr. Bonifacio Sumbilla, its President, Mr. Celestino Mercader, Jr. from the Independent Verification and Validation Contractor commissioned by the DFA under the Amended BOT Agreement, and DFA Assistant Secretary Domingo Lucenario, Jr. as adverse party witness.

The DFA and the BSP did not present any witness during the hearings for BCA's application for preliminary injunction. According to the DFA and the BSP, the trial court did not have any jurisdiction over the case considering that BCA did not pay the correct docket fees and that only the Supreme Court could issue a TRO on the bidding for a national government project like the e-Passport Project pursuant to the provisions of Republic Act No. 8975. Under Section 3 of Republic Act No. 8975, the RTC could only issue a TRO against a national government project if it involves a matter of extreme urgency involving a constitutional issue, such that unless a TRO is issued, grave injustice and irreparable injury will arise.

Thereafter, BCA filed an Omnibus Comment [on Opposition and Supplemental Opposition (To the Application for Temporary Restraining Order and/or Writ of Preliminary Injunction)] and Opposition [to Motion for Reconsideration (To the Temporary Restraining Order dated January 23, 2007)] and Urgent Omnibus Motion [(i) To Lift Temporary Restraining Order; and (ii) To Dismiss the Petition] dated January 31, 2007.[42] The DFA and the BSP filed their separate Replies (to BCA's Omnibus Comment) dated February 9, 2007[43] and February 13, 2007,[44] respectively.

On February 14, 2007, the trial court issued an Order granting BCA's application for preliminary injunction, to wit:

WHEREFORE, in view of the above, the court resolves that it has jurisdiction over the instant petition and to issue the provisional remedy prayed for, and therefore, hereby GRANTS petitioner's [BCA's] application for preliminary injunction. Accordingly, upon posting a bond in the amount of Ten Million Pesos (₱10,000,000.00), let a writ of preliminary injunction issue ordering respondents [DFA and BSP], their agents, representatives, awardees, suppliers and assigns to desist (i) from awarding a new contract to implement the project or any similar electronic passport or visa project or (ii) if such contract has been awarded from implementing such project or similar projects.

The motion to dismiss is denied for lack of merit. The motions for reconsideration and to lift temporary restraining Order are now moot and academic by reason of the expiration of the TRO.[45]

On February 16, 2007, BCA filed an Amended Petition,[46] wherein paragraphs 3.3(b) and 4.3 were modified to add language to the effect that unless petitioners were enjoined from awarding the e-Passport Project, BCA would be deprived of its constitutionally-protected right to perform its contractual obligations under the

original and amended BOT Agreements without due process of law. Subsequently, on February 26, 2007, the DFA and the BSP received the Writ of Preliminary Injunction dated February 23, 2007.

Hence, on March 2, 2007, the DFA and the BSP filed the instant Petition for *Certiorari*[47] and prohibition under Rule 65 of the Rules of Court with a prayer for the issuance of a temporary restraining order and/or a writ of preliminary injunction, imputing grave abuse of discretion on the trial court when it granted interim relief to BCA and issued the assailed Order dated February 14, 2007 and the writ of preliminary injunction dated February 23, 2007.

The DFA and the BSP later filed an Urgent Motion for Issuance of a Temporary Restraining Order and/or Writ of Preliminary Injunction dated March 5, 2007.[48]

On March 12, 2007, the Court required BCA to file its comment on the said petition within ten days from notice and granted the Office of the Solicitor General's urgent motion for issuance of a TRO and/or writ of preliminary injunction,[49] thus:

After deliberating on the petition for certiorari and prohibition with temporary restraining order and/or writ of preliminary injunction assailing the Order dated 14 February 2007 of the Regional Trial Court, Branch 71, Pasig City, in Civil Case No. 71079, the Court, without necessarily giving due course thereto, resolves to require respondents to COMMENT thereon (not to file a motion to dismiss) within ten (10) days from notice.

The Court further resolves to GRANT the Office of the Solicitor General's urgent motion for issuance of a temporary restraining order and/or writ of preliminary injunction dated 05 March 2007 and ISSUE a TEMPORARY RESTRAINING ORDER, as prayed for, enjoining respondents from implementing the assailed Order dated 14 February 2007 and the Writ of Preliminary Injunction dated 23 February 2007, issued by respondent Judge Franco T. Falcon in Civil Case No. 71079 entitled BCA International Corporation vs. Department of Foreign Affairs and Bangko Sentral ng Pilipinas, and from conducting further proceedings in said case until further orders from this Court.

BCA filed on April 2, 2007 its Comment with Urgent Motion to Lift TRO,[50] to which the DFA and the BSP filed their Reply dated August 14, 2007.[51]

In a Resolution dated June 4, 2007,[52] the Court denied BCA's motion to lift TRO. BCA filed another Urgent Omnibus Motion dated August 17, 2007, for the reconsideration of the Resolution dated June 4, 2007, praying that the TRO issued on March 12, 2007 be lifted and that the petition be denied.

In a Resolution dated September 10, 2007,[53] the Court denied BCA's Urgent Omnibus Motion and gave due course to the instant petition. The parties were directed to file their respective memoranda within 30 days from notice of the Court's September 10, 2007 Resolution.

Petitioners DFA and BSP submit the following issues for our consideration:

Issues

I

Whether or not the respondent judge gravely abused his discretion amounting to lack or excess of jurisdiction when he issued the assailed order, which effectively enjoined the implementation of the e-passport project -- A national government project under Republic Act No. 8975.

II

Whether or not the respondent judge acted with grave abuse of discretion amounting to lack or excess of jurisdiction in granting respondent BCA's "interim relief" inasmuch as:

> (I) Respondent BCA has not established a clear right that can be protected by an injunction; and
>
> (II) Respondent BCA has not shown that it will sustain grave and irreparable injury that must be protected by an injunction. On the contrary, it is the Filipino people, who petitioners protect, that will sustain serious and severe injury by the injunction.[54]

At the outset, we dispose of the procedural objections of BCA to the petition, to wit: (a) petitioners did not follow the hierarchy of courts by filing their petition directly with this Court, without filing a motion for reconsideration with the RTC and without filing a petition first with the Court of Appeals; (b) the person who verified the petition for the DFA did not have personal knowledge of the facts of the case and whose appointment to his position was highly irregular; and (c) the verification by the Assistant Governor and General Counsel of the BSP of only selected paragraphs of the petition was with the purported intent to mislead this Court.

Although the direct filing of petitions for *certiorari* with the Supreme Court is discouraged when litigants may still resort to remedies with the lower courts, we have in the past overlooked the failure of a party to strictly adhere to the hierarchy of courts on highly meritorious grounds. Most recently, we relaxed the rule on court hierarchy in the case of Roque, Jr. v. Commission on Elections,[55] wherein we held:

The policy on the hierarchy of courts, which petitioners indeed failed to observe, is not an iron-clad rule. For indeed the Court has full discretionary power to take cognizance and assume jurisdiction of special civil actions for *certiorari* and *mandamus* filed directly with it for exceptionally compelling reasons or if warranted by the nature of the issues clearly and specifically raised in the petition.[56] (Emphases ours.)

The Court deems it proper to adopt a similarly liberal attitude in the present case in consideration of the transcendental importance of an issue raised herein. This is the first time that the Court is confronted with the question of whether an information and communication technology project, which does not conform to our traditional notion of the term "infrastructure," is covered by the prohibition on the issuance of court injunctions found in Republic Act No. 8975, which is entitled "An Act to Ensure the Expeditious Implementation and Completion of Government Infrastructure Projects by Prohibiting Lower Courts from Issuing Temporary Restraining Orders, Preliminary Injunctions or Preliminary Mandatory Injunctions, Providing Penalties for Violations Thereof, and for Other Purposes." Taking into account the current trend of computerization and modernization of administrative and service systems of government offices, departments and agencies, the resolution of this issue for the guidance of the bench and bar, as well as the general public, is both timely and imperative.

Anent BCA's claim that Mr. Edsel T. Custodio (who verified the Petition on behalf of the DFA) did not have personal knowledge of the facts of the case and was appointed to his position as Acting Secretary under purportedly irregular circumstances, we find that BCA failed to sufficiently prove such allegations. In any event, we have previously held that "[d]epending on the nature of the allegations in the petition, the verification may be based either purely on personal knowledge, or entirely on authentic records, or on both sources."[57] The alleged lack of personal knowledge of Mr. Custodio (which, as we already stated, BCA failed

to prove) would not necessarily render the verification defective for he could have verified the petition purely on the basis of authentic records.

As for the assertion that the partial verification of Assistant Governor and General Counsel Juan de Zuniga, Jr. was for the purpose of misleading this Court, BCA likewise failed to adduce evidence on this point. Good faith is always presumed. Paragraph 3 of Mr. Zuniga's verification indicates that his partial verification is due to the fact that he is verifying only the allegations in the petition peculiar to the BSP. We see no reason to doubt that this is the true reason for his partial or selective verification.

In sum, BCA failed to successfully rebut the presumption that the official acts (of Mr. Custodio and Mr. Zuniga) were done in good faith and in the regular performance of official duty.[58] Even assuming the verifications of the petition suffered from some defect, we have time and again ruled that "[t]he ends of justice are better served when cases are determined on the merits — after all parties are given full opportunity to ventilate their causes and defenses — rather than on technicality or some procedural imperfections."[59] In other words, the Court may suspend or even disregard rules when the demands of justice so require.[60]

We now come to the substantive issues involved in this case.

On whether the trial court had jurisdiction to issue a writ of preliminary injunction in the present case

In their petition, the DFA and the BSP argue that respondent Judge Falcon gravely abused his discretion amounting to lack or excess of jurisdiction when he issued the assailed orders, which effectively enjoined the bidding and/or implementation of the e-Passport Project. According to petitioners, this violated the clear prohibition under Republic Act No. 8975 regarding the issuance of TROs and preliminary injunctions against national government projects, such as the e-Passport Project.

The prohibition invoked by petitioners is found in Section 3 of Republic Act No. 8975, which reads:

Section 3. Prohibition on the Issuance of Temporary Restraining Orders, Preliminary Injunctions and Preliminary Mandatory Injunctions. – No court, except the Supreme Court, shall issue any temporary restraining order, preliminary injunction or preliminary mandatory injunction against the government, or any of its subdivisions, officials or any person or entity, whether public or private, acting under the government's direction, to restrain, prohibit or compel the following acts:

> (a) Acquisition, clearance and development of the right-of-way and/or site or location of any national government project;
>
> (b) Bidding or awarding of contract/project of the national government as defined under Section 2 hereof;
>
> (c) Commencement, prosecution, execution, implementation, operation of any such contract or project;
>
> (d) Termination or rescission of any such contract/project; and
>
> (e) The undertaking or authorization of any other lawful activity necessary for such contract/project.

This prohibition shall apply in all cases, disputes or controversies instituted by a private party, including but not limited to cases filed by bidders or those claiming to have rights through such bidders involving such contract/project. This prohibition shall not apply when the matter is of extreme urgency involving a constitutional issue, such that unless a temporary restraining order is issued, grave injustice and irreparable injury will arise. The applicant shall file a bond, in an amount to be fixed by the court, which bond shall accrue in favor of the government if the court should finally decide that the applicant was not entitled to the relief sought.

If after due hearing the court finds that the award of the contract is null and void, the court may, if appropriate under the circumstances, award the contract to the qualified and winning bidder or order a rebidding of the same, without prejudice to any liability that the guilty party may incur under existing laws.

From the foregoing, it is indubitable that no court, aside from the Supreme Court, may enjoin a "national government project" unless the matter is one of extreme urgency involving a constitutional issue such that unless the act complained of is enjoined, grave injustice or irreparable injury would arise.

What then are the "national government projects" over which the lower courts are without jurisdiction to issue the injunctive relief as mandated by Republic Act No. 8975?

Section 2(a) of Republic Act No. 8975 provides:

Section 2. *Definition of Terms*. –

(a) "National government projects" shall refer to all current and future national government infrastructure, engineering works and service contracts, including projects undertaken by government-owned and -controlled corporations, all projects covered by Republic Act No. 6975, as amended by Republic Act No. 7718, otherwise known as the Build-Operate-and-Transfer Law, and other related and necessary activities, such as site acquisition, supply and/or installation of equipment and materials, implementation, construction, completion, operation, maintenance, improvement, repair and rehabilitation, regardless of the source of funding.

As petitioners themselves pointed out, there are three types of national government projects enumerated in Section 2(a), to wit:

> (a) current and future national government infrastructure projects, engineering works and service contracts, including projects undertaken by government-owned and –controlled corporations;
>
> (b) all projects covered by R.A. No. 6975, as amended by R.A. No. 7718, or the Build-Operate-and-Transfer (BOT) Law; and
>
> (c) other related and necessary activities, such as site acquisition, supply and/or installation of equipment and materials, implementation, construction, completion, operation, maintenance, improvement repair and rehabilitation, regardless of the source of funding.

Under Section 2(a) of the BOT Law as amended by Republic Act No. 7718,[61] private sector infrastructure or development projects are those normally financed and operated by the public sector but which will now be wholly or partly implemented by the private sector, **including but not limited to**, power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroads

and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, markets, slaughterhouses, warehouses, solid waste management, **information technology networks and database infrastructure**, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be authorized by the appropriate agency.

In contrast, Republic Act No. 9184,[62] also known as the Government Procurement Reform Act, defines infrastructure projects in Section 5(k) thereof in this manner:

(k) *Infrastructure Projects* - include the construction, improvement, rehabilitation, demolition, repair, restoration or maintenance of roads and bridges, railways, airports, seaports, communication facilities, civil works components of information technology projects, irrigation, flood control and drainage, water supply, sanitation, sewerage and solid waste management systems, shore protection, energy/power and electrification facilities, national buildings, school buildings, hospital buildings and other related construction projects of the government. (Emphasis supplied.)

In the present petition, the DFA and the BSP contend that the bidding for the supply, delivery, installation and commissioning of a system for the production of Electronic Passport Booklets, is a national government project within the definition of Section 2 of Republic Act No. 8975. Petitioners also point to the Senate deliberations on Senate Bill No. 2038[63] (later Republic Act No. 8975) which allegedly show the legislative's intent to expand the scope and definition of national government projects to cover not only the infrastructure projects enumerated in Presidential Decree No. 1818, but also future projects that may likewise be considered national government infrastructure projects, like the e-Passport Project, to wit:

Senator Cayetano. x x x Mr. President, the present bill, the Senate Bill No. 2038, is actually an improvement of P.D. No. 1818 and definitely not a repudiation of what I have earlier said, as my good friend clearly stated. But this is really an effort to improve both the scope and definition of the term "government projects" and to ensure that lower court judges obey and observe this prohibition on the issuance of TROs on infrastructure projects of the government.

x x x x

Senator Cayetano. That is why, Mr. President, I did try to explain why I would accept the proposed amendment, meaning the totality of the repeal of P.D. 1818 which is not found in the original version of the bill, because of my earlier explanation that the definition of the term 'government infrastructure project' covers all of those enumerated in Section 1 of P.D. No. 1818. And the reason for that, as we know, is we do not know what else could be considered government infrastructure project in the next 10 or 20 years.

x x x So, using the Latin maxim of expression unius est exclusion alterius, which means what is expressly mentioned is tantamount to an express exclusion of the others, that is the reason we did not include particularly an enumeration of certain activities of the government found in Section 1 of P.D. No. 1818. Because to do that, it may be a good excuse for a brilliant lawyer to say 'Well, you know, since it does not cover this particular activity, ergo, the Regional Trial Court may issue TRO.

Using the foregoing discussions to establish that the intent of the framers of the law was to broaden the scope and definition of national government projects and national infrastructure projects, the DFA and the BSP submit that the said scope and definition had since evolved to include the e-Passport Project. They assert that the concept of "infrastructure" must now refer to any and all elements that provide support,

framework, or structure for a given system or organization, including information technology, such as the e-Passport Project.

Interestingly, petitioners represented to the trial court that the e-Passport Project is a BOT project but in their petition with this Court, petitioners simply claim that the e-Passport Project is a national government project under Section 2 of Republic Act No. 8975. This circumstance is significant, since relying on the claim that the e-Passport Project is a BOT project, the trial court ruled in this wise:

The prohibition against issuance of TRO and/or writ of preliminary injunction under RA 8975 applies only to national government infrastructure project covered by the BOT Law, (RA 8975, Sec 3[b] in relation to Sec. 2).

The national government projects covered under the BOT are enumerated under Sec. 2 of RA6957, as amended, otherwise known as the BOT Law. Notably, it includes "information technology networks and database infrastructure."

In relation to information technology projects, infrastructure projects refer to the "civil works components" thereof. (R.A. No. 9184 [2003], Sec. 5[c]{sic}).[64]

Respondent BSP's request for bid, for the supply, delivery, installation and commissioning of a system for the production of Electronic Passport Booklets appears to be beyond the scope of the term "civil works." Respondents did not present evidence to prove otherwise.[65] (Emphases ours.)

From the foregoing, it can be gleaned that the trial court accepted BCA's reasoning that, assuming the e-Passport Project is a project under the BOT Law, Section 2 of the BOT Law must be read in conjunction with Section 5(c) of Republic Act No. 9184 or the Government Procurement Reform Act to the effect that only the civil works component of information technology projects are to be considered "infrastructure." Thus, only said civil works component of an information technology project cannot be the subject of a TRO or writ of injunction issued by a lower court.

Although the Court finds that the trial court had jurisdiction to issue the writ of preliminary injunction, we cannot uphold the theory of BCA and the trial court that the definition of the term "infrastructure project" in Republic Act No. 9184 should be applied to the BOT Law.

Section 5 of Republic Act No. 9184 prefaces the definition of the terms therein, including the term "infrastructure project," with the following phrase: "For purposes of this Act, the following terms or words and phrases shall mean or be understood as follows x x x."

This Court has stated that the definition of a term in a statute is not conclusive as to the meaning of the same term as used elsewhere.[66] This is evident when the legislative definition is expressly made for the purposes of the statute containing such definition.[67]

There is no legal or rational basis to apply the definition of the term "infrastructure project" in one statute to another statute enacted years before and which already defined the types of projects it covers. Rather, a reading of the two statutes involved will readily show that there is a legislative intent to treat information technology projects differently under the BOT Law and the Government Procurement Reform Act.

In the BOT Law as amended by Republic Act No. 7718, the national infrastructure and development projects covered by said law are enumerated in Section 2(a) as follows:

SEC. 2. *Definition of Terms*. - The following terms used in this Act shall have the meanings stated below:

(a) *Private sector infrastructure or development projects* - The general description of infrastructure or development projects normally financed and operated by the public sector but which will now be wholly or partly implemented by the private sector, including but not limited to, power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroads and railways, transport systems, land reclamation projects, industrial estates of townships, housing, government buildings, tourism projects, markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be authorized by the appropriate agency pursuant to this Act. Such projects shall be undertaken through contractual arrangements as defined hereunder and such other variations as may be approved by the President of the Philippines.

For the construction stage of these infrastructure projects, the project proponent may obtain financing from foreign and/or domestic sources and/or engage the services of a foreign and/or Filipino contractor: *Provided*, That, in case an infrastructure or a development facility's operation requires a public utility franchise, the facility operator must be a Filipino or if a corporation, it must be duly registered with the Securities and Exchange Commission and owned up to at least sixty percent (60%) by Filipinos: *Provided, further*, That in the case of foreign contractors, Filipino labor shall be employed or hired in the different phases of construction where Filipino skills are available: *Provided, finally*, That projects which would have difficulty in sourcing funds may be financed partly from direct government appropriations and/or from Official Development Assistance (ODA) of foreign governments or institutions not exceeding fifty percent (50%) of the project cost, and the balance to be provided by the project proponent. (Emphasis supplied.)

A similar provision appears in the Revised IRR of the BOT Law as amended, to wit:

SECTION 1.3 - DEFINITION OF TERMS

For purposes of these Implementing Rules and Regulations, the terms and phrases hereunder shall be understood as follows:

x x x x

v. **Private Sector Infrastructure or Development Projects** - The general description of infrastructure or Development Projects normally financed, and operated by the public sector but which will now be wholly or partly financed, constructed and operated by the private sector, including but not limited to, power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroad and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, public markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may otherwise be authorized by the appropriate Agency/LGU pursuant to the Act or these Revised IRR. Such projects shall be undertaken through Contractual Arrangements as defined herein, including such other variations as may be approved by the President of the Philippines.

x x x x

SECTION 2.2 - ELIGIBLE TYPES OF PROJECTS

The Construction, rehabilitation, improvement, betterment, expansion, modernization, operation, financing and maintenance of the following types of projects which are normally financed and operated by the public sector which will now be wholly or partly financed, constructed and operated by the private sector, including other infrastructure and development projects as may be authorized by the appropriate agencies, may be proposed under the provisions of the Act and these Revised IRR, provided however that such projects have a cost recovery component which covers at least 50% of the Project Cost, or as determined by the Approving Body:

x x x x

h. Information technology (IT) and data base infrastructure, including modernization of IT, geo-spatial resource mapping and cadastral survey for resource accounting and planning. (Underscoring supplied.)

Undeniably, under the BOT Law, wherein the projects are to be privately funded, the entire information technology project, including the civil works component and the technological aspect thereof, is considered an infrastructure or development project and treated similarly as traditional "infrastructure" projects. All the rules applicable to traditional infrastructure projects are also applicable to information technology projects. In fact, the MRP/V Project awarded to BCA under the BOT Law appears to include both civil works (i.e., site preparation of the Central Facility, regional DFA offices and foreign service posts) and non-civil works aspects (i.e., development, installation and maintenance in the Philippines and foreign service posts of a computerized passport and visa issuance system, including creation of databases, storage and retrieval systems, training of personnel and provision of consumables).

In contrast, under Republic Act No. 9184 or the Government Procurement Reform Act, which contemplates projects to be funded by public funds, the term "infrastructure project" was limited to only the "civil works component" of information technology projects. The non-civil works component of information technology projects would be treated as an acquisition of goods or consulting services as the case may be.

This limited definition of "infrastructure project" in relation to information technology projects under Republic Act No. 9184 is significant since the IRR of Republic Act No. 9184 has some provisions that are particular to infrastructure projects and other provisions that are applicable only to procurement of goods or consulting services.[68]

Implicitly, the civil works component of information technology projects are subject to the provisions on infrastructure projects while the technological and other components would be covered by the provisions on procurement of goods or consulting services as the circumstances may warrant.

When Congress adopted a limited definition of what is to be considered "infrastructure" in relation to information technology projects under the Government Procurement Reform Act, legislators are presumed to have taken into account previous laws concerning infrastructure projects (the BOT Law and Republic Act No. 8975) and deliberately adopted the limited definition. We can further presume that Congress had written into law a different treatment for information technology projects financed by public funds vis-a-vis privately funded projects for a valid legislative purpose.

The idea that the definitions of terms found in the Government Procurement Reform Act were not meant to be applied to projects under the BOT Law is further reinforced by the following provision in the IRR of the Government Procurement Reform Act:

Section 1. Purpose and General Coverage

This Implementing Rules and Regulations (IRR) Part A, hereinafter called "IRR-A," is promulgated pursuant to Section 75 of Republic Act No. 9184 (R.A. 9184), otherwise known as the "Government Procurement Reform Act" (GPRA), for the purpose of prescribing the necessary rules and regulations for the modernization, standardization, and regulation of the procurement activities of the government. This IRR-A shall cover all fully domestically-funded procurement activities from procurement planning up to contract implementation and termination, except for the following:

> a) Acquisition of real property which shall be governed by Republic Act No. 8974 (R.A. 8974), entitled "An Act to Facilitate the Acquisition of Right-of-Way Site or Location for National Government Infrastructure Projects and for Other Purposes," and other applicable laws; and
>
> b) Private sector infrastructure or development projects and other procurement covered by Republic Act No. 7718 (R.A. 7718), entitled "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes," as amended: *Provided, however*, That for the portions financed by the Government, the provisions of this IRR-A shall apply.

The IRR-B for foreign-funded procurement activities shall be the subject of a subsequent issuance. (Emphases supplied.)

The foregoing provision in the IRR can be taken as an administrative interpretation that the provisions of Republic Act No. 9184 are inapplicable to a BOT project except only insofar as such portions of the BOT project that are financed by the government.

Taking into account the different treatment of information technology projects under the BOT Law and the Government Procurement Reform Act, petitioners' contention the trial court had no jurisdiction to issue a writ of preliminary injunction in the instant case would have been correct if the e-Passport Project was a project under the BOT Law as they represented to the trial court.

However, petitioners presented no proof that the e-Passport Project was a BOT project. On the contrary, evidence adduced by both sides tended to show that the e-Passport Project was a procurement contract under Republic Act No. 9184.

The BSP's on-line request for expression of interest and to bid for the e-Passport Project[69] from the BSP website and the newspaper clipping[70] of the same request expressly stated that "[t]he two stage bidding procedure under Section 30.4 of the Implementing Rules and Regulation (sic) Part-A of Republic Act No. 9184 relative to the bidding and award of the contract shall apply." During the testimony of DFA Assistant Secretary Domingo Lucenario, Jr. before the trial court, he admitted that the e-Passport Project is a BSP procurement project and that it is the "BSP that will pay the suppliers."[71] In petitioners' Manifestation dated July 29, 2008[72] and the Erratum[73] thereto, petitioners informed the Court that a contract "for the supply of a complete package of systems design, technology, hardware, software, and peripherals, maintenance and technical support, ecovers and datapage security laminates for the centralized production and personalization of Machine Readable Electronic Passport" was awarded to Francois Charles Oberthur Fiduciaire. In the Notice of Award dated July 2, 2008[74] attached to petitioners' pleading, it was stated that the failure of the contractor/supplier to submit the required performance bond would be sufficient ground for the imposition of administrative penalty under Section 69 of the IRR-A of Republic Act No. 9184.

Being a government procurement contract under Republic Act No. 9184, only the civil works component of the e-Passport Project would be considered an infrastructure project that may not be the subject of a lower court-issued writ of injunction under Republic Act No. 8975.

Could the e-Passport Project be considered as "engineering works or a service contract" or as "related and necessary activities" under Republic Act No. 8975 which may not be enjoined?

We hold in the negative. Under Republic Act No. 8975, a "service contract" refers to "infrastructure contracts entered into by any department, office or agency of the national government with private entities and nongovernment organizations for services related or incidental to the functions and operations of the department, office or agency concerned." On the other hand, the phrase "other related and necessary activities" obviously refers to activities related to a government infrastructure, engineering works, service contract or project under the BOT Law. In other words, to be considered a service contract or related activity, petitioners must show that the e-Passport Project is an infrastructure project or necessarily related to an infrastructure project. This, petitioners failed to do for they saw fit not to present any evidence on the details of the e-Passport Project before the trial court and this Court. There is nothing on record to indicate that the e-Passport Project has a civil works component or is necessarily related to an infrastructure project.

Indeed, the reference to Section 30.4[75] of the IRR of Republic Act No. 9184 (a provision specific to the procurement of goods) in the BSP's request for interest and to bid confirms that the e-Passport Project is a procurement of goods and not an infrastructure project. Thus, within the context of Republic Act No. 9184 – which is the governing law for the e-Passport Project – the said Project is not an infrastructure project that is protected from lower court issued injunctions under Republic Act No. 8975, which, to reiterate, has for its purpose the expeditious and efficient implementation and completion of government infrastructure projects.

We note that under Section 28, Republic Act No. 9285 or the Alternative Dispute Resolution Act of 2004,[76] the grant of an interim measure of protection by the proper court before the constitution of an arbitral tribunal is allowed:

Sec. 28. *Grant of Interim Measure of Protection*. – (a) It is not incompatible with an arbitration agreement for a party to request, before constitution of the tribunal, from a Court an interim measure of protection and for the Court to grant such measure. After constitution of the arbitral tribunal and during arbitral proceedings, a request for an interim measure of protection, or modification thereof, may be made with the arbitral tribunal or to the extent that the arbitral tribunal has no power to act or is unable to act effectively, the request may be made with the Court. The arbitral tribunal is deemed constituted when the sole arbitrator or the third arbitrator, who has been nominated, has accepted the nomination and written communication of said nomination and acceptance has been received by the party making the request.

(a) The following rules on interim or provisional relief shall be observed:

(1) Any party may request that provisional relief be granted against the adverse party.

(2) Such relief may be granted:

(i) to prevent irreparable loss or injury;

(ii) to provide security for the performance of any obligation;

(iii) to produce or preserve any evidence; or

(iv) to compel any other appropriate act or omission.

(3) The order granting provisional relief may be conditioned upon the provision of security or any act or omission specified in the order.

(4) Interim or provisional relief is requested by written application transmitted by reasonable means to the Court or arbitral tribunal as the case may be and the party against whom the relief is sought, describing in appropriate detail the precise relief, the party against whom the relief is requested, the grounds for the relief, and the evidence supporting the request.

(5) The order shall be binding upon the parties.

(6) Either party may apply with the Court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal.

(7) A party who does not comply with the order shall be liable for all damages resulting from noncompliance, including all expenses and reasonable attorney's fees, paid in obtaining the order's judicial enforcement.

Section 3(h) of the same statute provides that the "Court" as referred to in Article 6 of the Model Law shall mean a Regional Trial Court.

Republic Act No. 9285 is a general law applicable to all matters and controversies to be resolved through alternative dispute resolution methods. This law allows a Regional Trial Court to grant interim or provisional relief, including preliminary injunction, to parties in an arbitration case prior to the constitution of the arbitral tribunal. This general statute, however, must give way to a special law governing national government projects, Republic Act No. 8975 which prohibits courts, except the Supreme Court, from issuing TROs and writs of preliminary injunction in cases involving national government projects.

However, as discussed above, the prohibition in Republic Act No. 8975 is inoperative in this case, since petitioners failed to prove that the e-Passport Project is national government project as defined therein. Thus, the trial court had jurisdiction to issue a writ of preliminary injunction against the e-Passport Project.

On whether the trial court's issuance of a writ of injunction was proper

Given the above ruling that the trial court had jurisdiction to issue a writ of injunction and going to the second issue raised by petitioners, we answer the question: Was the trial court's issuance of a writ of injunction warranted under the circumstances of this case?

Petitioners' attack on the propriety of the trial court's issuance of a writ of injunction is two-pronged: (a) BCA purportedly has no clear right to the injunctive relief sought; and (b) BCA will suffer no grave and irreparable injury even if the injunctive relief were not granted.

To support their claim that BCA has no clear right to injunctive relief, petitioners mainly allege that the MRP/V Project and the e-Passport Project are not the same project. Moreover, the MRP/V Project purportedly involves a technology (the 2D optical bar code) that has been rendered obsolete by the latest ICAO developments while the e-Passport Project will comply with the latest ICAO standards (the contactless

integrated circuit). Parenthetically, and not as a main argument, petitioners imply that BCA has no clear contractual right under the Amended BOT Agreement since BCA had previously assigned all its rights and obligations under the said Agreement to PPC.

BCA, on the other hand, claims that the Amended BOT Agreement also contemplated the supply and/or delivery of e-Passports with the integrated circuit technology in the future and not only the machine readable passport with the 2D optical bar code technology. Also, it is BCA's assertion that the integrated circuit technology is only optional under the ICAO issuances. On the matter of its assignment of its rights to PPC, BCA counters that it had already terminated (purportedly at DFA's request) the assignment agreement in favor of PPC and that even assuming the termination was not valid, the Amended BOT Agreement expressly stated that BCA shall remain solidarily liable with its assignee, PPC.

Most of these factual allegations and counter-allegations already touch upon the merits of the main controversy between the DFA and BCA, i.e., the validity and propriety of the termination of the Amended BOT Agreement (the MRP/V Project) between the DFA and BCA. The Court deems it best to refrain from ruling on these matters since they should be litigated in the appropriate arbitration or court proceedings between or among the concerned parties.

One preliminary point, however, that must be settled here is whether BCA retains a right to seek relief against the DFA under the Amended BOT Agreement in view of BCA's previous assignment of its rights to PPC. Without preempting any factual finding that the appropriate court or arbitral tribunal on the matter of the validity of the assignment agreement with PPC or its termination, we agree with BCA that it remained a party to the Amended BOT Agreement, notwithstanding the execution of the assignment agreement in favor of PPC, for it was stipulated in the Amended BOT Agreement that BCA would be solidarily liable with its assignee. For convenient reference, we reproduce the relevant provision of the Amended BOT Agreement here:

Section 20.15. It is clearly and expressly understood that BCA may assign, cede and transfer all of its rights and obligations under this Amended BOT Agreement to PPC [Philippine Passport Corporation], as fully as if PPC is the original signatory to this Amended BOT Agreement, **provided however that BCA shall nonetheless be jointly and severally liable with PPC for the performance of all the obligations and liabilities under this Amended BOT Agreement.** (Emphasis supplied.)

Furthermore, a review of the records shows that the DFA continued to address its correspondence regarding the MRP/V Project to both BCA and PPC, even after the execution of the assignment agreement. Indeed, the DFA's Notice of Termination dated December 9, 2005 was addressed to Mr. Bonifacio Sumbilla as President of both BCA and PPC and referred to the Amended BOT Agreement "executed between the Department of Foreign Affairs (DFA), on one hand, and the BCA International Corporation and/or the Philippine Passport Corporation (BCA/PPC)." At the very least, the DFA is estopped from questioning the personality of BCA to bring suit in relation to the Amended BOT Agreement since the DFA continued to deal with both BCA and PPC even after the signing of the assignment agreement. In any event, if the DFA truly believes that PPC is an indispensable party to the action, the DFA may take necessary steps to implead PPC but this should not prejudice the right of BCA to file suit or to seek relief for causes of action it may have against the DFA or the BSP, for undertaking the e-Passport Project on behalf of the DFA.

With respect to petitioners' contention that BCA will suffer no grave and irreparable injury so as to justify the grant of injunctive relief, the Court finds that this particular argument merits consideration.

The BOT Law as amended by Republic Act No. 7718, provides:

SEC. 7. *Contract Termination*. - In the event that a project is revoked, cancelled or terminated by the Government through no fault of the project proponent or by mutual agreement, the Government shall compensate the said project proponent for its actual expenses incurred in the project plus a reasonable rate of return thereon not exceeding that stated in the contract as of the date of such revocation, cancellation or termination: *Provided*, That the interest of the Government in this instances shall be duly insured with the Government Service Insurance System [GSIS] or any other insurance entity duly accredited by the Office of the Insurance Commissioner: *Provided, finally*, That the cost of the insurance coverage shall be included in the terms and conditions of the bidding referred to above.

In the event that the government defaults on certain major obligations in the contract and such failure is not remediable or if remediable shall remain unremedied for an unreasonable length of time, the project proponent/contractor may, by prior notice to the concerned national government agency or local government unit specifying the turn-over date, terminate the contract. The project proponent/contractor shall be reasonably compensated by the Government for equivalent or proportionate contract cost as defined in the contract. (Emphases supplied.)

In addition, the Amended BOT Agreement, which is the law between and among the parties to it, pertinently provides:

Section 17.01 Default – **In case a party commits an act constituting an event of default, the non-defaulting party may terminate this Amended BOT Agreement** by serving a written notice to the defaulting party specifying the grounds for termination and giving the defaulting party a period of ninety (90) days within which to rectify the default. If the default is not remedied within this period to the satisfaction of the non-defaulting party, then the latter will serve upon the former a written notice of termination indicating the effective date of termination.

Section 17.02 Proponents Default – If this Amended BOT Agreement is **terminated by reason of the BCA's default**, **the DFA shall have the following options:**

> A. **Allow the BCA's unpaid creditors who hold a lien** on the MRP/V Facility **to foreclose** on the MRP/V Facility. The right of the BCA's unpaid creditors to foreclose on the MRP/V Facility shall be valid for the duration of the effectivity of this Amended BOT Agreement; or,
>
> B. **Allow the BCA's unpaid creditors who hold a lien on the MRP/V Facility to designate a substitute BCA** for the MRP/V Project, provided the designated substitute BCA is qualified under existing laws and acceptable to the DFA. This substitute BCA shall hereinafter be referred to as the "Substitute BCA." The Substitute BCA shall assume all the BCA's rights and privileges, as well as the obligations, duties and responsibilities hereunder; provided, however, that the DFA shall at all times and its sole option, have the right to invoke and exercise any other remedy which may be available to the DFA under any applicable laws, rules and/or regulations which may be in effect at any time and from time to time. The DFA shall cooperate with the creditors with a view to facilitating the choice of a Substitute BCA, who shall take-over the operation, maintenance and management of the MRP/V Project, within three (3) months from the BCA's receipt of the notice of termination from the DFA. The Substituted BCA shall have all the rights and obligations of the previous BCA as contained in this Amended BOT Agreement; or

C. **Take-over the MRP/V Facility and assume all attendant liabilities thereof**.

D. **In all cases of termination due to the default of the BCA, it shall pay DFA liquidated damages** equivalent to the applicable the (sic) Performance Security.

Section 17.03 DFA's Default – If this Amended BOT Agreement is terminated by the BCA by reason of the DFA's Default, **the DFA shall**:

A. **Be obligated to take over the MRP/V Facility** on an "as is, where is" basis, and shall forthwith assume attendant liabilities thereof; and

B. **Pay liquidated damages** to the BCA equivalent to the following amounts, which may be charged to the insurance proceeds referred to in Article 12:

(1) **In the event of termination prior to completion** of the implementation of the MRP/V Project, **damages shall be paid equivalent to the value of completed implementation, minus the aggregate amount of the attendant liabilities assumed by the DFA, plus ten percent (10%) thereof.** The amount of such compensation shall be determined as of the date of the notice of termination and shall become due and demandable ninety (90) days after the date of this notice of termination. Under this Amended BOT Agreement, the term "Value of the Completed Implementation" shall mean the aggregate of all reasonable costs and expenses incurred by the BCA in connection with, in relation to and/or by reason of the MRP/V Project, excluding all interest and capitalized interest, as certified by a reputable and independent accounting firm to be appointed by the BCA and subject to the approval by the DFA, such approval shall not be unreasonably withheld.

(2) **In the event of termination after completion of design, development, and installation of the MRP/V Project, just compensation shall be paid equivalent to the present value of the net income which the BCA expects to earn or realize during the unexpired or remaining term of this Amended BOT Agreement** using the internal rate of return on equity (IRRe) defined in the financial projections of the BCA and agreed upon by the parties, which is attached hereto and made as an integral part of this Amended BOT Agreement as Schedule "1". (Emphases supplied.)

The validity of the DFA's termination of the Amended BOT Agreement and the determination of the party or parties in default are issues properly threshed out in arbitration proceedings as provided for by the agreement itself. However, even if we hypothetically accept BCA's contention that the DFA terminated the Amended BOT Agreement without any default or wrongdoing on BCA's part, it is not indubitable that BCA is entitled to injunctive relief.

The BOT Law expressly allows the government to terminate a BOT agreement, even without fault on the part of the project proponent, subject to the payment of the actual expenses incurred by the proponent plus a reasonable rate of return.

Under the BOT Law and the Amended BOT Agreement, in the event of default on the part of the government (in this case, the DFA) or on the part of the proponent, the non-defaulting party is allowed to terminate the agreement, again subject to proper compensation in the manner set forth in the agreement.

Time and again, this Court has held that to be entitled to injunctive relief the party seeking such relief must be able to show grave, irreparable injury that is not capable of compensation.

In Lopez v. Court of Appeals, [77] we held:

Generally, injunction is a preservative remedy for the protection of one's substantive right or interest. It is not a cause of action in itself but merely a provisional remedy, an adjunct to a main suit. It is resorted to only when there is a pressing necessity to avoid injurious consequences which cannot be remedied under any standard compensation. The application of the injunctive writ rests upon the existence of an emergency or of a special reason before the main case can be regularly heard. The essential conditions for granting such temporary injunctive relief are that the complaint alleges facts which appear to be sufficient to constitute a proper basis for injunction and that on the entire showing from the contending parties, the injunction is reasonably necessary to protect the legal rights of the plaintiff pending the litigation. Two requisites are necessary if a preliminary injunction is to issue, namely, the existence of a right to be protected and the facts against which the injunction is to be directed are violative of said right. In particular, for a writ of preliminary injunction to issue, the existence of the right and the violation must appear in the allegation of the complaint and a preliminary injunction is proper only when the plaintiff (private respondent herein) appears to be entitled to the relief demanded in his complaint. (Emphases supplied.)

We reiterated this point in Transfield Philippines, Inc. v. Luzon Hydro Corporation,[78] where we likewise opined:

Before a writ of preliminary injunction may be issued, there must be a clear showing by the complaint that there exists a right to be protected and that the acts against which the writ is to be directed are violative of the said right. It must be shown that the invasion of the right sought to be protected is material and substantial, that the right of complainant is clear and unmistakable and that there is an urgent and paramount necessity for the writ to prevent serious damage. Moreover, an injunctive remedy may only be resorted to when there is a pressing necessity to avoid injurious consequences which cannot be remedied under any standard compensation. (Emphasis supplied.)

As the Court explained previously in Philippine Airlines, Inc. v. National Labor Relations Commission[79]:

An injury is considered irreparable if it is of such constant and frequent recurrence that no fair and reasonable redress can be had therefor in a court of law, or where there is no standard by which their amount can be measured with reasonable accuracy, that is, it is not susceptible of mathematical computation. It is considered irreparable injury when it cannot be adequately compensated in damages due to the nature of the injury itself or the nature of the right or property injured or when there exists no certain pecuniary standard for the measurement of damages. (Emphases supplied.)

It is still contentious whether this is a case of termination by the DFA alone or both the DFA and BCA. The DFA contends that BCA, by sending its own Notice of Default, likewise terminated or "abandoned" the Amended BOT Agreement. Still, whether this is a termination by the DFA alone without fault on the part of BCA or a termination due to default on the part of either party, the BOT Law and the Amended BOT Agreement lay down the measure of compensation to be paid under the appropriate circumstances.

Significantly, in BCA's Request for Arbitration with the PDRCI, it prayed for, among others, "a judgment ordering respondent [DFA] to pay damages to Claimant [BCA], reasonably estimated at ₱50,000,000.00 as of [the date of the Request for Arbitration], representing lost business opportunities; financing fees, costs and

commissions; travel expenses; legal fees and expenses; and costs of arbitration, including the fees of the arbitrator/s."[80] All the purported damages that BCA claims to have suffered by virtue of the DFA's termination of the Amended BOT Agreement are plainly determinable in pecuniary terms and can be "reasonably estimated" according to BCA's own words.

Indeed, the right of BCA, a party which may or may not have been in default on its BOT contract, to have the termination of its BOT contract reversed is not guaranteed by the BOT Law. Even assuming BCA's innocence of any breach of contract, all the law provides is that BCA should be adequately compensated for its losses in case of contract termination by the government.

There is one point that none of the parties has highlighted but is worthy of discussion. In seeking to enjoin the government from awarding or implementing a machine readable passport project or any similar electronic passport or visa project and praying for the maintenance of the status quo ante pending the resolution on the merits of BCA's Request for Arbitration, BCA effectively seeks to enjoin the termination of the Amended BOT Agreement for the MRP/V Project.

There is no doubt that the MRP/V Project is a project covered by the BOT Law and, in turn, considered a "national government project" under Republic Act No. 8795. Under Section 3(d) of that statute, trial courts are prohibited from issuing a TRO or writ of preliminary injunction against the government to restrain or prohibit the termination or rescission of any such national government project/contract.

The rationale for this provision is easy to understand. For if a project proponent – that the government believes to be in default – is allowed to enjoin the termination of its contract on the ground that it is contesting the validity of said termination, then the government will be unable to enter into a new contract with any other party while the controversy is pending litigation. Obviously, a court's grant of injunctive relief in such an instance is prejudicial to public interest since government would be indefinitely hampered in its duty to provide vital public goods and services in order to preserve the private proprietary rights of the project proponent. On the other hand, should it turn out that the project proponent was not at fault, the BOT Law itself presupposes that the project proponent can be adequately compensated for the termination of the contract. Although BCA did not specifically pray for the trial court to enjoin the termination of the Amended BOT Agreement and thus, there is no direct violation of Republic Act No. 8795, a grant of injunctive relief as prayed for by BCA will indirectly contravene the same statute.

Verily, there is valid reason for the law to deny preliminary injunctive relief to those who seek to contest the government's termination of a national government contract. The only circumstance under which a court may grant injunctive relief is the existence of a matter of extreme urgency involving a constitutional issue, such that unless a TRO or injunctive writ is issued, grave injustice and irreparable injury will result.

Now, BCA likewise claims that unless it is granted injunctive relief, it would suffer grave and irreparable injury since the bidding out and award of the e-Passport Project would be tantamount to a violation of its right against deprivation of property without due process of law under Article III, Section 1 of the Constitution. We are unconvinced.*1avvphi1*

Article III, Section 1 of the Constitution provides "[n]o person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." Ordinarily, this constitutional provision has been applied to the exercise by the State of its sovereign powers such as, its legislative power,[81] police power,[82] or its power of eminent domain.[83]

In the instant case, the State action being assailed is the DFA's termination of the Amended BOT Agreement with BCA. Although the said agreement involves a public service that the DFA is mandated to provide and, therefore, is imbued with public interest, the relationship of DFA to BCA is primarily contractual and their dispute involves the adjudication of contractual rights. The propriety of the DFA's acts, in relation to the termination of the Amended BOT Agreement, should be gauged against the provisions of the contract itself and the applicable statutes to such contract. These contractual and statutory provisions outline what constitutes due process in the present case. In all, BCA failed to demonstrate that there is a constitutional issue involved in this case, much less a constitutional issue of extreme urgency.

As for the DFA's purported failure to appropriate sufficient amounts in its budget to pay for liquidated damages to BCA, this argument does not support BCA's position that it will suffer grave and irreparable injury if it is denied injunctive relief. The DFA's liability to BCA for damages is contingent on BCA proving that it is entitled to such damages in the proper proceedings. The DFA has no obligation to set aside funds to pay for liquidated damages, or any other kind of damages, to BCA until there is a final and executory judgment in favor of BCA. It is illogical and impractical for the DFA to set aside a significant portion of its budget for an event that may never happen when such idle funds should be spent on providing necessary services to the populace. For if it turns out at the end of the arbitration proceedings that it is BCA alone that is in default, it would be the one liable for liquidated damages to the DFA under the terms of the Amended BOT Agreement.

With respect to BCA's allegation that the e-Passport Project is grossly disadvantageous to the Filipino people since it is the government that will be spending for the project unlike the MRP/V Project which would have been privately funded, the same is immaterial to the issue at hand. If it is true that the award of the e-Passport Project is inimical to the public good or tainted with some anomaly, it is indeed a cause for grave concern but it is a matter that must be investigated and litigated in the proper forum. It has no bearing on the issue of whether BCA would suffer grave and irreparable injury such that it is entitled to injunctive relief from the courts.

In all, we agree with petitioners DFA and BSP that the trial court's issuance of a writ of preliminary injunction, despite the lack of sufficient legal justification for the same, is tantamount to grave abuse of discretion.

To be very clear, the present decision touches only on the twin issues of (a) the jurisdiction of the trial court to issue a writ of preliminary injunction as an interim relief under the factual milieu of this case; and (b) the entitlement of BCA to injunctive relief. The merits of the DFA and BCA's dispute regarding the termination of the Amended BOT Agreement must be threshed out in the proper arbitration proceedings. The civil case pending before the trial court is purely for the grant of interim relief since the main case is to be the subject of arbitration proceedings.

BCA's petition for interim relief before the trial court is essentially a petition for a provisional remedy (i.e., preliminary injunction) ancillary to its Request for Arbitration in PDRCI Case No. 30-2006/BGF. BCA specifically prayed that the trial court grant it interim relief pending the constitution of the arbitral tribunal in the said PDRCI case. Unfortunately, during the pendency of this case, PDRCI Case No. 30-2006/BGF was dismissed by the PDRCI for lack of jurisdiction, in view of the lack of agreement between the parties to arbitrate before the PDRCI.[84] In Philippine National Bank v. Ritratto Group, Inc.,[85] we held:

A writ of preliminary injunction is an ancillary or preventive remedy that may only be resorted to by a litigant to protect or preserve his rights or interests and for no other purpose during the pendency of the principal

action. The dismissal of the principal action thus results in the denial of the prayer for the issuance of the writ. x x x. (Emphasis supplied.)

In view of intervening circumstances, BCA can no longer be granted injunctive relief and the civil case before the trial court should be accordingly dismissed. However, this is without prejudice to the parties litigating the main controversy in arbitration proceedings, in accordance with the provisions of the Amended BOT Agreement, which should proceed with dispatch.

It does not escape the attention of the Court that the delay in the submission of this controversy to arbitration was caused by the ambiguity in Section 19.02 of the Amended BOT Agreement regarding the proper body to which a dispute between the parties may be submitted and the failure of the parties to agree on such an arbitral tribunal. However, this Court cannot allow this impasse to continue indefinitely. The parties involved must sit down together in good faith and finally come to an understanding regarding the constitution of an arbitral tribunal mutually acceptable to them.

WHEREFORE, the instant petition is hereby GRANTED. The assailed Order dated February 14, 2007 of the Regional Trial Court of Pasig in Civil Case No. 71079 and the Writ of Preliminary Injunction dated February 23, 2007 are **REVERSED** and **SET ASIDE**. Furthermore, Civil Case No. 71079 is hereby **DISMISSED**.

No pronouncement as to costs.

SO ORDERED.

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

WE CONCUR:

RENATO C. CORONA
Chief Justice
Chairperson

PRESBITERO J. VELASCO, JR.
Associate Justice

MARIANO C. DEL CASTILLO
Associate Justice

JOSE PORTUGAL PEREZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

RENATO C. CORONA
Chief Justice

Footnotes

[1] Rollo, pp. 84-92.

[2] Id. at 93.

[3] The International Civil Aviation Organization (ICAO) is a specialized agency of the United Nations which was established on December 7, 1944 by 52 nations whose aim was to assure the safe, orderly and economic development of international air transport. ICAO was created with the signing in Chicago of the *Convention on International Civil Aviation*. ICAO is the permanent body charged with the administration of the principles laid out in the Convention. (see http://www.icao.int/icao/en/m_about.html.)

[4] ICAO's mandate to develop MRTDs is provided by Articles 22, 23 and 37 of the Chicago Convention which oblige Contracting States to develop and adopt international standards for customs, immigration and other procedures to facilitate the border-crossing processes involved in international air transport. In order to address the clearance of increased passengers volumes that came with the emergence of wide body aircraft, ICAO took the initiative and published the first edition of Document No. 9303 in 1980. (http://www2.icao.int/en/MRTD/Pages/Overview.aspx.)

[5] A Machine Readable Travel Document (MRTD) is an international travel document (e.g., a passport or visa) containing eye- and machine-readable data. Each type of MRTD contains, in a standard format, the holder's identification details, including a photograph or digital image, with mandatory identity elements reflected in a two-line machine readable zone (MRZ) printed in Optical Character Recognition-B (OCR-B) style. (Id.)

[6] The relevant portion of Section 11.3, IRR of the BOT Law, states:

> Sec. 11.3. *Notice of Award*. – The Notice of Award shall indicate, among others, that the awardee must submit within thirty (30) calendar days from official receipt of the Notice of Award the following:
>
> a. prescribed performance security;
>
> b. proof of commitment of equity contribution as specified by the Agency/LGU and subject to current monetary rules and regulations, and indications of financing resources;
>
> c. in the case of a joint venture/consortium, the agreement indicating that the members are jointly, severally and solidarily liable for the obligations of the project proponent under the contract; or
>
> d. in case a project company is formed, proof of registration in accordance with Philippine laws.

[7] Rollo, pp. 177-200.

[8] Id. at 178.

[9] Id. at 201-226.

[10] Section 11.8 of the IRR of the BOT Law provides that "[t]he successful bidder should sign the contract within seven (7) calendar days from receipt of the advice of the Agency/LGU that all requirements for award, as provided for in Section 11.3 are fully complied with."

[11] *Rollo*, pp. 214-224.

[12] Id. at 227-232.

[13] Id. at 187-189.

[14] Id. at 234-237.

[15] Id. at 238-239.

[16] Id. at 240; erroneously dated as February 22, 2004.

[17] Section 5.02(A) of the Amended BOT Agreement provides:

> ***Section 5.02*** – The BCA further warrants to the DFA that:
>
> A. It shall have the necessary capitalization and shall obtain the required financing to carry out the MRP/V Project in accordance with this amended BOT Agreement; x x x. (*Rollo*, p. 208.)

[18] Rollo, pp. 241-243.

[19] Id. at 252-255.

[20] Id. at 671-675.

[21] Id. at 692.

[22] Id. at 256-257.

[23] The Amended BOT Agreement was dated April 2, 2002 and not 2005.

[24] Rollo, pp. 697-699.

[25] Id. at 258-259.

[26] Section 19.01 of the Amended BOT Agreement provides:

> ***Section 19.01 Dispute Settlement*** – Any dispute or controversy of any kind whatsoever between the DFA and the BCA (such dispute or controversy being referred to herein as a "Dispute") which may arise out of or in connection with this Agreement, in the first instance shall be settled within ninety (90) days through amicable means, such as, but not limited to, mutual discussion.

[27] Rollo, pp. 260-266.

[28] Id. at 222.

[29] Id. at 266; page 7 of the Request for Arbitration.

[30] Id. at 711-740.

[31] Id. at 741-742.

[32] Id. at 743-745.

[33] Id. at 268-269.

[34] Id. at 273-275.

[35] Id. at 276-286.

[36] Section 28. *Grant of Interim Measure of Protection*. – (a) It is not incompatible with an arbitration agreement for a party to request, before constitution of the tribunal, from a Court an interim measure of protection and for the Court to grant such measure. After constitution of the arbitral tribunal and during arbitral proceedings, a request for an interim measure of protection, or modification thereof, may be made with the arbitral tribunal or to the extent that the arbitral tribunal has no power to act or is unable to act effectively, the request may be made with the Court. The arbitral tribunal is deemed constituted when the sole arbitrator or the third arbitrator, who has been nominated, has accepted the nomination and written communication of said nomination and acceptance has been received by the party making the request.

(b) The following rules on interim or provisional relief shall be observed:

(1) Any party may request that provisional relief be granted against the adverse party.

(2) Such relief may be granted:

(i) to prevent irreparable loss or injury;

(ii) to provide security for the performance of any obligation;

(iii) to produce or preserve any evidence; or

(iv) to compel any other appropriate act or omission.

[37] Rollo, p. 284; page 9 of the Petition for Interim Relief.

[38] Id. at 287-289.

[39] Id. at 290-291.

[40] Id. at 313-338.

[41] Id. at 339-356.

[42] Id. at 357-408.

[43] Id. at 409-424.

[44] Id. at 425-440.

[45] Id. at 92.

[46] Id. at 473-484.

[47] Id. at 3-485.

[48] Id. at 491-495.

[49] Id. at 497-502.

[50] Id. at 511-1169.

[51] Id. at 1931-1965.

[52] Id. at 1837.

[53] Id. at 1978-1980.

[54] Id. at 2185-2186.

[55] G.R. No. 188456, September 10, 2009, 599 SCRA 69.

[56] Id. at 112-113, citing Chavez v. National Housing Authority, G.R. No. 164527, August 15, 2007, 530 SCRA 235, 285; Cabarles v. Maceda, G.R. No. 161330, February 20, 2007, 516 SCRA 303, 320.

[57] Aparece v. J. Marketing Corporation, G.R. No. 174224, October 17, 2008, 569 SCRA 636, 643.

[58] See Rules of Court, Rule 131, Section 3(m); Philippine Agila Satellite, Inc. v. Trinidad-Lichauco, G.R. No. 142362, May 3, 2006, 489 SCRA 22, 31.

[59] Ateneo de Naga University v. Manalo, 497 Phil. 635, 646-647 (2005).

[60] See, for example, Chuidian v. Sandiganbayan, G.R. Nos. 156383 & 160723, July 31, 2006, 497 SCRA 327, 339.

[61] An Act Amending Certain Sections of Republic Act No. 6957, Entitled "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes" or the Philippine Build-Operate-Transfer (BOT) Law, Approved on May 5, 1994.

[62] An Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes, Approved on January 18, 2003.

[63] Transcript of Senate Deliberations on Senate Bill 2038 (August 2 and 9, 2000), DFA and BSP Petition; rollo, pp. 53-54.

[64] The definition of "infrastructure" under Republic Act No. 9184 is found in Section 5(k), not Section 5(c).

[65] *Rollo,* pp. 88-89.

[66] Endencia v. David, 93 Phil. 696, 701 (1953); Misamis Lumber Co., Inc. v. Collector of Internal Revenue, 102 Phil. 116, 122 (1957); Calderon v. Carale, G.R. No. 91636, April 23, 1992, 208 SCRA 254, 263.

[67] City of Manila v. Manila Remnant Co., Inc., 100 Phil. 796, 800 (1957).

[68] Some examples of provisions in the IRR of Republic Act No. 9184 which differentiate among infrastructure projects, goods procurement and consulting services procurement follow:

> In Section 13.1, the IRR specifies who may be observers during the bidding process for the different types of procurement activities.
>
> Section 21 sets out different guidelines for the contents of the invitation to bid and the periods for advertising and posting the invitation to bid for each type of procurement activity.
>
> Section 23 enumerates the proponent's eligibility requirements for the procurement of goods and infrastructure projects while the eligibility requirements for consulting services are specified in Section 24.
>
> Section 25 lays down different documentation requirements for bids for each type of procurement activity.
>
> Section 32 sets out the guidelines for bids evaluation for the procurement of goods and infrastructure projects while Section 33 contains the guidelines for bids evaluation for consulting services.
>
> Section 42 states that the contract implementation guidelines for the procurement of goods, infrastructure projects and consulting services are set out in separate annexes (Annexes D, E and F of the IRR).

[69] Rollo pp. 273-275 and 787-789; Annex AA of the Petition and Annex 30 of BCA's Comment.

[70] Id. at 790; Annex 31 of BCA's Comment.

[71] Id. at 1713; TSN of the hearing held on February 7, 2007.

[72] Id. at 2347-2353.

[73] Id. at 2354-2358.

[74] Id. at 2357.

[75] Section 30.4 of the IRR of Republic Act No. 9184 states:

> 30.4. For the procurement of goods where, due to the nature of the requirements of the project, the required technical specifications/requirements of the contract cannot be precisely defined in advance of bidding, or where the problem of technically unequal bids is likely to occur, a two (2)-stage bidding procedure may be employed. In these cases, the procuring entity concerned shall prepare the bidding documents, including the technical specification in the form of performance criteria only. Under this procedure, prospective bidders shall be requested at the first stage to submit their respective Letter of Intent, eligibility requirements if needed, and initial technical proposals only (no price tenders). The concerned BAC shall then

evaluate the technical merits of the proposals received from eligible bidders vis-à-vis the required performance standards. A meeting/discussion shall then be held by the BAC with those eligible bidders whose technical tenders meet the minimum required standards stipulated in the bidding documents for purposes of drawing up the final revised technical specifications/requirements of the contract. Once the final revised technical specifications are completed and duly approved by the concerned BAC, copies of the same shall be issued to all the bidders identified in the first stage who shall then be required to submit their revised technical tenders, including their price proposals in two (2) separate sealed envelopes in accordance with this IRR-A, at a specified deadline, after which time no more bids shall be received. The concerned BAC shall then proceed in accordance with the procedure prescribed in this IRR-A. (Emphasis supplied.)

[76] An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes; approved on April 2, 2004.

[77] 379 Phil. 743, 749-750 (2000).

[78] G.R. No. 146717, November 22, 2004, 443 SCRA 307, 336; citing Philippine National Bank v. Ritratto Group, Inc., 414 Phil. 494, 507 (2001).

[79] 351 Phil. 172, 186 (1998).

[80] *Rollo*, p. 266.

[81] Smith, Bell & Company (Ltd.) v. Natividad, 40 Phil. 136 (1919); Central Bank (now Bangko Sentral ng Pilipinas) Employees Association, Inc. v. Bangko Sentral ng Pilipinas, G.R. No. 148208, December 15, 2004, 446 SCRA 299; Serrano v. Gallant Maritime Services, Inc., G.R. No. 167614, March 24, 2009.

[82] Roxas & Co., Inc. v. Court of Appeals, 378 Phil. 727 (1999); Kuwait Airways Corporation v. Philippine Airlines, Inc., G.R. No. 156087, May 8, 2009, 587 SCRA 399.

[83] Roxas & Co., Inc. v. Court of Appeals, id.; Brgy. Sindalan, San Fernando, Pampanga v. Court of Appeals, G.R. No. 150640, March 22, 2007, 518 SCRA 649.

[84] PDRCI Letter dated March 28, 2007, rollo pp. 1856-57.

[85] Supra note 78 at 507.