EN BANC

G.R. No. 178830 - ROLEX SUPLICO, *Petitioner,* versus **NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, represented by NEDA SECRETARY ROMULO L. NERI, and the NEDA-INVESTMENT COORDINATION COMMITTEE, DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS (DOTC), represented by DOTC SECRETARY LEANDRO MENDOZA, including the COMMISSION ON INFORMATION AND COMMUNICATIONS TECHNOLOGY, headed by its CHAIRMAN, RAMON P. SALES, THE TELECOMMUNICATIONS OFFICE, BIDS AND AWARDS FOR INFORMATION AND COMMUNICATIONS TECHNOLOGY COMMITTEE (ICT), headed by DOTC ASSISTANT SECRETARY ELMER A. SONEJA as CHAIRMAN, and the TECHNICAL WORKING GROUP FOR ICT and CICT ASSISTANT SECRETARY LORENZO FORMOSO, and ALL OTHER OPERATING UNITS OF THE DOTC FOR INFORMATION AND COMMUNICATIONS TECHNOLOGY, and ZTE CORPORATION, AMSTERDAM HOLDINGS, INC., and ARESCOM, INC., and ANY AND ALL PERSONS ACTING ON THEIR BEHALF,** *Respondents*.

Promulgated:

July 14, 2008

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DISSENTING OPINION

CARPIO, J.:

I dissent on the ground that the ZTE Supply Contract is **void from the beginning** for being contrary to the Constitution, the Administrative Code of 1987, the Government Auditing Code of the Philippines, and the Government Procurement Reform Act. As such, the ZTE Supply Contract

is legally non-existent. The Philippine Government's decision "not to continue with the ZTE National Broadband Network Project"[1] during the pendency of this case, even if deemed a cancellation of the ZTE Supply Contract, had no legal effect on the status of the contract, and did not moot this petition.

This case is of transcendental importance to the nation since it involves the constitutionality of a US$329.48 million (approximately ₱14.82 billion) government procurement contract awarded and signed **without an appropriation from Congress and without public bidding**. This case puts to the test the efficacy of constitutional and statutory proscriptions designed precisely to prevent such contracts. The Court has a duty to resolve the important issues in this case, including the novel question on the status of executive agreements that conflict with national law, to prevent a recurrence of government contracts that violate the Constitution and existing statutes.

Not only are the legal issues in this case "capable of repetition yet evading review."[2] The ZTE Supply Contract itself is capable of being resurrected. Public respondents merely stated that the Philippine Government would "not continue with the ZTE National Broadband Network Project," citing as basis the 1st Indorsement dated 24 October 2007 from the DOTC. Public respondents did not manifest that the ZTE Supply Contract had been mutually cancelled by the parties to the contract.

Equally important, private respondent ZTE Corporation has not manifested to this Court its consent to the discontinuance or cancellation of the ZTE Supply Contract. Indeed, private respondent ZTE Corporation has not wavered from its position that "the ZTE Supply Contract is entirely legal and proper."[3] It is axiomatic that one party to a bilateral contract cannot unilaterally declare a contract discontinued or cancelled. Clearly, this case is far from being moot.

Petitioner assails the ZTE Supply Contract as void from the beginning on two grounds. First, the contract has no appropriation from Congress, violating Section 29(2), Article VI of the Constitution. Second, the absence of public bidding violates the Government Procurement Reform Act.

In their Comment, public respondents attached the ZTE Supply Contract dated 21 April 2007, the Memorandum of Understanding on the Establishment of Philippines-China Economic Partnership dated 5 June 2006, and the letters between Philippine and Chinese officials relating to the National Broadband Network Project. These attachments mooted petitioner's prayer for copies of these documents, leaving as sole issue of this petition the legal status of the ZTE Supply Contract.

This *Petition for the Issuance of a Temporary Restraining Order and Writs of Prohibition and/or Permanent Injunction, and Mandamus* seeks, among others, to annul the ZTE Supply Contract and to prohibit public respondents from disbursing public funds to implement the contract. The Constitution and existing statutes prohibit public officers from disbursing public funds without the corresponding appropriation from Congress. Existing statutes also prohibit public officials from entering into procurement contracts without a certificate of appropriation and fund

availability from the proper accounting and auditing officials. It is the ministerial duty of public officials to not only desist from disbursing public funds without the corresponding appropriation from Congress, but also to refrain from signing and implementing procurement contracts without the requisite certificate of appropriation and fund availability. Indisputably, a petition for prohibition is a proper action to test the legality of such disbursement of public funds and the legality of the execution of such procurement contracts.[4]

From the admissions of respondents in their Consolidated Comment, the following facts are undisputed:

1. The ZTE Supply Contract, a procurement of goods and services for the Philippine Government, was signed on 21 April 2007 by DOTC Secretary Leandro R. Mendoza and ZTE Corporation Vice President Yu Yong;[5]

2. There was no public bidding in the award of the contract to ZTE Corporation, and the Chinese Government handpicked ZTE Corporation to supply the goods and services to the Philippine Government;[6]

3. The ZTE Supply Contract is to be financed by a loan from the Export-Import Bank of China to the Philippine Government;[7]

4. The Loan Agreement to finance the ZTE Supply Contract was not concluded before or after the signing of the ZTE Supply Contract;[8]

5. There is no appropriation law enacted by Congress to fund the ZTE Supply Contract;[9]

6. A certificate of appropriation and fund availability is not attached to the ZTE Supply Contract;[10] and

7. ZTE Corporation is publicly listed in the Hong Kong and Shenzhen stock exchanges.[11]

In addition, the 2006 and 2007 General Appropriations Acts[12] do not contain any appropriation for a foreign-assisted National Broadband Network Project, under which the ZTE Supply Contract would fall.

This case raises the following issues:

1. Whether the ZTE Supply Contract is void from the beginning in the absence of an appropriation by law to fund the contract, and in the absence of a certificate of appropriation and fund availability; and

2. Whether the ZTE Supply Contract is void from the beginning in the absence of a public bidding.

The simple answer to each question is yes, the ZTE Supply Contract is void from the beginning. The absence of **any** of the three - an appropriation law, a certificate of appropriation and fund availability, and public bidding - renders the ZTE Supply Contract void from the beginning.

Absence of an Appropriation Law

The Constitution requires an appropriation law before public funds are spent for any purpose. Section 29(2), Article VI of the Constitution provides:

> No money shall be paid out of the Treasury except in pursuance of an appropriation made by law.[13]

The power of the purse – or the power of Congress to authorize payment from funds in the National Treasury – is lodged **exclusively** in Congress. One of the fundamental checks and balances finely crafted in the Constitution is that Congress authorizes the amount to be spent, while the Executive spends the amount so authorized. The Executive cannot authorize its own spending, and neither can Congress spend what it has authorized. The rationale of this basic check and balance is to prevent abuse of discretion in the expenditure of public funds.

Thus, the Executive branch cannot spend a single centavo of government receipts, whether from taxes, sales, donations, dividends, profits, loans, or from any other source, unless there is an appropriation law authorizing the expenditure. Any government expenditure without the corresponding appropriation from Congress is unconstitutional. There is no exception to this constitutional prohibition that "no money shall be paid out of the Treasury except in pursuance of an appropriation made by law." This constitutional prohibition is self-executory.

To further insure compliance with Section 29(2), Article VI of the Constitution, the Administrative Code of 1987 **expressly prohibits the entering into contracts** involving the expenditure of public funds unless two prior requirements are satisfied. ***First*, there must be an appropriation law authorizing the expenditure required in the contract**. ***Second*, there must be attached to the contract a certification by the proper accounting official and auditor that funds have been appropriated by law and such funds are available**. Failure to comply with any of these two requirements renders the contract void.

Thus, Sections 46, 47 and 48, Chapter 8, Subtitle B, Title I, Book V of the Administrative Code of 1987 provide:

SECTION 46. Appropriation Before Entering into Contract. —
(1) **No contract involving the expenditure of public funds shall be**

entered into unless there is an appropriation therefor, the unexpended balance of which, free of other obligations, is sufficient to cover the proposed expenditure; and

(2) Notwithstanding this provision, contracts for the procurement of supplies and materials to be carried in stock may be entered into under regulations of the Commission provided that when issued, the supplies and materials shall be charged to the proper appropriations account.

SECTION 47. Certificate Showing Appropriation to Meet Contract. — Except in the case of a contract for personal service, for supplies for current consumption or to be carried in stock not exceeding the estimated consumption for three (3) months, or banking transactions of government-owned or controlled banks, **no contract involving the expenditure of public funds by any government agency shall be entered into or authorized unless the proper accounting official of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current calendar year is available for expenditure on account thereof**, subject to verification by the auditor concerned. The certificate signed by the proper accounting official and the auditor who verified it, shall be attached to and become an integral part of the proposed contract, and the sum so certified shall not thereafter be available for expenditure for any other purpose until the obligation of the government agency concerned under the contract is fully extinguished.

SECTION 48. Void Contract and Liability of Officer. — **Any contract entered into contrary to the requirements of the two (2) immediately preceding sections shall be void**, and the officer or officers entering into the contract shall be liable to the Government or other contracting party for any consequent damage to the same extent as if the transaction had been wholly between private parties. (Emphasis supplied)

Sections 85, 86 and 87 of the Government Auditing Code of the Philippines,[14] an earlier law, contain the same provisions.

The Administrative Code of 1987 and the Government Auditing Code expressly mandate that **"[N]o contract involving the expenditure of public funds shall be entered into unless there is an appropriation**

therefor." The law prohibits the **mere entering into a contract** without the corresponding appropriation from Congress. It does not matter whether the contract is subject to a condition as to its effectivity, such as a subsequent favorable legal opinion by the Department of Justice,[15] because even a contract with such condition is still a contract under the law.[16]

Moreover, the Administrative Code of 1987 and the Government Auditing Code expressly mandate that **"[N]o contract involving the expenditure of public funds x x x shall be entered into or authorized unless the proper accounting official x x x shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current fiscal year is available for expenditure.**" The law prohibits not only the entering into the contract, but also authorizing the entering into the contract without the certification from the proper accounting official. This means that the certificate of appropriation and fund availability must be issued **before** the signing of the contract.

In addition, the Administrative Code of 1987 and the Government Auditing Code expressly require that the "**certificate signed by the proper accounting official and the auditor who verified it, shall be attached to and become an integral part of the proposed contract**." The certificate of appropriation and fund availability must be **attached to the "proposed contract**," again clearly showing that the certificate must be issued **before** the signing of the contract.

In several cases, the Court had the occasion to apply these provisions of the Administrative Code of 1987 and the Government Auditing Code of thePhilippines. In these cases, the Court clearly ruled that the two requirements – the existence of appropriation and the attachment of the certification – are "**conditions *sine qua non* for the execution of**

government contracts." In *COMELEC v. Quijano-Padilla,*[17] the Court ruled:

> **It is quite evident from the tenor of the language of the law that the existence of appropriations and the availability of funds are indispensable pre-requisites to or conditions *sine qua non* for the execution of government contracts. The obvious intent is to impose such conditions as *a priori* requisites to the validity of the proposed contract**. Using this as our premise, we cannot accede to PHOTOKINA's contention that there is already a perfected contract. x x x
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> x x x
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> Petitioners are justified in refusing to formalize the contract with PHOTOKINA. Prudence dictated them not to enter into a contract not backed up by sufficient appropriation and available funds. Definitely, to act otherwise would be a futile exercise for the contract would inevitably suffer the vice of nullity. In *Osmeña vs. Commission on Audit*, this Court held:
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> > The Auditing Code of the Philippines (P.D. 1445) further provides that no contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor and the proper accounting official of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and the amount necessary to cover the proposed contract for the current fiscal year is available for expenditure on account thereof. Any contract entered into contrary to the foregoing requirements shall be VOID.
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> > Clearly then, the contract entered into by the former Mayor Duterte was void from the very beginning since the agreed cost for the project (₱8,368,920.00) was way beyond the appropriated amount (₱5,419,180.00) as certified by the City Treasurer. Hence, the contract was properly declared void and unenforceable in COA's 2nd Indorsement, dated September 4, 1986. The COA declared and we agree, that:
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> > > The prohibition contained in Sec. 85 of PD 1445 (Government Auditing Code) is explicit and mandatory. **Fund availability is, as it has always**

> **been, an indispensable prerequisite to the execution of any government contract involving the expenditure of public funds by all government agencies at all levels**. Such contracts are not to be considered as final or binding unless such a certification as to fund availability is issued (Letter of Instruction No. 767, s. 1978). Antecedent of advance appropriation is thus essential to government liability on contracts (Zobel vs. City of Manila, 47 Phil. 169). This contract being violative of the legal requirements aforequoted, the same contravenes Sec. 85 of PD 1445 and is null and void by virtue of Sec. 87.
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> Verily, the contract, as expressly declared by law, is inexistent and void ab initio. This is to say that the proposed contract is without force and effect from the very beginning or from its incipiency, as if it had never been entered into, and hence, cannot be validated either by lapse of time or ratification. (Emphasis supplied)

The law expressly declares void a procurement contract that fails to comply with the two requirements, namely, an appropriation law funding the contract and a certification of appropriation and fund availability. The clear purpose of these requirements is to insure that government contracts are never signed unless supported by the corresponding appropriation law and fund availability.[18] **The ZTE Supply Contract does not comply with any of these two requirements**. Thus, the ZTE Supply Contract is void for violation of Sections 46, 47 and 48, Chapter 8, Subtitle B, Title I, Book V of the Administrative Code of 1987, as well as Sections 85, 86 and 87 of the Government Auditing Code of the Philippines. These provisions of both Codes implement Section 29(2), Article VI of the Constitution.

Public respondent National Economic and Development Authority is fully aware that all proceeds of loans and grants secured by the Philippine Government cannot be disbursed without an appropriation from Congress. Public respondent National Economic and Development Authority and its officials know, or ought to know by heart, that this is a

fundamental requirement of the Constitution and existing statutes. The National Economic and Development Authority has succinctly summarized this fundamental rule in Section 5.1 of the Implementing Rules and Regulations for the Official Development Assistance (ODA) Act of 1996:

> Section 5.1. General Principles on Budget - All expenditures, inclusive of counterpart and **proceeds of loans** and loans and grant funds, must be included in the annual national expenditure program to be submitted to Congress for approval. (Emphasis supplied)

There can be no dispute that the proceeds of foreign loans, whether concluded or not, cannot be obligated in a procurement contract without a prior appropriation from Congress.

The Office of the Solicitor General (OSG), representing the public respondents, advances two arguments to justify the absence of appropriation for the ZTE Supply Contract. First, there is no need for an appropriation by law because the loan agreement has not been concluded. Second, the automatic appropriation for payment of foreign loans under Section 31 of Presidential Decree No. 1177[19] provides the appropriation cover to fund the ZTE Supply Contract. Thus, the OSG asserts:

> At the outset, there is no need yet for a budget allocation as the loan agreement has yet to be concluded. Assuming *arguendo* that one has already been executed, the appropriation therefor is covered by the Executive branch's power of automatic appropriation for payment of foreign loans contracted. x x x[20]

The OSG's first argument is an admission that when the ZTE Supply Contract was signed, there was no loan agreement, no loan proceeds, and no appropriation from Congress for the contract. This only drives the last nail deeper into the coffin of the ZTE Supply Contract because the absence

of an appropriation from Congress makes the signing of the ZTE Supply Contract an unconstitutional and unlawful act.

The OSG's second argument betrays a lack of understanding of appropriations for payment of goods and services as distinguished from appropriations for repayment of loans. When the Executive branch secures a loan to fund a procurement of goods or services, the loan proceeds enter the National Treasury as part of the general funds of the government. Congress must appropriate by law the loan proceeds to fund the procurement of goods or services, otherwise the loan proceeds cannot be spent by the Executive branch. When the loan falls due, Congress must make another appropriation law authorizing the repayment of the loan out of the general funds in the National Treasury.[21] This appropriation for the *repayment of the loan* is what is covered by the automatic appropriation in Section 31 of PD No. 1177.[22] It is not the appropriation needed to fund a procurement contract. The OSG's arguments are clearly misplaced.

Absence of Public Bidding

The Government Procurement Reform Act requires public bidding in **all procurement** of infrastructure, goods and services. Section 10, Article IV of the Government Procurement Reform Act provides:

> Section 10. Competitive Bidding – **All procurement shall be done through Competitive Bidding**, except as provided for in Article XVI of this Act. (Emphasis supplied)

In addition, Section 4 of the Government Procurement Reform Act provides that the Act applies to government procurement "regardless of source of funds, whether local or foreign." Hence, the requirement of public bidding applies to foreign-funded contracts like the ZTE Supply Contract.

Respondents admit that there was no public bidding for the ZTE Supply Contract. Respondents do not claim that the ZTE Supply Contract falls under any of the exceptions to public bidding in Article XVI of the Government Procurement Reform Act. Instead, private respondent ZTE Corporation claims that the ZTE Supply Contract, **being part of an executive agreement**, is exempt from public bidding under the last sentence of Section 4 of the Government Procurement Reform Act. Thus, private respondent ZTE Corporation argues:

> x x x Section 4 of RA 9184 itself expressly provides that executive agreements that deal on subject matters covered by said law shall be observed. Hence, the requirement of competitive bidding under section 10 of the law is not applicable. Section 4 of RA 9184 provides:
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> > Section 4. Scope and Application. - This Act shall apply to the procurement of Infrastructure Projects, Goods and Consulting Services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. **Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed**.
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> x x x
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> **There is no provision in the Executive Agreement that requires the conduct of competitive public bidding before the award of the NBN Project, or any project envisioned in the RP-China MNOU for that matter. The subsequent exchange of notes between China and the Philippines clearly shows that ZTE was chosen as the contractor for the NBN Project. This was formalized through the DTI-ZTE MOU and the ZTE Supply Contract**. (Boldfacing and underlining in the original)

Private respondent ZTE Corporation's argument will hold water if an executive agreement can amend the mandatory statutory requirement of

public bidding in the Government Procurement Reform Act. In short, the issue turns on the **novel question** of whether an executive agreement can amend or repeal a prior law. The obvious answer is that an executive agreement cannot amend or repeal a prior law.

Admittedly, an executive agreement has the force and effect of law, just like implementing rules of executive agencies. However, just like implementing rules of executive agencies, executive agreements cannot amend or repeal prior laws but must comply with the laws they implement.[23] Only a treaty, upon ratification by the Senate, acquires the status of a municipal law. Thus, a treaty may amend or repeal a prior law and *vice-versa.*[24] Hence, a treaty may change state policy embodied in a prior law.

In sharp contrast, an executive agreement, being an exclusive act of the Executive branch, does not have the status of a municipal law. Acting alone, the Executive has no law-making power. While the Executive does possess rule-making power, such power must be exercised consistent with the law it seeks to implement.

Consequently, an executive agreement cannot amend or repeal a prior law. An executive agreement must comply with state policy embodied in existing municipal law. This Court has declared:

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. **But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements**.[25] (Emphasis supplied)

Executive agreements are intended to carry out **well-established national policies**, and these are found in statutes.

In the United States, from where we adopted the concept of executive agreements, the prevailing view is that **executive agreements[26] cannot alter existing law but must conform with all statutory requirements**. The U.S. State Department has explained the distinction between treaties and executive agreements in this manner:

> x x x it may be desirable to point out here the well-recognized distinction between an executive agreement and a treaty. In brief, it is that **the former cannot alter the existing law and must conform to all statutory enactments**, whereas a treaty, if ratified by and with the advice and consent of two-thirds of the Senate, as required by the Constitution, itself becomes the supreme law of the land and takes precedence over any prior statutory enactments.[27] (Emphasis supplied)

As Professor Erwin Chemerinsksy states, "So long as the (U.S.) president is not violating another constitutional provision or a federal statute, there seems little basis for challenging the constitutionality of an executive agreement."[28] In the United States, while an executive agreement cannot alter a federal law, an executive agreement prevails over state law.[29]

Likewise, Professor Laurence H. Tribe states that an executive agreement cannot override a prior act of Congress even as it prevails over state law. Thus:

> x x x Although it seems clear that an unratified executive agreement, unlike a treaty, cannot override a prior act of Congress, executive agreements, even without Senate ratification, have the same weight as formal treaties in their effect upon conflicting state laws.[30]

Professor Tribe cited *United States v. Gary W. Capps, Inc.*,[31] where the Court of Appeals (4th Circuit) ruled that an unratified executive agreement

could not prevail over a conflicting federal law. The U.S. Supreme Court affirmed the appellate court's decision but on non-constitutional grounds.

Clearly, an executive agreement must comply with well-established state policies, and these state policies are laid down in statutes. The Government Procurement Reform Act has laid down a categorical state policy – "**All procurement shall be done through Competitive Bidding**," subject only to narrowly defined exceptions that respondents do not invoke here. Consequently, the executive agreement between China and the Philippines cannot exempt the ZTE Supply Contract from the state policy of public bidding.

Private respondent ZTE Corporation further claims that the ZTE Supply Contract is part of the executive agreement between China and the Philippines. This is plain error. An executive agreement is an agreement **between governments**. The Executive branch has defined an "international agreement," which includes an executive agreement, to refer to a contract or an understanding "**entered into between the Philippines and another government**."[32]

That the Chinese Government handpicked the ZTE Corporation to supply the goods and services to the Philippine Government does not make the ZTE Supply Contract an executive agreement. ZTE Corporation is not a government or even a government agency performing governmental or developmental functions like the Export-Import Bank of China or the Japan Bank for International Cooperation,[33] or a multilateral lending agency organized by governments like the World Bank.[34] ZTE Corporation is a business enterprise performing purely commercial functions. ZTE Corporation is publicly listed in the Hong Kong and Shenzhen stock exchanges, with individual and juridical stockholders that receive dividends from the corporation.

Moreover, an executive agreement is governed by international law.[35] However, the ZTE Supply Contract expressly provides that it shall

be governed by Philippine law.[36] Thus, the ZTE Supply Contract is not an executive agreement but simply a commercial contract, which must comply with public bidding as mandated by the governing law, which is Philippine law.

Finally, respondents seek refuge in the second sentence of Section 4 of the Government Procurement Reform Act:

> Section 4. Scope and Application - This Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, regardless of the source of funds, whether local or foreign, by all branches of the government, its departments, offices and agencies, including government-owned and/or-controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. **Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed**. (Emphasis supplied)

Respondents argue that the second sentence of Section 4 allows an executive agreement to override the mandatory public bidding in Section 10 of the Government Procurement Reform Act.

Respondents' argument is flawed. First, an executive agreement, being an exclusive act of the Executive branch, cannot amend or repeal a mandatory provision of law requiring public bidding in government procurement contracts. To construe otherwise the second sentence of Section 4 would constitute an undue delegation of legislative powers to the President, making such sentence unconstitutional. There are no standards prescribed in the Government Procurement Reform Act that would guide the President in exercising such alleged delegated legislative power. Thus, the second sentence of Section 4 cannot be construed to delegate to the President the legislative power to amend or repeal mandatory requirements in the Government Procurement Reform Act.

Second, under Section 10 of the Government Procurement Reform Act, the only exceptions to mandatory public bidding are those specified in Article XVI of the Act. These specified exceptions do not include purchases from foreign suppliers handpicked by foreign governments, or from suppliers owned or controlled by foreign governments. Moreover, Section 4 of the Government Procurement Reform Act mandates that the "Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, **regardless of source of funds, whether local or foreign** x x x."

Third, the second sentence of Section 4 should be read in conjunction with Section 4 of the Foreign Borrowings Act,[37] which provides:

> Section 4. In the contracting of any loan, credit or indebtedness under this Act, **the President of the Philippines may, when necessary, agree to waive or modify the application of any law granting preferences or imposing restrictions on international competitive bidding**, including among others, Act Numbered Four Thousand Two Hundred Thirty-Nine, Commonwealth Act Numbered One Hundred Thirty-Eight, the provisions of Commonwealth Act Numbered Five Hundred Forty-One, insofar as such provisions do not pertain to constructions primarily for national defense or security purposes, Republic Act Numbered Five Thousand One Hundred Eighty-Three: Provided, however, That as far as practicable, utilization of the services of qualified domestic firms in the prosecution of projects financed under this Act shall be encouraged: Provided, further, That in case where international competitive bidding shall be conducted preference of at least fifteen per centum shall be granted in favor of articles, materials, or supplies of the growth, production or manufacture of the Philippines: **Provided, finally, That the method and procedure in the comparison of bids shall be the subject of agreement between the Philippine Government and the lending institution**. (Emphasis supplied)

Likewise, Section 4 of the Government Procurement Reform Act should be read in conjunction with Section 11-A of the Official Development Assistance Act of 1996:[38]

> Section 11-A. In the contracting of any loan, credit or indebtedness under this Act or any law, **the President of the Philippines may, when necessary, agree to waive or modify the application of any provision of law granting preferences in connection with, or imposing restrictions on, the procurement of goods or services**: Provided, however, That as far as practicable, utilization of the services of qualified Filipino citizens or corporations or associations owned by such citizens in the prosecution of projects financed under this Act shall be prepared on the basis of the standards set for a particular project: Provided, further, That the matter of preference in favor of articles, materials, or supplies of the growth, production or manufacture of the Philippines, including **the method or procedure in the comparison of bids for purposes therefor, shall be the subject of agreement between the Philippine Government and the lending institution**. (Emphasis supplied)

Consequently, as construed together, the executive agreements mentioned in the second sentence of Section 4 of the Government Procurement Reform Act should refer to executive agreements on **(1) the waiver or modification of preferences to local goods or domestic suppliers;**[39] **(2) the waiver or modification of restrictions on international competitive bidding; and (3) the method or procedure in the comparison of bids**.

The executive agreements cannot refer to the waiver of public bidding for two reasons. *First*, the law only allows the President to "waive or modify, the application of any law x x x imposing **restrictions** on international competitive bidding." The law does not authorize the President to waive entirely public bidding but only the restrictions on public bidding. Thus, the President may **restrict** the public bidding to suppliers domiciled in the country of the creditor. This is the usual modification on restrictions imposed by creditor countries. *Second*, when the law speaks of executive agreements on the method or procedure **in the comparison of**

bids, the obvious assumption is there will be competitive bidding. *Third*, there is no provision of law allowing waiver of public bidding outside of the well-defined exceptions in Article XVI of the Government Procurement Reform Act.

Respondents, while not raising this argument, cannot also rely on Section 1 of the Foreign Borrowings Act, which provides:

> Section 1. The President of the Philippines is hereby authorized, in behalf of the Republic of the Philippines, to contract such loans, credits, including supplier's credit, deferred payment arrangements, or indebtedness **as may be necessary and upon terms and conditions as may be agreed upon**, not inconsistent with this Act, with Governments of foreign countries with whom the Philippines has diplomatic or trade relations or which are members of the United Nations, their agencies, instrumentalities or financial institutions or with reputable international organizations or non-governmental national or international lending institutions or firms extending supplier's credit deferred payment arrangements x x x . (Emphasis supplied)

A solitary Department of Justice opinion[40] has ventured that the phrase "as may be necessary and upon terms and conditions as may be agreed upon" serves as statutory basis for the President to exempt foreign-funded government procurement contracts from public bidding. This is a mistake. This phrase means that the President has discretion to decide the **terms and conditions of the loan**, such as the rate of interest, the maturity period, amortization amounts, and similar matters. This phrase does not delegate to the President the legislative power to amend or repeal mandatory provisions of law like compulsory public bidding of government procurement contracts. Otherwise, this phrase would constitute undue delegation of legislative power since there are no standards that would guide the President in exercising this alleged delegated legislative power.

What governs the waiver or modification of restrictions on public bidding is Section 4-A of the Foreign Borrowings Act, which authorizes the

President to, "when necessary, agree to modify the application of any law x x x imposing restrictions on international competitive bidding." Section 4 is the specific provision of the Foreign Borrowings Act that deals with the President's authority to waive or modify restrictions on public bidding. Section 1 of the Act does not deal with the requirement of public bidding. Besides, if Section 1 is construed as granting the President full authority to waive or limit public bidding, Section 4 becomes a superfluous provision.

In any event, whatever doubt may have existed before has been erased by the enactment in 2003 of the Government Procurement Reform Act, which **reformed** the laws regulating government procurement. The following provisions of the Act clearly prescribe the rule that government procurement contracts shall be subject to mandatory public bidding:

> Section 3. Governing Principles on Government Procurement. - **All procurement** of the national government, its departments, bureaus, offices and agencies, including state universities and colleges, government-owned and/or controlled corporations, government financial institutions and local government units shall, in all cases, be governed by these principles:
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> (a) **Transparency** in the procurement process x x x.
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> (b) **Competitiveness** by extending equal opportunity to enable private contracting parties who are eligible and qualified to participate in **public bidding**.
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> x x x.
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> Section 4. Scope and Application. - This Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, **regardless of source of funds, whether local or foreign**, by all branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or controlled corporations and local government units, x x x.
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> Section 10. Competitive Bidding. - **All procurement shall be done through Competitive Bidding**, except as provided for in Article XVI of this Act. (Emphasis supplied)

The only exceptions to mandatory public bidding are procurements falling under any of the narrowly defined situations in Article XVI of the Act, which respondents do not invoke.

Foreign-funded projects of the government are not exempt from public bidding despite executive agreements entered into by the Philippines with creditor countries or lending institutions. In *Abaya v. Ebdane, Jr.*,[41] the Court cited Memorandum Circular No. 104 dated 21 August 1989[42] issued by the President:

> x x x it is hereby clarified that foreign-assisted infrastructure projects may be exempted from the application of the pertinent provisions of the Implementing Rules and Regulations (IRR) of Presidential Decree (P.D.) No. 1594 relative to the method and procedure in the comparison of bids, which may be the subject of agreement between the infrastructure agency concerned and the lending institution. ***It should be made clear however that public bidding is still required and can only be waived pursuant to existing laws***. (Italicization in the original of the Memorandum Circular; boldfacing supplied)

Executive agreements with lending institutions have never been understood to allow exemptions from public bidding. What the executive agreements can modify are the methods or procedures in the comparison of bids, such as the adoption of the **competitive bidding procedures or guidelines** of the Japan Bank for International Cooperation[43] or the World Bank[44] on the method or procedure in the evaluation or comparison of bids. It is self-evident that these procedures or guidelines require public bidding.

Even so-called tied loans from creditor countries cannot justify exemption from public bidding although the bidders may be limited to suppliers domiciled in the creditor countries. Such a geographic restriction on the domicile of suppliers can be the subject of an executive agreement as a modification of restrictions on international competitive bidding. A

publication issued by public respondent National Economic and Development Authority summarizes the international practice on tied loans with respect to public bidding:

> The conditions imposed by the donor on the recipient with respect to ODA utilization provide another basis for differentiating ODA. In particular, **restriction of the geographic areas** where procurement of goods and services are eligible for ODA funding make ODA loan/grant tied or untied with respect to source of procurement. **Usually, bilateral ODA is tied to the donor country in terms of procurement. While competitive bidding is still practiced, qualified bidders for the supply of goods and services are confined to those firms which are owned or controlled by nationals of the donor country**. x x x[45] (Emphasis supplied)

Even for tied loans, the international practice still requires public bidding although the public bidding is restricted only among suppliers that are nationals of the creditor country. In the present case, there was no such public bidding because the Export-Import Bank of China simply handpicked ZTE Corporation as the supplier of the goods and services to the Philippine Government.

That the funding for the ZTE Supply Contract will come from a foreign loan does not negate the rationale for public bidding. **Filipino taxpayers will still pay for the loan with interest**. The need to safeguard public interest against anomalies exists in all government procurement contracts, regardless of the source of funding. Public bidding is the most effective means to prevent anomalies in the award of government contracts. Public bidding promotes transparency and honesty in the expenditure of public funds. Public bidding is accepted as the best means of securing the most advantageous price for the government, whether in procuring infrastructure, goods or services, or in disposing off government assets.

Even in a Build-Operate-Transfer project where the proponent provides all the capital with no government guarantee on project loans, the law requires public bidding in the form of a Swiss challenge.[46] With more

reason should a project financed by a tied loan to the government be subject to public bidding. There is no sound reason why the Philippine government should allow its foreign creditor in an already tied loan to handpick the supplier of goods and services.

A tied loan, driven by a handpicked supplier, violates the principle of fair and open process in government procurement transactions. Such a tied loan, which arbitrarily reserves a contract to a pre-determined supplier, will likely lead to anomalies. This is contrary to the state policies enunciated in Sections 27 and 28, Article II of the Constitution:

> Section 27. The State shall maintain honesty and integrity in the public service and take positive and effective measures against graft and corruption.
>
> Section 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.

ZTE Supply Contract is Void from the Beginning

Contracts expressly prohibited or declared void by law are void from the beginning. Article 1409 of the Civil Code provides:

> Article 1409. The following contracts are **inexistent and void from the beginning**:
>
> x x x
>
> (7) Those **expressly prohibited** or **declared void by law**.
>
> x x x. (Emphasis supplied)

Sections 46 and 47, Chapter 8, Subtitle B, Title I, Book V of the Administrative Code of 1987 **expressly prohibit** the entering into procurement contracts that are not funded by an appropriation law and which do not have certificates of appropriation and fund availability. Section 48 of the same law **expressly declares such contracts void**. To repeat, Section 48 provides:

> SECTION 48. Void Contract and Liability of Officer. — **Any contract entered into contrary to the requirements of the two (2) immediately preceding sections shall be void**, x x x. (Emphasis supplied)

The ZTE Supply Contract, which is not funded by an appropriation law and does not have a certificate of appropriation and fund availability, is not only void, but also void from the beginning under Article 1409 of the Civil Code. As the Court held in *COMELEC v. Quijano-Padilla,*[47] which involved a procurement contract without the requisite appropriation law and certificate of appropriation and fund availability:

> Verily, the contract, as expressly declared by law, is **inexistent and void ab initio**. This is to say that the proposed contract is **without force and effect from the very beginning or from its incipiency**, as if it had never been entered into, and hence, cannot be validated either by lapse of time or ratification. (Emphasis supplied)

A contract void from the beginning is legally non-existent. As such, it cannot be annulled because to annul a contract assumes a voidable contract.[48] A cancellation of a contract void from the beginning has no legal effect because the contract is legally non-existent. Any cancellation may simply be construed as an acknowledgment or admission that the contract is void from the beginning. A contract void from the beginning can only be declared as such, that is, void from the beginning.

Thus, the discontinuance or cancellation of the ZTE Supply Contract by the Philippine Government, apart from being unilateral, had no legal effect and did not moot this petition. The members of this Court have the sworn duty to uphold the system of checks and balances that is so essential to our democratic system of government. In the present case, the members of this Court must uphold the check and balance in the appropriation and expenditure of public funds as embodied in Section 29(2), Article VI of the Constitution and the statutes insuring its compliance. If our democratic institutions are to be strengthened, this Court must not shirk from its primordial duty to preserve and uphold the Constitution.

It is time to put an end to government procurement contracts, amounting to tens of billions of pesos, exceeding even the annual budget of the Judiciary, that are awarded and signed without an appropriation from Congress, and without the required public bidding. This Court must categorically declare the ZTE Supply Contract void from the beginning.

Accordingly, I vote to **GRANT** the petition and to **DECLARE** the ZTE Supply Contract **VOID** from the beginning.

ANTONIO T. CARPIO
Associate Justice

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[1] *Rollo*, p. 1093. Public respondents' Manifestation and Motion dated 26 October 2007.

[2] *Rufino v. Endriga*, G.R. No. 139554, 21 July 2006, 496 SCRA 13; *Manalo v. Calderon*, G.R. No. 178920, 15 October 2007, 536 SCRA 290.

[3] Private respondent ZTE Corporation's Comment, p. 8.

[4] Section 2, Rule 65 of the Rules of Court.

[5] *Rollo*, pp. 348-349. In their Consolidated Comment, pubic respondents attached as Annex "LL" a copy of the ZTE Supply Contract. Public respondents explained, "On April 21, 2007, Mendoza and

ZTE Corporation Vice President Yu Yong signed a US$329 million supply contract for the NBN Project at the VIP room of the Haikou Meilan International Airport of the People's Republic of China."

[6] The fourth whereas clause of the ZTE Supply Contract (Annex "LL") states: "an Executive Agreement was entered into between the Republic of the Philippines and the People's Republic of China where the latter agreed to finance the National Broadband Network Project through a Loan Agreement with Export-Import Bank of China subject to the condition that the Equipment and Services to be procured from the proceeds of the loan come from ZTE Corporation." (Id. at 539) Public respondents also attached to their Consolidated Comment the 2 December 2006 letter (Annex "N") of Chinese Ambassador Li Jinjun to Presidential Chief of Staff Michael T. Defensor, stating: "It may interest Your Honorable to know that ZTE Corporation, a reputable and established telecommunications company in China, responded to this worthwhile undertaking and, consequently, the People's Republic of China through the Chinese Ministry of Commerce designated it as the NBN project's prime contractor." (Id. at 472)

[7] Id. at 369, fourth whereas clause of the ZTE Supply Contract. In their Consolidated Comment, public respondents stated, "Among the above-enumerated requisites (including the conclusion of the loan agreement), only the issuance of a legal opinion from the DOJ had been complied with."

[8] Id. at 431. In their Consolidated Comment, public respondents stated: "At the outset, there is no need yet for a budget allocation as the loan agreement has yet to be concluded."

[9] Id.

[10] Supra, note 5. Annex "LL," which is a copy of the ZTE Supply Contract, does not have as attachment the certificate of appropriation and fund availability.

[11] *Rollo*, p. 339. Consolidated Comment of public respondents, footnote 14.

[12] Republic Act No. 9336 (2005 reenacted for 2006) and Republic Act No. 9401, respectively.

[13] This provision originated from the Jones Law, or the Philippine Bill of 1901. Section 5 of the Jones Law provides: "That no money shall be paid out of the Treasury except in pursuance of an appropriation by law." This provision was carried over almost verbatim in the 1935, 1973 and 1987 Constitutions.

[14] Presidential Decree No. 1445. Sections 85, 86 and 87 of this Decree provide:

> SECTION 85. Appropriation Before Entering into Contract. — (1) No contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor, the unexpended balance of which, free of other obligations, is sufficient to cover the proposed expenditure.
>
> (2) Notwithstanding this provision, contracts for the procurement of supplies and materials to be carried in stock may be entered into under regulations of the Commission provided that when issued, the supplies and materials shall be charged to the proper appropriation account.
>
> SECTION 86. Certificate Showing Appropriation to Meet Contract. — Except in the case of a contract for personal service, for supplies for current consumption or to be carried in stock not exceeding the estimated consumption for three months, or banking transactions of government-owned or controlled banks no contract involving the expenditure of public funds by any government agency shall be entered into or authorized unless the proper accounting official of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current fiscal year is available for expenditure on account thereof, subject to verification by the auditor concerned. The certificate signed by the proper accounting official and the auditor who verified it, shall be attached to and become an integral part of the proposed contract, and the sum so certified shall not thereafter be

available for expenditure for any other purpose until the obligation of the government agency concerned under the contract is fully extinguished.

SECTION 87. Void Contract and Liability of Officer. — Any contract entered into contrary to the requirements of the two immediately preceding sections shall be void, and the officer or officers entering into the contract shall be liable to the government or other contracting party for any consequent damage to the same extent as if the transaction had been wholly between private parties.

[15] *Rollo*, pp. 572-573. The ZTE Supply Contract (Annex "LL" of public respondents' Consolidated Comment), on the paragraph Conditions for the Effectivity of the Contract, provides:

The Effectivity of this Contract shall be subject to the fulfillment of the following conditions precedent:

Issuance of a Forward Obligation Authority (FOA) by the Department of Budget and Management (DBM) of the Government of the Philippines;

Conclusion of the Loan Agreement between Export-Import Bank of China and the Department of Finance (DOF) of the Government of the Republic of the Philippines;

Legal opinion on the procurement process by the Department of Justice of the Government of the Republic of the Philippines.

The ratification by the Government of the Republic of the Philippines and the People's Republic of China of the Executive Agreement evidenced by the letter dated 02 December 2006 of Chinese Ambassador Li Jinjun to Presidential Chief of Staff Michael T. Defensor relating to the NBN Project and the letter of NEDA Secretary dated 20 April 2007 addressed to Honorable Minister Bo Xlll, Ministry of Commerce and Honorable Li Ruogu, Chairman and President, of the Export-Import Bank of China, People's Republic of China nominating the NBN Project.

[16] Article 1318 of the Civil Code provides: "There is no contract unless the following requisites concur: (1) Consent of the contracting parties; (2) Object certain which is the subject of the contract; (3) Cause of the obligation which is established." Hence, once the three requisites concur, a contract arises, regardless of any stipulation on conditional obligations.

[17] 438 Phil. 72 (2002). See also *Osmeña v. Commission on Audit*, G.R. No. 98355, 2 March 1994, 230 SCRA 585; *Agan, Jr. v. Phil. International Air Terminals Co*., *Inc*., 450 Phil. 744 (2003).

[18] *Melchor v. Commission on Audit*, G.R. No. 95398, 16 August 1991, 200 SCRA 704.

[19] Section 31 of Presidential Decree No. 1177 provides:

SECTION 31. Automatic Appropriations. — All expenditures for (a) personnel retirement premiums, government service insurance, and other similar fixed expenditures, (b) **principal and interest on public debt**, (c) national government guarantees of obligations which are drawn upon, are automatically appropriated: provided, that no obligations shall be incurred or payments made from funds thus automatically appropriated except as issued in the form of regular budgetary allotments. (Emphasis supplied)

[20] *Rollo*, p. 431. Consolidated Comment of public respondents.

[21] *Guingona, Jr. v. Carague*, G.R. No. 94571, 22 April 1991, 196 SCRA 221.

[22] See also Section 6 of Presidential Decree No. 81, and Section 1 of Presidential Decree No. 1967.

[23] *Land Bank of the Philippines v. Court of Appeals*, 319 Phil. 246 (1995).

[24] *Secretary of Justice v. Lantion*, 379 Phil. 165 (2000).

[25] *Commissioner of Customs v. Eastern Sea Trading*, No. L-14279, 31 October 1961, 3 SCRA 351, reiterated in *Adolfo v. Court of First Instance of Zambales*, 145 Phil. 264 (1970).

[26] Made solely by the Executive, as distinguished from executive-legislative agreements that are embodied in ordinary legislation.

[27] Prof. Edwin Borchard (Justus S. Hotchkiss Professor of Law, Yale Law School), *Treaties and Executive Agreements – A Reply*, Yale Law Journal, June 1945, citing Current Information Series, No. 1, 3 July 1934, quoted in 5 Hackworth, Digest of International Law (1943) pp. 425-6.

[28] Constitutional Law: Principles and Polices, 2nd Edition (2002), p. 361.

[29] *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

[30] American Constitutional Law, Vol. 1, 3rd Edition (2000), p. 648.

[31] 204 F.2d 655 (4th Circuit, 1953).

[32] Section 2(a) of Executive Order No. 459 dated 25 November 1997, entitled *Providing for the Guidelines in the Negotiation of International Agreements and its Ratification*, provides: "*International agreement* - shall refer to a contract or understanding, regardless of nomenclature, **entered into between the Philippines and another government** in written form and **governed by international law**, whether embodied in a single instrument or in two or more instruments." (Emphasis supplied)

[33] *Abaya v. Ebdane*, *Jr*., G.R. No. 167919, 14 February 2007, 515 SCRA 720.

[34] *DBM-Procurement Service v. Kolonwel Trading*, G.R. Nos. 175608, 175616 and 175659, 8 June 2007, 524 SCRA 591.

[35] Supra, note 32.

[36] Article 33 of the ZTE Supply Contract provides: "The Contract shall be governed by and construed in accordance with the laws of the Republic of the Philippines."

[37] Republic Act No. 4860, as amended.

[38] Republic Act No. 8182, as amended.

[39] Commonwealth Act No. 138, otherwise known as the Flag Law.

[40] DOJ Opinion No. 143 dated 10 October 1991 issued by Acting Secretary Silvestre H. Bello III on the Municipal Telephone Project funded by a French Financial Protocol loan of 186.6 million French francs.

[41] Supra, note 33.

[42] Clarification on the Applicability of the Amended Implementing Rules and Regulations (IRR) of Presidential Decree No. 1595 relative to the Prosecution of Foreign-Assisted Projects.

[43] Supra, note 33.

[44] Supra, note 34.

[45] Romeo A. Reyes, *Official Development Assistance to the Philippines: A Study of Administrative Capacity and Performance,* published by National Economic and Development Authority, 1985.

[46] Section 4-A, Republic Act No. 6957, as amended. A Swiss challenge is a form of public procurement in some (usually lesser developed) jurisdictions which requires a public authority (usually an agency of government) which has received an unsolicited bid for a public project (such as a port, road or railway) or services to be provided to government, to publish the bid and invite third parties to match or exceed it. x x x Some Swiss challenges also allow the entity which submitted the unsolicited bid itself then to match or better the best bid which comes out of the Swiss challenge process. It is a form of regulating public procurement. http://en.wikipedia.org/wiki/Swiss_challenge.

[47] Supra, note 17.

[48] Article 1390 of the Civil Code provides that voidable contracts "are binding, unless they are annulled by a proper action in court." Of course, voidable contracts can also be annulled by mutual agreement of the parties.