G.R. No. 192591 - *EFREN L. ALVAREZ, Petitioner v. PEOPLE OF THE PHILIPPINES, Respondent.*

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DISSENTING OPINION

BERSAMIN, *J.*:

The Majority have voted to deny the motion for reconsideration of the Decision promulgated on June 29, 2011 filed by the petitioner. However, I respectfully dissent and strongly urge that we review and reverse the Decision of June 29, 2011. My re-examination of the records convinces me to conclude and hold that the acts and actuations of the petitioner did not amount to a violation of the letter and spirit of Section 3(*e*) of Republic Act No. 3019.

Accordingly, I vote to acquit the petitioner for failure of the State to establish his guilt beyond reasonable doubt.

Antecedents

The petitioner was the Mayor of the then Municipality of Muñoz (now Science City of Muñoz) when the transaction subject of this case transpired in September 1996.

On July 7, 1995, the *Sangguniang Bayan* of Muñoz (SB) adopted Resolution No. 136, S-95[1] to invite Jess Garcia, President of the Australian Professional, Inc. (API), to participate in the planned construction of a four-storey shopping mall (Wag-Wag Shopping Mall).

On February 9, 1996, the tabloid *Pinoy* published the invitation[2] for proposals for the Wag-Wag Shopping Mall project, giving interested bidders

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1 *Rollo*, pp. 153-154.
2 Id. at 152.

30 days within which to submit their offers. On April 12, 1996, the Pre-qualification, Bids and Awards Committee (PBAC) recommended[3] the approval of the proposal submitted by API, the lone interested bidder. On April 15, 1996, the SB passed a resolution authorizing the petitioner to enter into a Memorandum of Agreement (MOA) with API regarding the Wag-Wag Shopping Mall project.[4] Then, on September 12, 1996, Alvarez (representing the Municipality) and API entered into and executed the MOA.[5]

On February 14, 1997, the groundbreaking ceremony was held on site, where the old Motor Pool, the old Health Center, and a semi-concrete one-storey building (then housing the Department of Agriculture, the BIR, the Office of the Assessor, the old Post Office, the Commission on Elections, and the Department of Social Welfare and Development) were all situated. API later started the excavation, and a billboard informing the public about the project and its contractor was placed on the site.

On August 10, 2006, the petitioner was indicted in the Sandiganbayan for violation of Section 3(*e*) of Republic Act No. 3019 under the information that alleged:

> That on or about 12 September 1996, and sometime prior or subsequent thereto, in the then Municipality (now Science City) of Muñoz, Nueva Ecija, and within the jurisdiction of this Honorable Court, the above-named accused EFREN L. ALVAREZ, a high ranking public official, being then the Mayor of Muñoz, Nueva Ecija, taking advantage of his official position and while in the discharge of his official or administrative functions, and committing the offense in relation to his office, acting with evident bad faith or gross inexcusable negligence or manifest partiality did then and there willfully, unlawfully and criminally give the Australian-Professional Incorporated (API) unwarranted benefits, advantage or preference, by awarding to the latter the contract for the construction of Wag-Wag Shopping Mall in the amount of Two Hundred Forty Million Pesos (Php 240,000,000.00) under a Buil[d]-Operate-Transfer Agreement, notwithstanding the fact that API was and is not a duly-licensed construction company as per records of the Philippine Construction Accreditation Board (PCAB), which construction license is a pre-requisite for API to engage in construction of works for the said

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3 Id. at 64.
4 Id. at 196.
5 Id. at 147-151.

> municipal government and that API does not have the experience and financial qualifications to undertake such costly project among others, to the damage and prejudice of the public service.
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> CONTRARY TO LAW.[6]

On September 22, 2006, the petitioner pleaded *not guilty*. Trial then ensued. The State presented several witnesses to prove that Alvarez approved the MOA with API, knowing that API had no capacity to undertake such a big project. Aaron C. Tablazon of the Philippine Construction Accreditation Board (PCAB) testified that PCAB issued the two certifications to the effect that API had not been issued a Contractor's License.[7] Ma. Chona A. Caacbay of the Securities and Exchange Commission (SEC) stated that API's application for registration was approved on July 28, 1995; and that its capital stock was ₱40,000,000.00 and its paid-up capital ₱2,500,000.00.[8] Romeo A. Ruiz, the Vice Mayor of Muñoz in 1992-1998, recalled that the petitioner had requested the SB to pass a resolution granting him authority to enter into the MOA with API on the construction of Wag-Wag Shopping Mall under the Build-Operate-Transfer (BOT) scheme; and that the petitioner made such request because the PBAC, headed by the petitioner, had recommended the acceptance of the proposal of API.

On the other hand, the Defense countered that the petitioner had substantially complied with the provisions of the BOT law. He testified that when he was its Mayor, the Municipality of Muñoz borrowed money from the Government Service Insurance System (GSIS) to finance the proposed four-storey Wag-Wag Shopping Mall project; that then Vice Mayor Ruiz and the other members of the SB showed him the *Manila Bulletin* and *Business Bulletin* publications of the BOT projects of the Australian Professional Realty Incorporated (APRI);[9] that on September 16, 1996, the Municipality issued a notice of award to API; that prior to the start of the

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6 Id. at 53-54.
7 Id. at 54-55.
8 Id. at 55.
9 Id. at 58.

project he required API to submit the necessary documents and to post notices; that API did not submit the necessary documents, claiming that the BOT law did not require such documents; that the project was not completed because of the 1997 financial crisis; that then Vice Mayor Ruiz sent a letter to API complaining about the slow pace of the project; and that the letter remained unheeded at that time because the president of API was then vacationing in Europe.[10]

The petitioner emphasized that the Municipality suffered no actual damage because the local treasury did not spend a single centavo for the project; that the project was an *unsolicited proposal* under the BOT law; that API paid a disturbance fee of ₱500,000.00; that the SB passed a resolution authorizing him to file cases against API with the objective of mutually terminating the agreement; that he, as the representative of the Municipality, and Atty. Lydia Y. Marciano, as the representative of API, mutually terminated the agreement; and that he could not present a copy of the compromise agreement because fire had meanwhile razed the premises of the Regional Trial Court in Balok, Sto. Domingo, Nueva Ecija, where the compromise settlement had been filed.[11]

The petitioner declared that an annual net income of ₱5,000,000.00 had been forecast out of the loan of ₱40,000,000.00 from the GSIS; that he had conducted a study relative to the capability of API, but APRI had not yet completed any project as of that time; that API and APRI were one and the same, although he admittedly did not inquire from the SEC about the status of the two companies; and that he did not determine whether API was a licensed contractor.[12]

On November 16, 2009, the Sandiganbayan rendered its decision, convicting the petitioner based on the following findings: (*a*) the project had no prior confirmation or approval by the Investment Coordination Council

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10 Id. at 59.
11 Id.
12 Id. at 60.

of NEDA; (*b*) a shorter period was given for comparative or competitive proposals; (*c*) there was failure to meet the conditions for the approval of the contract, including the posting of a performance security; (*d*) there was no in-depth negotiations with proponent; *(e)* API did not submit a complete proposal; (*f*) no clear plan was presented; (*g*) API was not a licensed contractor according to the PCAB; and (*h*) the petitioner was totally remiss in his duties under the *Local Government Code of 1991*. The Sandiganbayan further found that the Government suffered actual damages due to the acts of the petitioner, resulting from the loss of several public buildings as well as the resources from the demolition of such structures, which was quantified at ₱4,800,000.00, or 2% of the total project cost of ₱240,000,000.00.[13] The dispositive portion reads:

> ACCORDINGLY, accused Efren L. Alvarez is found guilty beyond reasonable doubt for [sic] violation of Section 3 (e) of Republic Act No. 3019 and is sentenced to suffer in prison the penalty of 6 years and 1 month to 10 years. He also has to suffer perpetual disqualification from holding any public office and to indemnify the City Government of Muñoz (now Science), Nueva Ecija the amount of Four Million Eight Hundred Thousand Pesos (Php4,800,000.00) less the Five Hundred Thousand Pesos (Php500,000.00) API earlier paid the municipality as damages.
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> Costs against the accused.
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> SO ORDERED.[14]

On June 9, 2010, the Sandiganbayan denied the petitioner's motion for reconsideration for its lack of merit.[15]

Ruling of the Court

Thus, the petitioner appealed, raising the following issues:

1. Whether or not the Sandiganbayan failed to observe the requirement of proof beyond reasonable doubt in convicting him;

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13 Id. at 80-81.
14 Id. at 84.
15 Id. at 111.

2. Whether or not the Sandiganbayan failed to appreciate the legal intent of the BOT project;

3. Whether or not the Sandiganbayan utterly failed to appreciate that the BOT was a lawful project of the SB and not his project; and

4. Whether or not the Sandiganbayan utterly failed to appreciate that there was no damage as contemplated by law caused to the Municipality of Muñoz to warrant his conviction.[16]

On June 29, 2011, the Court affirmed the conviction of the petitioner. It rejected his argument that he could not be held liable for violating Section 3(*e*) of Republic Act No. 3019 because there had been no disbursement of public funds involved. The Court explained that there were two modes of violating Section 3(*e*) of Republic Act No. 3019, namely: (*a*) "causing any undue injury to any party, including the Government;" and (*b*) "giving any private party any unwarranted benefits, advantage or preference." The Court discoursed that under the second mode, it was sufficient that the accused gave unjustified favor or benefit to another, in the exercise of his official, administrative, or judicial functions; and held that the State successfully demonstrated that the petitioner acted with manifest partiality and gross inexcusable negligence in awarding the BOT contract to an unlicensed and financially unqualified private entity.

Hence, the petitioner filed a motion for reconsideration, contending:

I

THE HONORABLE COURT FAILED TO CONSIDER THAT THE SANDIGANBAYAN COMMITTED MANIFEST ERROR, VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO THE PRESUMPTION OF INNOCENCE, AND BLATANTLY DISREGARDED THE PRINCIPLE OF REGULARITY IN THE PERFORMANCE OF OFFICIAL FUNCTIONS WHEN IT CONVICTED MAYOR ALVAREZ OF VIOLATING R.A. 3019 ON THE BASIS OF HIS FAILURE TO COMPLY WITH THE REQUIREMENTS OF R.A. 7718 ON "SOLICITED PROPOSALS" WHEN IT WAS CLEAR THAT THE CONSTRUCTION OF THE WAG WAG SHOPPING MALL WAS AN UNSOLICITED AND UNCHALLENGED PROPOSAL.

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[16] Id. at 20.

II

THE HONORABLE COURT FAILED TO CONSIDER THE SERIOUS AND MANIFEST ERROR COMMITTED BY THE SANDIGANBAYAN WHEN THE LATTER DISREGARDED MAYOR ALVAREZ'S SUBSTANTIAL COMPLIANCE WITH THE REQUIREMENTS OF R.A. 7718.

III

THE HONORABLE COURT FAILED TO CONSIDER THAT THE SANDIGANBAYAN DISREGARDED THE RIGHT OF MAYOR ALVAREZ TO THE EQUAL PROTECTION OF THE LAWS WHEN HE ALONE AMONG THE NUMEROUS PERSONS WHO APPROVED AND IMPLEMENTED THE UNSOLICITED PROPOSAL WAS CHARGED, TRIED AND CONVICTED.

IV

THE HONORABLE COURT FAILED TO CONSIDER THAT THE SANDIGANBAYAN CONVICTED PETITIONER DESPITE THE CLEAR FACT THAT THE PROSECUTION FAILED TO ESTABLISH HIS GUILT BEYOND REASONABLE DOUBT, AS SHOWN BY THE FOLLOWING CIRCUMSTANCES:

(A) THE PROSECUTION FAILED TO ESTABLISH ALLEGED GROSS INEXCUSABLE NEGLIGENCE, EVIDENT BAD FAITH OR MANIFEST PARTIALITY OF PETITIONER

(B) THE PROSECUTION FAILED TO ESTABLISH THE ALLEGED DAMAGE OR INJURY PURPORTEDLY SUFFERED BY THE GOVERNMENT.

V

THE HONORABLE COURT FAILED TO CONSIDER THE ESTABLISHED FACTS SHOWING THAT PETITIONER:

(A) NEVER ACTED WITH "GROSS INEXCUSABLE NEGLIGENCE" AND/OR "MANIFEST PARTIALITY".

(B) NEVER GAVE ANY "UNWARRANTED BENEFIT", "ADVANTAGE" OR "PREFERENCE" TO API.

VI

THE HONORABLE COURT FAILED TO CONSIDER THAT PETITIONER IS AN OUTSTANDING LOCAL EXECUTIVE WITH UNIMPEACHABLE CHARACTER AND UNQUESTIONED ACCOMPLISHMENT. PETITIONER IS NOT THE KIND OF INDIVIDUAL WHO WOULD ENTER INTO CONTRACT THAT WOULD PREJUDICE THE GOVERNMENT AND HIS CONSTITUENTS.

Submissions

I find and consider the motion for reconsideration to be meritorious.

I.
Preliminary Considerations

In *Sistoza v. Sandiganbayan*,[17] Sistoza stood charged with a violation of Section 3(*e*) of Republic Act No. 3019, the same offense for which the petitioner herein was indicted and convicted. At the very first sight of lack of probable cause, the Court did not hesitate to spare Sistoza from being subjected to a trial, and in the process uttered the following wise words to caution against insensitive prosecution of supposed official wrongdoings in routine government procurement, stating:

> There is no question on the need to ferret out and expel public officers whose acts make bureaucracy synonymous with graft in the public eye, and to eliminate systems of government acquisition procedures which covertly ease corrupt practices. But the remedy is not to indict and jail every person who happens to have signed a piece of document or had a hand in implementing routine government procurement, nor does the solution fester in the indiscriminate use of the conspiracy theory which may sweep into jail even the most innocent ones. To say the least, this response is excessive and would simply engender catastrophic consequences since prosecution will likely not end with just one civil servant but must, logically, include like an unsteady streak of dominoes the department secretary, bureau chief, commission chairman, agency head, and all chief auditors who, if the flawed reasoning were followed, are equally culpable for every crime arising from disbursements they sanction.
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> Stretching the argument further, if a public officer were to personally examine every single detail, painstakingly trace every step from inception, and investigate the motives of every person involved in a transaction before affixing his signature as the final approving authority, if only to avoid prosecution, our bureaucracy would end up with public managers doing nothing else but superintending minute details in the acts of their subordinates. It is worth noting that while no charges of violation of Sec. 3, par. (e), of *RA 3019* otherwise known as the *Anti-Graft and Corrupt Practices Act*, as amended, were filed against the responsible officials of the Department of Justice and officers of other government agencies who similarly approved the procurement subject of the instant petition and authorized the disbursement of funds to pay for it, all the blame unfortunately fell upon petitioner Pedro G. Sistoza as then Director of the Bureau of Corrections who merely acted pursuant to representations made by three (3) office divisions thereof, in the same manner that the other officials who were not charged but who nonetheless authorized the transaction in their respective capacities, relied upon the assurance of regularity made by their individual subordinates.
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> In truth, it is sheer speculation to perceive and ascribe corrupt intent and conspiracy of wrongdoing for violation of Sec. 3, par. (e), of the *Anti-*

[17] G.R. No. 144784, September 3, 2002, 388 SCRA 307, 315-316.

> *Graft and Corrupt Practices Act*, as amended, solely from a mere signature on a purchase order, although coupled with repeated endorsements of its approval to the proper authority, without more, where supporting documents along with transactions reflected therein passed the unanimous approval of equally accountable public officers and appeared regular and customary on their face.

These words uttered by the *Sistoza* Court have served as my illuminating guidepost in taking a hard look at our Decision of June 29, 2011 affirming the petitioner's conviction.

In our Decision, we observed that "(a)s to the allegation of conspiracy, the Sandiganbayan held that such was adequately shown by the evidence, *noting that this is one case where the Ombudsman should have included the entire Municipal Council in the information for the latter had conspired if not abetted all the actions of the petitioner in his dealings with API to the damage and prejudice of the municipality*."

We should disown such observation because we would thereby be passing an unwarranted judgment of guilt against persons who were never heard, thereby circumventing their constitutional guarantee of due process that all democratic systems, including ours, have held dear and in the highest esteem. Still, the observation only firmed up the logical conclusion that, at the very least, the petitioner should not alone be faulted for the supposedly illegal acts.

I want to make it clear that I do not subscribe to the petitioner's proposition that "the non-inclusion of the members of the SB in the information constituted a grave violation of his constitutional right to equal protection." The proposition neither shielded him from criminal prosecution nor rendered him innocent. But it is my humble opinion that his individual participation in the awarding of the assailed contract to API did not call for his criminal conviction, considering that the acts the State established to have been proof of his involvement were only his signing

of the Invitation for BOT Project; his causing of the publication of the invitation; his signing of the PBAC Resolution recommending the award of the contract to API; his signing of the MOA covering the project; and his entering into the compromise with API after he instituted a civil action against it. Even assuming that all his acts constituted significant and integral components of some fiasco, which I cannot concede, the Court should not close its discerning eyes to the fact that the Wag-Wag Shopping Mall project had originated as the brainchild of the SB. Specifically, it had been the SB that had invited API to present a proposal; it had been the SB that had resolved to adopt the BOT scheme in the construction of the Wag-Wag Shopping Mall; it had been the SB that had authorized the petitioner to enter into a MOA with API; it had been the SB that had authorized him to file a case against API; and it had been the SB that had authorized him to enter into a compromise with API.

Contrary to the stance taken by the Sandiganbayan, what the Court should reckon from the totality of the established circumstances was not a criminal conspiracy among the municipal officials, the petitioner included, but, rather, a conscious effort to faithfully observe the checks and balances within the realm of local governance. The affirmance of the conviction of the petitioner would then be an exaggerated chastisement of his having affixed his signature on the MOA, the very kind of prosecution of a public official that the *Sistoza* Court eloquently denounced.

II.
Unsolicited Proposal

In our challenged Decision, we initially positioned API against the tapestry that was Republic Act No. 6957,[18] as amended by Republic Act No. 7718[19] (collectively, BOT Law). The Decision began by highlighting that a BOT project could only be awarded to the bidder who met the standards set

[18] *An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes* (approved on July 9, 1990).
[19] *An Act Amending Certain Sections of Republic Act No. 6957.*

by the BOT Law; and then went on to find that the undeniable disqualification of API for being an unlicensed contractor required us to rule that API could not properly be the awardee of the BOT project for the construction of the Wag-Wag Shopping Mall because it was not qualified to participate in the bidding.

Yet, API was not a bidder because there would be no bidding in which it would participate. Rather, API had been invited by the SB to submit its proposal, and API had accepted the invitation and submitted its proposal. On account of this reality, a review of the Decision is in order.

The Municipality of Muñoz viewed the project from its inception under the rules on *unsolicited proposals*. Several circumstances buttress this conclusion, namely: (*a*) the SB's classification of the project as "non-priority" in Resolution No. 230, S-95[20] because the Municipality lacked adequate resources to finance the project and because priority projects were ineligible for unsolicited proposals;[21] (*b*) the PBAC's explicit recommendation of the acceptance of the unsolicited proposal and the awarding of the contract to API pursuant to SB Resolution No. 01, S-96;[22] and (*c*), the Invitation for BOT Project,[23] which was an earnest and sincere attempt to give to the interested public a chance to defeat API's unsolicited proposal.

The Court has repeatedly enforced its power to brush aside erroneous legal impressions, however sincerely they might have been made, where the correct understanding of the pertinent laws indubitably painted a different picture of intention on the part of the parties. Consistent with this laudable zeal, we should immediately deem the Wag-Wag Shopping Mall project to be the unsolicited proposal that it really was simply because that was the

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20 *Rollo*, p. 162.
21 Section 10.3, Implementing Rules and Regulations.
22 *Rollo*, p. 64.
23 Id. at 152.

nomenclature adopted by the SB for the project. Indeed, I cannot yet find any indicators that varied at all from the *unsolicited* nature of the proposal.

We have regarded the SB's invitation to API as a symbol of solicitation. That view may be justified because API did not originate the idea for the project. However, the proposal was still unsolicited. To be all too literal about the meaning of the term "unsolicited" might be misapprehended hereafter as forbidding the Government, in effect, from giving even the slightest hint on its pursuits to any potential investor. That misapprehension would be most unfortunate and unjustified, considering that the avowed intent of the BOT Law of promoting private sector participation in development projects did not prohibit any proponent of a worthwhile BOT project from knocking on the Government's door *uninvited*. That unwarranted interpretation would have the private sector act like a wandering caroler, moving from one house to the next, uncertain whether his caroling would even be listened to; or would have the private sector simply distance itself from any collaboration with the Government because of the uncertainty of partnering with the Government in pursuing development projects, no matter how worthy, thereby preventing rather than forging the partnerships that the law has desired and envisioned.

In fact, that the Government first communicates with a prospective investor who then submits an unsolicited proposal has not been unprecedented. The Court actually took note of one such situation in *Agan, Jr. v. Philippine International Air Terminal Co., Inc.*,[24] as the following excerpt indicates:

> In August 1989, the DOTC engaged the services of Aeroport de Paris (ADP) to conduct a comprehensive study of the Ninoy Aquino International Airport (NAIA) and determine whether the present airport can cope with the traffic development up to the year 2010. The study consisted of two parts: first, traffic forecasts, capacity of existing facilities, NAIA future requirements, proposed master plans and development plans; and second, presentation of the preliminary design of

[24] G.R. No. 155001, May 5, 2003, 402 SCRA 612, 631-632.

> the passenger terminal building. The ADP submitted a Draft Final Report to the DOTC in December 1989.
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> **Sometime in 1993, six business leaders consisting of John Gokongwei, Andrew Gotianun, Henry Sy, Sr., Lucio Tan, George Ty and Alfonso Yuchengco met with then President Fidel V. Ramos to explore the possibility of investing in the construction and operation of a new international airport terminal. To signify their commitment to pursue the project, they formed the Asia's Emerging Dragon Corp. (AEDC) which was registered with the Securities and Exchange Commission (SEC) on September 15, 1993.**
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> **On October 5, 1994, AEDC submitted an unsolicited proposal** to the Government through the DOTC/MIAA for the development of NAIA International Passenger Terminal III (NAIA IPT III) under a build-operate-and-transfer arrangement pursuant to RA 6957 as amended by RA 7718 (BOT Law). (Emphases and underscoring supplied.)

Agan, Jr. adverted to the six business leaders approaching President Ramos to "explore the possibility of investing in the construction and operation of a new international airport terminal." Ostensibly, they proposed to build the NAIA International Passenger Terminal III without prior solicitation by the Government. Here, however, it was slightly different, with the SB inviting API. **But the making of that invitation alone did not make API's eventual proposal a solicited one. Both *Agan, Jr.* and this case shared one common circumstance – that preliminary communications transpired *prior to* the submission of the proposal.**

Unsolicited proposals for projects may be accepted by any government agency or local government unit on a negotiated basis, provided that the following conditions are all met, namely: (*a*) such projects involved a new concept or technology and/or are not part of the list of priority projects; (*b*) no direct government guarantee, subsidy or equity is required; (*c*) the government agency or local government unit has invited comparative or competitive proposals by publication for three consecutive weeks in a newspaper of general circulation, and no other proposal is received for a period of 60 working days; and (d) in the event another proponent submits a

lower price proposal, the original proponent shall have the right to match that price within 30 working days.[25]

I take the view, therefore, that the Government is not legally precluded from consulting a private entity that possesses the requisite expertise, skills and know-how on a particular undertaking, even if the consultation is pursued with the end of ultimately engaging the private entity for the undertaking. My reason for taking the view is that the giving of undue favors that our policies consistently condemn will be thwarted by the law's several protective measures in place to still afford the public an opportunity for fair competition.

The BOT Law provides two ways on how the private sector may take on a project, to wit: (*a*) through public bidding; and (*b*) through unsolicited proposals.[26] In the first way, an identified project is immediately thrown open to the public for competition, while in the second, a proposal is first submitted before the public is given the chance to compete. If the Government chooses to transact indiscriminately with the public through regular bidding, the pertinent rules on unsolicited proposals find no application. Conversely, if at the outset and to the exclusion of the public, negotiations take place between the Government and a specific person, the ordinary bidding procedures are not at play.

Rule 9 of the Implementing Rules and Regulations (IRR) of the BOT Law has the following significant provisions on direct negotiations and unsolicited proposals, to wit:

> Sec. 9.1. *Direct Negotiation.* - Direct negotiation shall be resorted to when there is only one complying bidder left as defined hereunder:
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> > a. If, after advertisement, only one project proponent applies for pre-qualification and it meets the pre-qualification requirements, after which it is required to submit a bid/proposal which is subsequently found by the Agency/LGU to be complying;

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[25] Section 4-a of R.A. No. 6957, as amended by R.A. No. 7718.

[26] Section 2.6 of the Implementing Rules and Regulations (IRR) of the BOT Law states:

Sec. 2.6. *Allowable Modes of Implementation.* - Projects may be implemented through public bidding or direct negotiation. The direct negotiation mode is subject to conditions specified in Rules 9 and 10 hereof.

> b. If, after advertisement, more than one project proponent applied for pre-qualification but only one meets the pre-qualification requirements, after which it submits a bid proposal that is found by the Agency/LGU to be complying;
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> c. If, after pre-qualification of more than one project proponent, only one submits a bid which is found by the Agency/LGU to be complying;
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> d. If, after pre-qualification, more than one project proponent submit bids but only one is found by the Agency/LGU to be complying;
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> In such events however, any disqualified bidder may appeal the decision of the concerned Agency/LGU to the Head of Agency in case of national projects, or to the Department of Interior and Local Government (DILG) in case of local projects within fifteen (15) working days from receipt of the notice of disqualification. The Agency/LGU concerned shall act on the appeal within forty-five (45) working days from receipt thereof. The decision of the Agency concerned or the DILG, as the case may be, shall be final and immediately executory.
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> Sec. 9.2. *Unsolicited Proposals.*- Unsolicited proposals may likewise, subject to the conditions provided under Rule 10, be accepted by an Agency/LGU on a negotiated basis.

Section 9.1, *supra*, actually envisages an ordinary public bidding in which only a lone bidder ends up to be compliant. The offer to the public and the opportunity for competition, two of the three principles in public bidding,[27] precede the negotiation. Under the BOT Law, therefore, the private sector may become a partner of the Government in its infrastructure projects only either by participating in a regular bidding or by presenting an unsolicited proposal, where there is likewise a subsequent bidding.

The mere fact that the SB invited API did not put API's proposal outside the purview of an unsolicited proposal. Any private corporation, on whose expertise, skills and know-how the Government relies, if asked by the Government to conduct a study for a project, should not be later on disqualified from making a proposal for the project. Nor should its proposal after the study be immediately considered as outside the scope of an unsolicited proposal only because the initiative has not originated from it.

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[27] *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines, Inc.,* G.R. No. 183789, August 24, 2011, 656 SCRA 214, 229.

Should that be the case, the procedure for ordinary bidding will apply, and the corporation will just have to find itself on the same footing as its competitors despite having expended so much time, effort and resources on the study, wondering in uncertainty about whether its substantial expenditures will ultimately blossom into a solid investment. Such innate unfairness is precisely what the lawmakers sought to avoid, as can be gleaned from the Minutes of the Senate deliberations,[28] to wit:

> Senator Macapagal: In the Medium-Term Philippine Development Plan and the Cagayan de Oro-Iligan Corridor, the anchor project of the Cagayan de Oro-Iligan Corridor is the Lagindingan International Airport. However, it was very sad to note that in the DOTC public investment program, it was not there. xxx
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> So, the people of Cagayan de Oro-Iligan Corridor were really flabbergasted that a national government agency should completely ignore a particular anchor project. xxx
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> The people in the area started selling the idea to everybody who might be interested and, of course, one very obvious party that should be interested is Ayala Corporation because it owns the land that was identified in the planning as the ideal place for the airport. xxx
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> As time went on, Ayala got more and more interested because everybody in the Cagayan de Oro-Iligan Corridor was telling them that that airport is so crucial in the development of the Cagayan de Oro-Iligan Corridor. So, Ayala Corporation started toying with the idea; it started some preliminary casual talks, and then more serious talks with possible Japanese investors. Then they got into the conclusion that there are some things they cannot undertake even in that consortium of two. They got into that some aspects should really be funded by the Government and that therefore, the project should be divided into two parts, one part should be Government and one part should be BOT. All of this conceptualization to be transformed into project specifications would undertake time and, in fact, millions of investment on the part of, let us say, Ayala corporation.
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> If, after spending millions for the project specification, it is simply bidded out in a purely competitive tender, then that is thoroughly unfair to Ayala Corporation. If that is the case provided by law, Ayala Corporation will not even go into the feasibility study. Unfortunately, DOTC does not have the money to go into that feasibility study instead. If that happens, we will have the money to go into that feasibility study instead. If that happens, we will have a Cagayande Oro-Iligan Corridor project that will again be a political wish because the anchor project will not be there.
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> So, Mr. President, it is a situation such as this where we feel that there is certainly merit for the common good in a negotiated contract. This example is what we mean by an unsolicited proposal.

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[28] Record of the Senate, Tuesday, February 1, 1994, p. 477.

Accordingly, any proposal, invited or not, that is introduced where the Government has no prior intention of conducting a public bidding must still be categorized as "unsolicited." This interpretation will not prove disastrous inasmuch as the law itself has provided adequate safeguards. Moreover, the abhorred capricious awarding of a project to a preferred party is effectively hindered by the mandate for a subsequent invitation for comparative proposals.

III.
Deviations from the BOT Law

Having shown that API's proposal was really an unsolicited proposal, let me next carefully show that the petitioner complied with the BOT Law.

In our Decision, we held:

> The IRR specified the requirement of publication of the invitation for submission of proposals, as follows:
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> > SEC. 10.11. *Invitation for Comparative Proposals.* - The Agency/LGU shall publish the invitation for comparative or competitive proposals **only after ICC/Local Sanggunian issues a no objection clearance of the draft contract**. The invitation for comparative or competitive proposals should be published at least once every week for three (3) weeks in at least one (1) newspaper of general circulation. It shall **indicate the time, which should not be earlier than the last date of publication, and place where tender/bidding documents could be obtained.** It shall likewise explicitly specify a time of **sixty (60) working days reckoned from the date of issuance of the tender/bidding documents** upon which proposals shall be received. Beyond said deadline, no proposals shall be accepted. A pre-bid conference shall be conducted ten (10) working days after the issuance of the tender/bidding documents. (Emphasis supplied.)
>
> The above provision highlighted other violations in the bidding procedure for the subject BOT project. *First*, there was no prior approval by the Investment Coordinating Committee of the National Economic Development Authority (ICC-NEDA) of the Wag-Wag Shopping Mall project. **Under the BOT Law, local projects to be implemented by the local government units concerned costing above ₱200 million shall be submitted for confirmation to the ICC-NEDA. Such requisite approval shall be applied for and should be secured by the head of the LGU prior to the call for bids for the project.** *Second*, the law requires publication in a newspaper of general circulation. To be a newspaper of

> general circulation, it is enough that it is published for the dissemination of local news and general information, that it has a *bona fide* subscription list of paying subscribers, and that it is published at regular intervals. Over and above all these, the newspaper must be available to the public in general, and not just to a select few chosen by the publisher. **Petitioner did not submit in evidence the affidavit of the publisher attesting to *Pinoy* tabloid as such newspaper of general circulation.** And *third*, even assuming that *Pinoy* was indeed a newspaper of general circulation, the invitation published indicated a shorter period of submission of comparative proposals, only thirty (30) days instead of the prescribed sixty (60) days counted from the date of issuance of tender documents. (Emphasis supplied)

I believe that we must thoroughly revisit our finding about the lack of prior approval by the ICC and about the failure of the petitioner to submit the affidavit of the publisher of *Pinoy* tabloid that would confirm its being a newspaper of general circulation. There was no basis for the finding.

Firstly, the finding was unfortunate because it was not for the petitioner to prove that he had complied with such requirements, but rather for the Prosecution to establish the fact of non-compliance with the requirements in a degree that would justify the presence of the elements of the crime charged. We apparently thereby brushed aside the well-settled rule in criminal cases that it was the Prosecution, not the accused, who has the burden of proof to establish guilt beyond reasonable doubt.[29]

Secondly, we have thereby ignored that the vigorous objection raised herein had been only about the publication of the invitation being for a period shorter than the law required, and about *Pinoy* being a mere tabloid.

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[29] Section 1(a), Rule 115, *Rules of Court*, which states that the accused has the right: "To be presumed innocent until the contrary is proved beyond reasonable doubt;" Section 2, Rule 133, *Rules of Court*, which provides that: "In a criminal case, the accused is entitled to an acquittal, unless his guilt is shown beyond reasonable doubt. Proof beyond reasonable doubt does not mean such a degree of proof as, excluding possibility of error, produces absolute certainty. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind."; *Boac v. People*, G.R. No. 180597, November 7, 2008, 570 SCRA 533, 548.

Anent the requirement for ICC approval, the Decision, citing Section 4 of Republic Act No. 6957, as amended by Republic Act No. 7718,[30] and Section 2.3 of the IRR,[31] held that projects costing over ₱200 million should be submitted for confirmation by the ICC-NEDA, and the approval should be applied for and secured prior to the bidding by the petitioner as the head of the local government unit.

Yet, a closer look readily shows that cited provisions related to *priority projects,* of which the Wag-Wag Shopping Mall project was not. The records indicate that the project was classified by the SB as "non-priority" through its Resolution No. 230, S-95 owing to "the large amount of investment therein" that the Municipality could not shoulder. The inapplicability of the provisions was bolstered by Section 2.8 of the IRR, which states:

> 2.8. *ICC Approval of Projects.* - The review and approval of projects by ICC, as indicated above, including those proposed for BOO implementation, shall be in accordance with the guidelines of the ICC, attached hereto as Annex B.
>
> For publicly-bid projects, **the ICC approval of the project should be secured** prior to bidding and **for unsolicited proposals prior to negotiation with the original proponent**.

Considering that priority projects were not eligible for unsolicited proposals,[32] Section 2.8 should be construed to pertain only to projects other than priority ones.

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[30] SEC. 4. *Priority Projects.* – x x x

The list of local projects to be implemented by the local government units concerned shall be submitted for confirmation to the municipal development council for projects costing up to Twenty million pesos; those costing above Twenty up to Fifty million pesos to the provincial development council; those costing up to Fifty Million pesos to the city development council; above Fifty Million up to Two hundred million pesos to the regional development councils; and those above Two hundred million pesos to the ICC of the NEDA.

[31] Sec. 2.3. *List of Priority Projects.* - Concerned Agencies/LGUs are tasked to prepare their infrastructure/development programs and to identify specific priority projects that may be financed, constructed, operated and maintained by the private sector through the contractual arrangements or schemes authorized under these IRR.

The projects require the approval of either the NEDA Board, ICC or Local Development Councils (LDCs) and respective Sanggunians as specified in Section 2.7. Such requisite approval shall be applied for and should be secured by the Head of Agency/LGU **prior to the call for bids for the project.** For this purpose, the Head of Agency/LGU may submit projects for inclusion in the list, for approval by the appropriate approving authority, as often as is necessary. Approved projects shall constitute the List of Priority Projects.

[32] Section 10.3, IRR.

With the Wag-Wag Shopping Mall being a non-priority project, and API's proposal being unsolicited, what then applied was the requirement of ICC approval prior to the negotiation with API as the proponent. **There being no evidence on record that proved non-compliance with the requirements, the Court thus had no real and proper factual bases to find and hold that Alvarez had failed to prove compliance.**

In its Comment on the petition for review, the Office of the Solicitor General (OSG) tendered a sweeping statement that "there was no showing that Petitioner [Alvarez] sought the prior approval or confirmation by the ICC of NEDA of the said undertaking." The trial records show, on the other hand, that the Prosecution and the Sandiganbayan heavily banked on the *supposed* violations of the regular bidding procedures or, in the alternative, on the irregularities in the publication of the Invitation for BOT Project, without showing that the violations had been actual, or that the publication had been grossly defective and deficient.

Anent *Pinoy*, the petitioner's failure to present the affidavit of the publisher attesting to *Pinoy*'s being a newspaper of general circulation was fatal to the cause of the Prosecution, but not to the cause of the Defense. There was in favor of the petitioner the presumption of regularity in the performance of official duty from his availing of the publication services of *Pinoy* as a newspaper of general circulation.[33] The presumption could be rebutted only by the Prosecution adducing clear and convincing affirmative evidence of irregularity or failure to perform a duty.[34] Towards that end, every reasonable intendment was to be made in support of the presumption; in case of any doubt as to an officer's act being lawful or unlawful, the construction should be in favor of its lawfulness. Without the Prosecution adducing such rebutting evidence, the presumption became conclusive herein.

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33 Section 3(j), Rule 131, *Rules of Court*.
34 *Bustillo v. People*, G.R. No. 160718, May 12, 2010, 620 SCRA 483, 492.

Thirdly**,** the period of only 30 days for the submission of comparative proposals provided in the Invitation for BOT Project that the petitioner signed being shorter than required should not be a factor of any irregularity.

Although an unsolicited proposal for projects may be accepted if, after the publication, no other proposal is received for a period of 60 working days, the BOT Law does not actually provide the time when the 60-day period is to commence. On the other hand, Section 10.11 of the IRR contains the following relevant instructions:

> 1. The invitation for comparative or competitive proposals shall **indicate the time, which should not be earlier than the last date of publication, and the place where tender/bidding documents can be obtained;**
>
> 2. **The invitation shall likewise explicitly specify a time of 60 working days reckoned from the date of issuance of the tender/bidding documents upon which proposals shall be received;** beyond said deadline, no proposals shall be accepted.
>
> 3. **A pre-bid conference shall be conducted 10 working days after the issuance of the tender/bidding documents**.

The Invitation for BOT Project did not state the time when and the place where the tender/bidding documents could be obtained; did not indicate a specific time of 60 working days reckoned from the date of issuance of the tender/bidding documents within which proposals would be received; and directed the submission of proposals within only 30 days from the date of its *first* publication.

Yet, the failure to literally comply with the BOT Law and the IRR was not enough justification to conclude adversely against the petitioner. Let me explain why.

Upon being invited to bid, any prospective bidder could not just quickly present himself to the Government with a proposal ready at hand. This is because every knowledgeable bidder was expected to know that it would only be through the bid/tender documents that he would determine how to formulate the bid. Thus, any party interested in the Wag-Wag Shopping Mall project had to secure first the bid/tender documents from the Office of the Mayor. The period of 30 days stated in the invitation, instead of being considered as the period for a prospective bidder to submit a proposal, should be understood as referring to the period *within which a comparative bidder should obtain the bid/tender documents*. In this context, the obtention of the bid/tender documents was, after the publication of the invitation, the *next unavoidable step* for the bidding process to start rolling. The next step thereafter would be the pre-bid conference, to be conducted 10 working days from the issuance of the tender/bidding documents.[35]

For the Wag-Wag Shopping Mall project, counting the 30 days from the date of *first* publication (February 9, 1996), the interested public had until March 10, 1996 to obtain the bid/tender documents. That was 16 days from the date of last publication (February 23, 1996). A time frame of 16 days was reasonable, and was in fact even more beneficial to prospective bidders by virtue of their not being limited to one particular day. The time frame was also in full accord with the IRR, whose only parameter being that the time to obtain the bid/tender documents not be earlier than the last date of publication.

Another requirement under Section 10.11 of the IRR, was the indication of the place where the bid/tender documents would be obtained. Considering that any interested party could easily infer from the Invitation that any response to the invitation had to be coursed through the Office of the Mayor, that requirement was met in this case, and the place was the Office of the Mayor. **But no one went to obtain the bid/tender**

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[35] Section 10.11, IRR.

documents, or even to inquire about the subject of the published invitation. As a result, with the Municipality having no other comparative proposal to consider and pass upon, no pre-bid conference was conducted.

Underscoring the other violations attributed to the petitioner, the Decision said the following:

> There is likewise no showing that API complied with the submission of a complete proposal required under the IRR:
>
> > SEC. 10.5 *Submission of a Complete Proposal.* - For a proposal to be considered by the Agency/LGU, the proponent has to submit a complete proposal which shall include a feasibility study, **company profile** as outlined in Annex A, and the basic contractual terms and conditions on the obligations of the proponent and the government. The Agency/LGU shall acknowledge receipt of the proposal and advice the proponent whether the proposal is complete or incomplete. If incomplete, it shall indicate what information is lacking or necessary. (Emphasis supplied.)
>
> As correctly pointed out by the Sandiganbayan, API's proposal showed that it lacked the above requirements as it did not include a company profile and the basic contractual terms and conditions on the obligations of the proponent/contractor and the government. Had such company profile been required of API, the municipal government could have been apprised of the fact that said contractor/proponent had been in existence for only three months at that time and had not yet completed a project, although APRI, which actually undertook the Calamba and Lemery shopping centers also under BOT scheme, is allegedly the same entity as API which have the same set of incorporators and directors. But more important, the municipality could have realized earlier, on the basis of financial statements and experience in construction included in the company profile, that API could not possibly comply with the huge financial outlay for the Wag-Wag Shopping Mall project. It could have also noted the fact that the aforesaid BOT shopping centers in Lemery and Calamba being implemented by APRI at that time were not yet finished or completed. In any event, such existing BOT contract of APRI with another LGU neither justified non-compliance by API with the submission of a complete proposal for the Wag-Wag Shopping Mall project for a competent evaluation by the PBAC.

The findings on the other violations were unfair. It is noteworthy that the petitioner's first direct participation in the Wag-Wag Shopping Mall project was his signing of the Invitation for BOT Project. Still, we should deduce that by that time, API would have been pre-qualified, its company

profile assessed, and its proposal evaluated by the Municipality. We should presume that the SB had undertaken the evaluation because it was the SB, after all, that had invited API pursuant to its Resolution No. 136, S-95,[36] adopted the BOT scheme for the Wag-Wag Shopping Mall project through its Resolution No. 230, S-95,[37] and created a Special Committee on Build Operate and Transfer through Resolution No. 262, S-95 shortly after API had submitted its proposal.[38] The function of evaluation appropriately fell on the shoulders of the SB, not on the petitioner's, because the project would entail the disbursement of municipal funds.

In short, whatever the petitioner had to do with the project *prior to* his signing of the Invitation for BOT Project should not be left to guesswork.

It is true that the IRR contained a directive for the head of the local government unit to secure the ICC clearance for the unsolicited proposal prior to any negotiations with the original proponent.[39] But there was no proof adduced by the Prosecution showing the non-compliance with this requirement. Hence, we should resolve the issue in favor of compliance. The consequence of so resolving is to accept that the petitioner was charged with actual knowledge of the proposal and of the qualifications of API. Nonetheless, despite such actual knowledge, the responsibility for securing the approval should not be thrown exclusively in his direction, for securing the approval was a purely ministerial duty. In this regard, the petitioner had to endorse the proposal to the ICC without yet needing to exercise his discretion. He was under no mandate to review the proposal at that stage. The only time that he, as the head of a local government unit, would use his discretion was after the submission by the PBAC of the recommendation to award, upon which he, as the head of the local government unit, would then decide.[40]

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36 *Rollo*, p. 153.
37 Id. at 155.
38 Id. at 156.
39 Section 10.8, Section 2.8, IRR.
40 Section 11.2, IRR.

Fourthly, we further agree with the Sandiganbayan that "there was no in-depth negotiation as to the project scope, implementation and arrangements and concession agreement, which are supposed to be used in the Terms of Reference (TOR). Such TOR would have provided the interested competitors the basis for their proposed cost, and its absence in this case is an indication that any possible competing proposal was intentionally avoided or altogether eliminated."

I am apprehensive that we have thereby allowed ourselves to draw a decisive conclusion even without proper factual support. I have carefully perused the decision of the Sandiganbayan under review and have not come across any portion of it that might have contained the factual basis from which the Sandiganbayan derived its conclusory pronouncement. The absence of the factual basis necessitates a reversal of our affirmance of the Sandiganbayan, for, indeed, the People did not even attempt to make these matters a point of contention.

Fifthly, another established act of the petitioner was his signing of the Resolution whereby the PBAC recommended both the acceptance of API's unsolicited proposal and the awarding of the contract to API. Upon careful analysis, however, I find that his signature on the PBAC Resolution was by virtue of his capacity as the PBAC Chairman, a capacity that he had not arrogated unto himself due to its having been conferred by law.[41] As the PBAC Chairman, he could participate in the recommendation in two ways, namely: by signing the Resolution, and, by voting in case of a tie.[42] The PBAC Resolution showed six members under the chairmanship of the petitioner. A member, Angelo C. Abellera, had no signature on the Resolution; hence, he did not have any involvement in its passage. Only five members remained, rendering a tie impossible. Based on such circumstances, the petitioner could not have voted for the recommendation in favor of API.

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41 Section 3.1, IRR; Section 37, R.A. No. 7160.
42 Section 3.3, IRR.

Sixthly, the Sandiganbayan further found that the petitioner had requested the SB to authorize him to enter into a MOA with API, for which the SB had then passed the resolution for that purpose.

The finding was of no material consequence.

The request and the Resolution were unnecessary and superfluous due to the fact that no other proposal had been submitted to outdo the proposal of API. Under the law, awarding the contract to API was a matter of course. As to this, the Court observed in *Asia's Emerging Dragon Corporation v. Department of Transportation and Communications*,[43] to wit:

> xxx In the 18 April 2008 Decision, we have already exhaustively scrutinized Section 4-A of the BOT Law, as amended, in relation to its IRR, and in consideration of the intent of the legislators who crafted the BOT Law. We find no reason to disturb our conclusion therein that:
>
> > The special rights or privileges of an original proponent thus come into play only when there are other proposals submitted during the public bidding of the infrastructure project. As can be gleaned from the plain language of the statutes and the IRR, the original proponent has: (1) the right to match the lowest or most advantageous proposal within 30 working days from notice thereof, and (2) in the event that the original proponent is able to match the lowest or most advantageous proposal submitted, then it has the right to be awarded the project. The second right or privilege is contingent upon the actual exercise by the original proponent of the first right or privilege. Before the project could be awarded to the original proponent, he must have been able to match the lowest or most advantageous proposal within the prescribed period. Hence, when the original proponent is able to timely match the lowest or most advantageous proposal, with all things being equal, it shall enjoy preference in the awarding of the infrastructure project.
>
> It is without question that in a situation where there is **no other competitive bid** submitted for the BOT project that the project would be awarded to the original proponent thereof. However, **when there are competitive bids submitted,** the original proponent must be able to match the most advantageous or lowest bid; only when it is able to do so, will the original proponent enjoy the preferential right to the award of the project over the other bidder. These are the general circumstances covered by Section 4-A of Republic Act No. 6957, as amended. (Underscoring supplied)

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[43] G.R. Nos. 169914 and 1714166, April 7, 2009, 584 SCRA 355.

IV
Alvarez did not violate Section 3(*e*)

The Decision declared that the petitioner had failed to ensure that API would meet the conditions prescribed by Section 11.7 and Section 12.7 of the IRR, namely: (*a*) performance security; (*b*) proof of sufficient equity; and (*c*) ICC clearance of the contract on a no-objection basis.

The petitioner argues that these requirements did not apply because they were not enumerated in Rule 10 of the IRR, the issuance governing unsolicited proposals.

The argument of the petitioner cannot be sustained.

Rule 10 provided the procedure in the handling of an unsolicited proposal. Its last three sections related to "submission of proposal", "evaluation of proposals" and "disclosure of the price proposal." If the petitioner's argument was followed, nothing could come out of unsolicited proposals because Rule 10 did not provide the mechanism for the awarding of the contract. To answer the hanging question of whether Alvarez observed the IRR in awarding the contract, resort must necessarily be had to Rule 11, entitled "Award and Signing of Contract" and Rule 12, entitled "Contract Approval and Recommendation." The separate processes for unsolicited proposals and for publicly-bidded projects find their confluence in both Rules.

In view of the foregoing, we should determine if the petitioner deliberately disregarded the BOT Law and its IRR as to warrant his prosecution for and conviction of a violation of Section 3(*e*) of Republic Act No. 3019.

Section 3(*e*) of Republic Act No. 3019 states:

> Section 3. *Corrupt Practices of Public Officers*. – In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful.
>
> xxxx
>
> (*e*) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant or licenses or permits or other concessions.
>
> xxxx

The State must prove the following essential elements of Section 3(*e*) offense, as follows:

1. The accused is a public officer discharging administrative, judicial, or official functions;

2. The accused must have acted with manifest partiality, evident bad faith, or gross inexcusable negligence; and

3. The action of the accused caused undue injury to any party, including the Government, or gave any private party unwarranted benefits, advantage or preference in the discharge of his functions.[44]

That the petitioner, being then the incumbent Mayor of his Municipality, was a public official on the date in question showed the attendance of the first element.

As to the second element (that the accused must have acted with manifest partiality, evident bad faith, or gross inexcusable negligence), which involve the three modes of committing the crime, we have enunciated in *Fonacier v. Sandiganbayan*[45] that the three modes are distinct and different from each other, to wit:

> The second element enumerates the different modes by which means the offense penalized in Section 3 (e) may be committed. "Partiality" is synonymous with "bias" which "excites a disposition to see and report

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[44] *People v. Romualdez*, G.R. No. 166510, July 23, 2008, 559 SCRA 492, 509-510; *Cabrera v. Sandiganbayan*, G.R. Nos. 162314-17, October 25, 2004, 441 SCRA 377, 386.

[45] G.R. Nos. 50691, 52263, 52766, 52821, 53350, 53397, 53415 & 53520, December 5, 1994, 238 SCRA 655, 687-688.

> matters as they are wished for rather than as they are". "Bad faith does not simply connote bad judgment or negligence; it imputes a dishonest purpose or some moral obliquity and conscious doing of a wrong; a breach of sworn duty through some motive or intent or ill will; it partakes of the nature of fraud. "Gross negligence has been so defined as negligence characterized by the want of even slight care, acting or omitting to act in a situation where there is a duty to act, not inadvertently but willfully and intentionally with a conscious indifference to consequences in so far as other persons may be affected. It is the omission of that care which even inattentive and thoughtless men never fail to take on their own property. These definitions prove all too well that the three modes are distinct and different from each other. Proof of the existence of any of these modes in connection with the prohibited acts under Section 3 (e) should suffice to warrant conviction.

IV.a.
Manifest partiality and gross inexcusable negligence were not competently established

In our Decision, we held that "the prosecution was able to successfully demonstrate that [Alvarez] acted with manifest partiality and gross inexcusable negligence in awarding the BOT contract to an unlicensed and financially unqualified private entity". As basis thereof, the Decision cited the petitioner's non-compliance with the BOT Law and its IRR, and made the following pronouncement:

> Under the facts established, it is clear that petitioner gave unwarranted benefits, advantage or preference to API considering that said proponent/contractor was not financially and technically qualified for the BOT project awarded to it, and *without complying with the requirements of bidding and contract approval for BOT projects* under existing laws, rules and regulations.
>
> The word "unwarranted" means lacking adequate or official support; unjustified; unauthorized or without justification or adequate reason. "Advantage" means a more favorable or improved position or condition; benefit, profit or gain of any kind; benefit from some course of action. "Preference" signifies priority or higher evaluation or desirability; choice or estimation above another. As to "partiality," "bad faith," and "gross inexcusable negligence," we have explained the meaning of these terms, as follows:
>
> > "Partiality" is synonymous with "bias" which "excites a disposition to see and report matters as they are wished for rather than as they are." "Bad faith does not simply connote bad judgment or negligence; it imputes a dishonest purpose or some moral obliquity and conscious doing of a wrong; a breach of sworn duty through some motive or intent or ill will; it partakes of the nature of fraud." "Gross negligence has been so defined as negligence characterized by the want of even slight care, acting

> or omitting to act in a situation where there is a duty to act, not inadvertently but wilfully and intentionally with a conscious indifference to consequences in so far as other persons may be affected. It is the omission of that care which even inattentive and thoughtless men never fail to take on their own property."

We sustain and affirm the Sandiganbayan in holding that petitioner violated Section 3(e) of R.A. No. 3019, and that he cannot shield himself from criminal liability simply because the SB passed the necessary resolutions adopting the BOT project and authorizing him to enter into the MOA. We find no error or grave abuse in its ruling, which we herein quote:

> It is apparent that the unwarranted benefit in this case lies in the very fact that API was allowed to present its proposal without compliance of*[sic]* the requirements provided under the relevant laws and rules. To begin with, the municipal government never conducted a public bidding prior to the execution of the contract. The project was immediately awarded to the API without delay and without any rival proponents, when it was not qualified to participate in the first place. The legality and propriety of the agreement executed with the contractor is totally absent based on the testimonies of both the prosecution and the defense.
>
> This Court also considers these particular acts significant. *First*. From the testimony of then Vice-Mayor Ruiz, Jesus V. Garcia, the president of API, attended the SB session after paying a courtesy call to the Accused who was then the Mayor. *Second*. It was the Accused who signed and posted the Invitation to Bid (Exhibit N) giving proponents 30 days to submit their proposals. *Third*. The Accused is the head of the Pre-Qualification Bids and Awards Committee which according to him recommended the approval of API's proposal. This was the reason he used in requesting authority from the SB to grant him the authority to contract with API. *Fourth*. The Accused requested the SB to give him authority to enter into an agreement with API through a resolution (Exhibit S)[.] *Fifth*. It was the Accused who invited the SB members to go to the Mayor's office to witness the signing of the Memorandum of Agreement between the municipality and API.

I submit that the Sandiganbayan gravely erred and that we should not affirm its error. The established facts showed that the petitioner neither extended any favors to nor manifested partiality towards API. He also did not give any unwarranted benefits to API.

As I previously pointed out, the only significant acts of the petitioner proved by the Prosecution were his signing of the Invitation for BOT Project; his causing of the publication thereof; his signing of

the PBAC Resolution recommending the award to API of the contract; and his signing of the MOA for the project – all of which had mitigating, if not justifying, factors that I already stated in my foregoing discussions. But none of such acts could be read as manifesting partiality or giving unwarranted benefits to API.

For one, the Decision declared that "(t)he project was immediately awarded to the API without delay and without any rival proponents." However, the declaration was belied by the fact that the petitioner had to invite investors to "finance, construct and operate"[46] **the Wag-Wag Shopping Mall project. The Invitation, despite its faults, was still an invitation, and it unquestionably demonstrated the intention of the petitioner to give the interested public the reasonable opportunity for competition. In the end, because no other company except API showed any interest in the project, no comparative offer was made to surpass API's proposal.**

Anent the alleged fault in the Invitation, in that it gave a period of only 30 days from the date of first publication within which the prospective bidders would submit their proposals, the fact that the period was shorter than what the law required should not be seen as a sign of bias or partiality towards API or of giving unwarranted benefits to API. The Invitation was first published on February 9, 1996. Were it true that the petitioner had been biased towards API, would he not have moved at lightning speed, in a manner of speaking, in order to award the contract by March 10, 1996, the end of the 30-day period? The records show that he did not. Instead, he first sought and obtained the recommendation of the PBAC, which recommendation came about on April 12, 1996, *or a month after the accrual to API of the right to be awarded the contract*. Equally noteworthy was that, despite API's proposal being uncontested and the contract could have already been

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[46] *Rollo*, p. 152.

awarded to API for that reason, the petitioner still first secured the *express authorization* of the SB for him to enter into a MOA with API. He awarded the contract only on September 12, 1996, *five long months after the PBAC had made its recommendation on the matter.*

Moreover, the petitioner himself did not initiate dealings with API. That was done by the SB itself. The SB got him to be interested by showing to him the newspapers advertising the projects undertaken by API in the Provinces of Laguna and Batangas. It was the SB, not Alvarez, that invited API (represented by Garcia) to attend one of its sessions for the purpose of having API share with the SB its knowledge on the proposed project to be pursued under the BOT Law.[47]

On the other hand, the petitioner deserved credit for two things that indicated he did not extend any unwarranted benefits to API in connection with the project. The first was that he required API to pay to the Municipality the substantial sum of ₱500,000.00 as a relocation or disturbance fee to compensate for the demolition of the already-condemned structures standing on the project site. There was no question about the structures being already *without economic value* to the Municipality *after they had been declared as a nuisance and duly condemned for demolition*. The other was that he prosecuted API by bringing a civil action for rescission and damages when API defaulted on its contractual obligation.

Section 3(*e*) of Republic Act No. 3019 requires that partiality must be manifest. But the petitioner's actuations could not be categorized as manifestly partial. His *minimal* participation in the transaction could not be characterized by bias. His seeking the intervention of both the SB and the PBAC before taking action in favor of API belied any partiality towards API. He opted to share with the members of the SB and the PBAC the responsibility for making any decision on the project. All these showed that

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[47] Id. at 63.

he himself sought and put in place stumbling blocks that did not at all make it easy and simple for API to get the project.

In the Notice of Award, the petitioner directed API to submit its performance security, proof of sufficient equity, and ICC clearance of the contract on a no-objection basis. But the requirements were not submitted. The reason for this was that API's counsel, Atty. Lydia Y. Marciano, insisted that such requirements did not apply because the project did not involve any government undertaking. Apparently, the petitioner relied on Atty. Marciano's representation.

Even assuming that the representations of API's counsel were erroneous, the petitioner's reliance upon them was justifiable under the circumstances. Firstly, he was only a layman as compared to Atty. Marciano who was presumed to be possessed of a satisfactory knowledge of the pertinent law. Secondly, he knew that the Municipality would not be releasing any funds from its coffers intended for the project. I am sure that the impression left by Atty. Marciano's representations was that there was nothing to lose on the part of the Municipality should API fail to perform its obligations. And, thirdly, both the SB and the PBAC previously found API to be qualified for the project. In addition, there were the news reports indicating API's capacity to undertake the BOT project.

Anent negligence, any omissions that the petitioner committed along the way were due only to either mere inadvertence, or simple over-eagerness to proceed with a worthwhile project, or placing too much confidence in the declarations of subordinates and Atty. Marciano. **I submit that the omissions would amount, at worst, only to gross negligence, which is want or absence of reasonable care and skill.**

Section 3(*e*) of Republic Act No. 3019 required that the gross negligence must also be inexcusable. In other words, the gross negligence

should have no excuse. But that was not so herein, for, according to *Sistoza*,[48] *gross inexcusable negligence –*

> xxx does not signify mere omission of duties nor plainly the exercise of less than the standard degree of prudence. Rather, it refers to negligence characterized by the want of even the slightest care, acting or omitting to act in a situation where there is a duty to act, not inadvertently but willfully and intentionally, **with conscious indifference to consequences insofar as other persons may be affected**. It entails the omission of care that even inattentive and thoughtless men never fail to take on their own property, and **in cases involving public officials it takes place only when breach of duty is flagrant and devious**.[49]

In the same case of *Sistoza*, the Court took the occasion to lengthily discuss why a prosecution for Section 3(*e*) of Republic Act No. 3019 did not lie against Siztoza, *viz:*

> Clearly, the issue of petitioner Sistoza's criminal liability does not depend solely upon the allegedly scandalous irregularity of the bidding procedure for which prosecution may perhaps be proper. For even if it were true and proved beyond reasonable doubt that the bidding had been rigged, an issue that we do not confront and decide in the instant case, this pronouncement alone does not automatically result in finding the act of petitioner similarly culpable. **It is presumed that he acted in good faith in relying upon the documents he signed and thereafter endorsed**. **To establish a *prima facie* case against petitioner for violation of Sec. 3, par. (e), *RA 3019,* the prosecution must show not only the defects in the bidding procedure, xxx but also the alleged evident bad faith, gross inexcusable negligence or manifest partiality of petitioner** in affixing his signature on the purchase order and repeatedly endorsing the award earlier made by his subordinates despite his knowledge that the winning bidder did not offer the lowest price. **Absent a well-grounded and reasonable belief that petitioner perpetrated these acts in the criminal manner he is accused of, there is no basis for declaring the existence of probable cause.**
>
> As defined above, the acts charged against petitioner do not amount to manifest partiality, evident bad faith nor gross inexcusable negligence which should otherwise merit a prosecution for violation of Sec. 3, par. (e), *RA 3019*. It is not disputed that petitioner relied upon supporting documents apparently dependable as well as certifications of regularity made by responsible public officers of three (3) office divisions of the Bureau of Corrections before affixing his signature on the purchase order. xxx

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[48] G.R. No. 144784, September 3, 2002, 388 SCRA 307, 326.

[49] Id., citing *De la Victoria v. Mongaya*, A.M. No. P-00-1436, February 19, 2001, 352 SCRA 12, 20.

The fact that petitioner had knowledge of the status of Elias General Merchandising as being only the second lowest bidder does not *ipso facto* characterize petitioner's act of reliance as recklessly imprudent without which the crime could not have been accomplished. Albeit misplaced, reliance in good faith by a head of office on a subordinate upon whom the primary responsibility rests negates an imputation of conspiracy by gross inexcusable negligence to commit graft and corruption. As things stand, petitioner is presumed to have acted honestly and sincerely when he depended upon responsible assurances that everything was aboveboard xxx

Verily, even if petitioner erred in his assessment of the extrinsic and intrinsic validity of the documents presented to him for endorsement, his act is all the same imbued with good faith because the otherwise faulty reliance upon his subordinates, who were primarily in charge of the task, falls within parameters of tolerable judgment and permissible margins of error. Stated differently, granting that there were flaws in the bidding procedures, xxx there was no cause for petitioner Sistoza to complain nor dispute the choice nor even investigate further since neither the defects in the process nor the unfairness or injustice in the actions of his subalterns are definite, certain, patent and palpable from a perusal of the supporting documents. xxx "[w]hen x x x we speak of the law as settled, though, no matter how great the apparent settlement, the possibility of error in the prediction is always present." Given that the acts herein charged failed to demonstrate a well-grounded belief that petitioner had *prima facie* foreknowledge of irregularity in the selection of the winning bid other than the alleged fact that such bid was not the lowest, we cannot conclude that he was involved in any conspiracy to rig the bidding in favor of Elias General Merchandising.

The instant case brings to the fore the importance of clearly differentiating between acts simply negligent and deeds grossly and inexcusably negligent punishable under Sec. 3, par. (e), of the *Anti-Graft and Corrupt Practices Act*. While we do not excuse petitioner's manner of reviewing the award of the supply of tomato paste in favor of Elias General Merchandising, whereby he cursorily perused the purchase order and readily affixed his signature upon it, since he could have checked the supporting documents more lengthily, it is our considered opinion that his actions were not of such nature and degree as to be considered brazen, flagrant and palpable to merit a criminal prosecution for violation of Sec. 3, par. (e), of *RA 3019*. To paraphrase *Magsuci v. Sandiganbayan*, petitioner might have indeed been lax and administratively remiss in placing too much reliance on the official documents and assessments of his subordinates, but **for conspiracy of silence and inaction to exist it is essential that there must be patent and conscious criminal design, not merely inadvertence, under circumstances that would have pricked curiosity and prompted inquiries into the transaction because of obvious and definite defects in its execution and substance.** To stress, there were no such patent and established flaws in the award made to Elias General Merchandising that would have made his silence tantamount to tacit approval of the irregularity. (Emphases supplied)

IV.b.
Dearth of evidence to prove actual injury to any party or to the Government

My next submission is that the finding of the Sandiganbayan that the Municipality of Muñoz suffered undue injury from the non-performance of the contractual obligations of API was speculative and unwarranted.

The injury that Section 3(*e*) of Republic Act No. 3019 contemplates is **actual damage** as the term is understood under the *Civil Code*. In *Llorente, Jr. v. Sandiganbayan*,[50] the Court made this concept of undue injury very clear, saying:

> Unlike in actions for torts, undue injury in Sec. 3 (e) cannot be presumed even after a wrong or a violation of right has been established. Its existence must be proven as one of the elements of the crime. In fact, the causing of undue injury, or the giving of any unwarranted benefits, advantage or preference through manifest partiality, evident bad faith, or gross inexcusable negligence constitutes the very act punished under this section. **Thus, it is required that the undue injury be specified, quantified and proven to the point of moral certainty**.
>
> **In jurisprudence, "undue injury" is consistently interpreted as "actual damage." *Undue* has been defined as "more than necessary, not proper, [or] illegal;" and *injury* as "any wrong or damage done to another, either in his person, rights, reputation or property[;] [that is, the] invasion of any legally protected interest of another." Actual damage, in the context of these definitions, is akin to that in civil law.**
>
> **In turn, actual or compensatory damages of a person is defined by Art. 2199, *Civil Code*, as "such pecuniary loss suffered by him as he has duly proved." xxx**
>
> **Fundamental in the law on damages is that one injured by a breach of contract, or by a wrongful or negligent act or omission shall have a fair and just compensation commensurate to the loss sustained as a consequence of the defendant's act. Actual pecuniary compensation is awarded as a general rule, except where the circumstances warrant the allowance of other kinds of damages. Actual damages are primarily intended to simply make good or replace the loss caused by the wrong.**
>
> **Furthermore, damages must not only be capable of proof, but must actually be proven with a reasonable degree of certainty. They cannot be based on flimsy and non-substantial evidence or upon**

[50] G.R. No. 122166, March 11, 1998, 287 SCRA 382, 399-400.

speculation, conjecture or guesswork. They cannot include speculative damages which are too remote to be included in an accurate estimate of the loss or injury.

In its decision, the Sandiganbayan pertinently held:

As a defense, accused claims that there was no undue injury in this case. He said that there was no wastage considering that the demolished buildings were already condemned. The demolition will give way to a dreamed edifice. Disturbance compensation was advance by API to the municipality.

This Court finds these defenses bereft of merit. There is no doubt that the Government suffered actual damage due to the acts of the Accused. The damage suffered is visibly demonstrable. The alleged prejudice and damage to the municipal government has been proven by the prosecution with moral certainty. His acts unmistakably resulted in the Government's unlawful loss of several of its buildings or offices. The municipal government likewise deployed its resources including equipments, personnel and financial outlay for fuel and repairs in the demolition of the buildings. Had accused been unfaltering in performing his duties under the law, the government would have not suffered such loss and undue injury and it could have been avoided and prevented early on. Had accused followed the BOT law, API would have been required to post a performance security to guarantee its faithful performance of the obligations under the contract. When API failed to complete the work within the construction period prescribed, the performance security would have been forfeited to answer for any liquidated damages due to the Municipality of Muñoz. At the very least, the municipality is entitled to two percent (2%) of the project cost of Two Hundred Forty Million Pesos (Php 240,000,000.00) or an equivalent of Four Million Eight Hundred Thousand Pesos (Php 4,800,000.00).[51]

xxxx

ACCORDINGLY, accused **Efren L. Alvarez** is found guilty **beyond reasonable doubt** for violation of Section 3 (e) of Republic Act No. 3019 and is sentenced to suffer in prison the penalty of **6 years and 1 month to 10 years**. He also has to suffer perpetual disqualification from holding any public office and to indemnify the City Government of Muñoz (now Science), Nueva Ecija the amount of Four Million Eight Hundred Thousand Pesos (Php 4,800,000.00) less the Five Hundred Thousand Pesos (Php 500,000.00) API earlier paid the municipality as damages.

Costs against the accused.

SO ORDERED.[52]

The Decision of June 29, 2011 upheld the Sandiganbayan, as follows:

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[51] *Rollo*, pp. 80-81.
[52] Id. at 84.

As to the propriety of damages awarded by the Sandiganbayan, we find that the same is proper and justified. The term "undue injury" in the context of Section 3(e) of the Anti-Graft and Corrupt Practices Act punishing the act of "causing undue injury to any party," has a meaning akin to that civil law concept of "actual damage." Actual damage, in the context of these definitions, is akin to that in civil law.

Article 2199 of the Civil Code provides that *except as provided by law or by stipulation,* one is entitled to an adequate compensation only for such pecuniary loss suffered by a party as he has duly proved. Liquidated damages, on the other hand, are those agreed upon by the parties to a contract, to be paid in case of a breach thereof.

For approved BOT contracts, it is mandatory that a performance security be posted by the contractor/proponent in favor of the LGU in the form of cash, manager's check, cashier's check, irrevocable letter of credit or bank draft in the minimum amount of 2% of the total project cost. In case the default occurred during the project construction stage, the LGU shall likewise forfeit the performance security of the erring project proponent/contractor. The IRR thus provides:

> SEC. 12.13. *Liquidated Damages*. – Where the project proponent of a project fails to satisfactorily complete the work within the construction period prescribed in the contract, including any extension or grace period duly granted, and is thereby in default under the contract, the project proponent shall pay the Agency/LGU concerned liquidated damages, as may be agreed upon under the contract by the parties. The parties shall agree on the amount and schedule of payment of the liquidated damages. The performance security may be forfeited to answer for any liquidated damages due to the Agency/LGU. The amount of liquidated damages due for every calendar day of delay will be determined by the Agency/LGU. In no case however shall the delay exceed twenty percent (20%) of the approved construction time stipulated in the contract plus any time extension duly granted. In such an event the Agency/LGU concerned shall rescind the contract, forfeit the proponent's performance security and proceed with the procedures prescribed under Section 12.19.b.

Had the requirement of performance security been complied with, there is no dispute that the Municipality of Muñoz would have been entitled to the forfeiture of performance security when API defaulted on its obligation to execute the construction contract, at the very least in an amount equivalent to 2% of the total project cost. Hence, said LGU is entitled to such damages which the law mandates to be incorporated in the BOT contract, the parties being at liberty only to stipulate the extent and amount thereof. To rule otherwise would mean a condonation of blatant disregard and violation of the provisions of the BOT law and its implementing rules and regulations which are designed to protect the public interest in transactions between government and private business entities. While petitioner claims to have entered into a compromise agreement as authorized by the SB and approved by the trial court, no evidence of such judicial compromise was submitted before the Sandiganbayan.

> WHEREFORE, the petition is DENIED. The Decision dated November 16, 2009 and Resolution dated June 9, 2010 of the Sandiganbayan in Criminal Case No. SB-06-CRM-0389 are AFFIRMED.
>
> With costs against the petitioner.[53]

I observe that the Sandiganbayan rendered no factual finding of any actual damage suffered by the Municipality. What the decision contained on the requirement of actual damage were mere *conclusions of both fact and law*. But such conclusions did not satisfactorily meet the standard set in *Llorente, Jr.* to the effect that:

> **xxx damages must not only be capable of proof, but must actually be proven with a reasonable degree of certainty. They cannot be based on flimsy and non-substantial evidence or upon speculation, conjecture or guesswork. They cannot include speculative damages which are too remote to be included in an accurate estimate of the loss or injury.[54]**

Speculative damages are too remote to be included in an accurate estimate of damages.[55] In determining actual damages, the Court cannot rely on speculation, conjecture or guesswork as to the amount. Without the actual proof of loss, the award of actual damages becomes erroneous.[56] To be recoverable, actual damages must not only be capable of proof, but must actually be proved with reasonable degree of certainty. The Court cannot simply rely on speculation, conjecture, or guesswork in determining the amount of damages. Without any factual basis, it cannot be granted.[57]

It is true that the petitioner should have required API to post a performance bond of ₱4,800,000.00, which bond would have been forfeited in favor of the Municipality upon API's default. **But the failure to post the bond could not be the proof of actual injury because its face amount did not *per se* establish the actual loss of the Municipality.** For one, would

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53 Id. at 318-320.
54 *Supra* at Note 50, p. 400.
55 *Coca Cola Bottlers, Phils., Inc. v. Roque*, G.R. No. 118985. June 14, 1999, 308 SCRA 215, 223.
56 *Lucas v. Royo*, G.R. No. 136185, October 30, 2000, 344 SCRA 481, 489.
57 *Magdala Multipurpose & Livelihood Cooperative v. Kilusang Manggagawa Ng Lgs, Magdala Multipurpose & Livelihood Corperative (KMLMS)*, G.R. Nos. 191138-39, October 19, 2011.

undue injury still be deemed established had the bond been posted but the awarding of the contract had nonetheless suffered from other omissions? In that instance, if the Sandiganbayan's ratiocination against the petitioner was sustained, a prosecution for violation of Section 3(*e*) committed by causing undue injury to any party or the Government would be futile because the element of undue injury could then be difficult to prove.

At most, therefore, the failure of API to post the bond would subject the petitioner to some administrative liability for non-compliance with certain requirements prescribed by other laws in relation to procurement, but not criminal liability under Section 3(*e*).

Even worse was to have the petitioner be liable for the ₱4,800,000.00 performance bond. The Sandiganbayan apparently did not appreciate the fact that the petitioner, upon the express authority granted by the SB, and API entered into a compromise agreement that finally settled the issues between them and terminated the civil suit brought by the Municipality against API. As such, the Municipality became barred from asserting undue injury under the principle of *res judicata,*[58] and could no longer recover *any further* from API. A compromise is a contract whereby the parties, by making reciprocal concessions, *avoid a litigation or put an end to one already commenced*.[59] The entering into the compromise agreement served the public policy announced in the *Civil Code* for the courts in civil actions *to endeavor to persuade the litigants in a civil case to agree upon some fair compromise*.[60]

In truth, the Municipality did not lose anything of value at all. API paid ₱500,000.00 as reimbursement for the value of the condemned properties demolished to give way to the Wag-Wag Shopping Mall

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[58] The *Civil Code* provides:

Article 2037. A compromise has upon the parties the effect and authority of *res judicata*; but there shall be no execution except in compliance with a judicial compromise. (1816)

[59] Article 2028, *Civil Code*.

[60] Article 2029. The court shall endeavor to persuade the litigants in a civil case to agree upon some fair compromise. (n)

project. Hence, for the Municipality to be still paid the further amount of ₱4,800,000.00, less ₱500,000.00, would be unjust enrichment.

V.
Lack of evidence to prove the giving of unwarranted benefits

There was no factual basis for the Sandiganbayan to find that the petitioner gave unwarranted benefits to API. The fact is that the petitioner sought better offers from the public, as borne out by his causing the publication of the Invitation for BOT Project. It was further shown that he signed the MOA with API only after it was clear that no other proposals were presented for the Municipality to consider, and that the signing occurred on September 12, 1996, five long months after the PBAC had made its recommendation on the matter. The regularity of the signing was buttressed by the authority given to him by the SB.

Did API derive any benefits from the project?

Before giving the answer, I remind that in a BOT scheme, the proponent undertakes to build and operate the project, and to transfer the project to the Government after a certain period of time without need of payment to the proponent. The scheme benefits the proponent only after the finished project starts to operate, and during the operation the proponent earns and recoups its investments. Senator Tatad explained during the Senate deliberations on Republic Act No. 7718 how a project proponent would derive benefit or advantage from the BOT scheme, to wit:

> Under the build-and-transfer scheme, a project proponent – that is the new term used here – will undertake the construction of a project, raising its own financing, and upon completion turns over the project to a government agency or to a local government unit which is the party to the contract, according to an agreed schedule of payments.
>
> In the build-operate-transfer scheme, someone **builds a facility, operates the facility, and then at the end of a given period of time, say 25 years,**

not more than 50 years, the facility is transferred to the government. It does not cost the government anything.[61]

Yet, API did not get any benefit from the project because it did not get to finish building the Wag-Wag Shopping Mall, let alone to operate it. Rather to the contrary, API was even compelled to shell out ₱500,000.00 to the Municipality for the demolition of the dilapidated buildings.

The word *unwarranted* means lacking adequate or official support; unjustified; unauthorized or without justification or adequate reason. In that regard, it is significant that the SB and the PBAC gave its official support to the project. *Advantage* means a more favorable or improved position or condition; benefit, profit or gain of any kind; benefit from some course of action. *Preference* signifies priority or higher evaluation or desirability; choice or estimation above another.[62]

WHEREFORE, I **VOTE** to grant the motion for reconsideration of the petitioner and to vacate his conviction on the ground of failure of the State to prove his guilt beyond reasonable doubt.

LUCAS P. BERSAMIN
Associate Justice

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[61] Records of the Senate, 2nd Regular Session 1993-1994, Vol. III, Nos. 40-52, Interpellation of Sen. Tatad, p. 471.

[62] *Sison v. People*, G.R. Nos. 170339, 170398-403, March 9, 2010, 614 SCRA 670.