

Republic of the Philippines
SUPREME COURT
Manila

**INITIATIVES FOR DEVELOPMENT
AND EMPOWERMENT THROUGH
ALTERNATIVE LEGAL SERVICES,
INC. (IDEALS, INC.), ET AL.,**
Petitioners,

- versus -

G.R. No. 192088

**POWER SECTOR ASSETS AND
LIABILITIES MANAGEMENT,
CORP., ET AL.**
Respondents.

X-----X

MOTION FOR PARTIAL RECONSIDERATION

PETITIONERS, through counsel, most respectfully state –

1. On 23 October 2012, Petitioners received copy of the Decision of this Honorable Court, the dispositive portion of which states:

WHEREFORE, the present petition for certiorari and prohibition with prayer for injunctive relief/s is **PARTLY GRANTED**.

The following **DISPOSITIONS** are in order:

1) The bidding conducted and the Notice of Award issued by PSALM in favor of the winning bidder, KOREA WATER RESOURCES CORPORATION (K-WATER), are declared **VALID** and **LEGAL**;

2) PSALM is directed to **FURNISH** the petitioners with copies of all documents and records in its files pertaining to K-Water;

3) Section 6 (a), Rule 23, IRR of EPIRA, is hereby declared as merely **DIRECTORY**, and not an absolute condition in all cases where NPC-owned hydropower generation facilities are privatized;

4) NPC shall **CONTINUE** to be the **HOLDER** of Water Permit No. 6512 issued by the National Water Resources Board. NPC shall authorize K-Water to utilize the waters in the Angat Dam for hydropower generation, subject to NWRB's rules and regulations governing water right and usage. The Asset Purchase Agreement and Operation Management Agreement between NPC/PSALM and K-Water are thus amended accordingly.

Except for the requirement of securing a water permit, K-Water remains **BOUND** by its undertakings and warranties under the APA and O & M Agreement;

5) NPC shall be a **CO-PARTY** with K-Water in the Water Protocol Agreement with MWSS and NIA, and not merely as a conforming authority or agency; and

6) The *Status Quo Ante* Order issued by this Court on May 24, 2010 is hereby **LIFTED** and **SET ASIDE**.

SO ORDERED.

2. Petitioners have fifteen (15) days or until 7 November 2012 within which to file their motion for reconsideration; hence, the timeliness of the instant Motion for Partial Reconsideration.

3. Petitioners do not seek to reconsider the ruling of this Honorable Court on all the issues except the ruling on the legality and validity of the bidding conducted and the Notice of Award (NOA) issued by PSALM in favor of the winning bidder, KOREA WATER RESOURCES CORPORATION (K-WATER).

4. With all due respect, Petitioners most respectfully request this Honorable Court to take a second hard look on its decision regarding the

legality and validity of the bidding and the NOA issued by PSALM to K-Water in view of its grave constitutional implications. At the very core of the controversy is the correct interpretation and proper application of the nationality provision of Sec. 2, Art. XII of the 1987 Constitution.

5. Petitioners fear that, if traversed to its logical conclusion, the decision effectively allows wholly foreign-owned corporations to engage in the exploration, development and utilization of State-owned water and other natural resources notwithstanding the clear nationality restrictions prescribed in Sec. 2, Art. XII of the fundamental law of the land. Thus, no “charter change” would be necessary to allow foreigners and foreign-owned corporations to explore, develop, utilize – and even exploit – the State’s natural resources, including water. All they have to do is follow the decision this Honorable Court in the case at bar.

6. Thus, petitioners most respectfully beg the indulgence of this Honorable Court to revisit the basis for the unfortunate ruling declaring the bidding process and issuance of NOA to K-Water as legal and valid. Petitioners most humbly pray this Honorable Court to reverse and set aside the said ruling for being contrary to the Constitution and the law.

**THE HONORABLE COURT’S
RELIANCE ON R.A. 7718
(AMENDED BOT LAW) IN
UPHOLDING THE LEGALITY AND
VALIDITY OF THE BIDDING
PROCESS AND ISSUANCE OF
NOA TO K-WATER IS MISPLACED**

7. In its decision, this Honorable Court upheld the legality and validity of the bidding process and the NOA to K-Water, a 100%-owned foreign corporation. The Court stated that “[f]oreign ownership of a hydropower facility is not prohibited under existing laws.”¹ The Court cited as legal basis Republic Act No. 7718 or the Amended Build-Operate-Transfer (Amended BOT) Law:

“xxx The construction, rehabilitation and development of hydropower plants are among those infrastructure projects which even wholly-owned foreign corporations are allowed to undertake under the Amended Build-Operate-Transfer (Amended BOT) Law (R.A. No. 7718). xxx”²

With all due respect, the reliance of this Honorable Court on the Amended BOT Law is misplaced. While it is true that under the Amended BOT Law, wholly-owned foreign corporations are allowed to undertake construction, rehabilitation and development of hydropower plants, the glaring fact ignored by the decision that the instant case had nothing to do with the Amended BOT Law. The privatization of Angat Hydro-Electrical Power Plant (AHEPP) was made pursuant to the EPIRA and not under the Amended BOT Law.

8. Furthermore, it bears stressing that under a BOT scheme, there is no danger of alienating State-owned natural resources or property because the ownership of resources and property remains with the

¹ Decision, p. 38.

² *Ibid.*

State. Finally, under BOT, the operation, management and use of the resources and property revert to the government after the period fixed in the BOT agreement. Thus, this Honorable Court's reliance on the Amended BOT Law in upholding the legality and validity of the bidding process and the issuance of NOA is misplaced considering that the privatization of AHEPP is under a different legal regime and not under the BOT scheme.

**THE HONORABLE COURT ERRED
IN ITS FINDING THAT THE
PROCESS OF POWER
GENERATION DOES NOT
AMOUNT TO UTILIZATION OF
NATURAL RESOURCES**

9. In its analysis of the nationality issue raised in the Petition, the Honorable Court stated –

With respect to foreign investors, the nationality issue had been framed in terms of the character or nature of the power generation process itself, *i.e.*, whether the activity amounts to utilization of natural resources within the meaning of Sec. 2, Art. XII of the Constitution. If so, then foreign companies cannot engage in hydropower generation business; but if not, then government may legally allow even foreign-owned companies to operate hydropower facilities.³

10. To the mind of the Court, the power generation process does not amount to utilization of natural resources within the meaning of Sec. 2, Art. II of the Constitution; hence, allowed.

³ *Ibid.*, p. 39.

11. With all due respect, the distinction made by this Honorable Court is flawed. It flies in the face of reality that power generation cannot operate without water. Hence, in the power generation process, water – a natural resource specifically mentioned in Sec. 2, Art. 12 – is indispensable. The operation of the AHEPP cannot be separated from the Dam Complex from which it draws its source of power. It is unthinkable to operate AHEPP without water!

12. From the very admission of respondent PSALM –

“the non-use of the Angat HEPP has not been considered an efficient use of the water in the Angat Dam. Considering the downstream flow of the water from the Angat Dam, considerations of efficiency and utility prompted the construction of the Angat HEPP in order that the same water from the Angat Dam may be utilized for power generation, domestic water supply, and irrigation all at the same time.”

Very clearly, to maximize the use of the water from Angat Dam, the complex – the Reservoir, Dam, and HEPP - must be *operated* as an indivisible whole. In the case at bar, the transfer of ownership of AHEPP to K-Water unmistakably violates Article XII, Section 2 of the Philippine Constitution which states that the exploration, development, and utilization of natural resources – including waters and all forces of potential energy - shall be under the full control and supervision of the State, and that such activities must be undertaken with Filipino citizens or corporations or associations with at least 60% Filipino equity. To operate AHEPP, K-Water necessarily needs to utilize the waters from the Angat Dam because it is the energy generated by the downstream of

water that will be used for power generation.

**THE HONORABLE COURT ERRED
IN NOT HOLDING THAT
VIOLATION OF PETITIONERS'
RIGHT TO INFORMATION DOES
NOT INVALIDATE THE BIDDING
PROCESS AND THE ISSUANCE
OF NOTICE OF AWARD TO K-
WATER**

13. The Honorable Court correctly ruled that Petitioners have the right to information. In fact, the Decision found respondent PSALM's compliance with the letter dated May 14, 2010 as insufficient.⁴ However, instead of invalidating the bidding process and the eventual issuance of NOA to K-Water, the Honorable Court merely directed PSALM to allow Petitioners access to the requested documents and records pertaining to K-Water.

14. In upholding Petitioners' right to information, this Honorable Court cited, *Chavez v. Public Estates Authority* (384 SCRA 152). In the said case, the Joint Venture Agreement entered into by PEA and Amari Coastal Bay Development Corporation was declared **NULL AND VOID**. Considering that the instant case is on all force with *Chavez*, it is only logical that the same ruling be applied in the case at bar – declaring the bidding process and the issuance of NOA to K-Water by respondent PSALM.

⁴ *Ibid.*, p. 24.

WHEREFORE, premises considered, Petitioners most respectfully pray that the Decision dated 9 October 2012 of this Honorable Court be **PARTIALLY RECONSIDERED**, declaring as **ILLEGAL, INVALID** and **NULL AND VOID** the bidding process and issuance of Notice of Award to K-Water by respondent PSALM.

Such other reliefs just and equitable under the premises are likewise prayed for.

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EXPLANATION

This Motion for Partial Reconsideration was served by registered mail unto the parties in view of the constraints of distance and lack of messengerial personnel to effect personal service thereof.

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