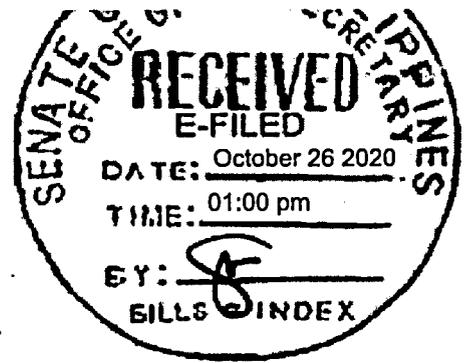


EIGHTEENTH CONGRESS OF THE)
REPUBLIC OF THE PHILIPPINES)
Second Regular Session)



SENATE
P.S. Res. No. 555

Introduced by SENATOR LEILA M. DE LIMA

RESOLUTION
DIRECTING THE APPROPRIATE SENATE COMMITTEE TO CONDUCT AN INQUIRY, IN AID OF LEGISLATION, ON THE REPORT MADE BY THE COMMISSION ON AUDIT (COA) ON THE IRREGULARITIES THAT MARRIED THE JOINT VENTURE AGREEMENT (JVA) ENTERED INTO BY THE BASES CONVERSION AND DEVELOPMENT AUTHORITY (BCDA) WITH MTD CAPITAL BERHAD FOR THE CONSTRUCTION OF THE ₱8.51-B SPORTS FACILITIES PROJECT FOR THE SEA GAMES, AND WHICH DISADVANTAGEOUSLY ENTAILED ADDITIONAL GOVERNMENT SPENDING

1 WHEREAS, Article II, Section 27 of the Constitution mandates that “[t]he
2 State shall maintain honesty and integrity in the public service and take positive
3 effective measures against graft and corruption”;

4 WHEREAS, Article II, Section 28 of the same declares, in part, that “[t]he
5 State adopts and implements a policy of full public disclosure of all its transactions
6 involving public interest;

7 WHEREAS, Article III, Section 7 of the same enunciates the right of citizens to
8 have access to official records, and to documents and papers pertaining to official
9 acts, transactions, or decisions”, and states that “[t]he right of the people to
10 information on matters of public concern shall be recognized”;

11 WHEREAS, on 30 January 2018, the Office of the Government Corporate
12 Counsel (OGCC) in its Contract Review No. 068, commented that serious

1 consideration should be given on the modality by which the Sports Facilities project
2 for the 2019 Southeast Asian (SEA) Games will be developed and funded;¹

3 WHEREAS, on 22 February 2018, the Bases Conversion and Development
4 Authority (BCDA) entered into a Joint Venture Agreement (JVA) with the MTD
5 Capital Berhad for the development of the National Government Administrative
6 Center (NGAC) Project in New Clark City. Phase 1 of the 200-hectare NGAC
7 “involves the development of back-up offices of various government agencies to
8 ensure continuous business operation and services for the people in case of disaster
9 or natural calamities. Out of the 200-hectare land, 60 hectares shall be developed
10 through the Joint Venture...”;²

11 WHEREAS, the agreement indicated that Phase 1A of the development
12 includes the sports facilities consisting of the Athletic Stadium (20,000 seating
13 capacity), an Aquatic Center (2,000 seating capacity) and Athlete’s Village. These
14 facilities were later used as venues for the 2019 SEA Games hosted by the Philippines
15 from November 30 to December 11, 2019;³

16 WHEREAS, the COA reported that provisions in the JVA between the BCDA
17 and MTD Capital Berhad involving expenditure of public funds for the construction
18 of the Sports Facilities under Phase 1A of the project, was executed without prior
19 appropriation of funds. State Auditors found that the execution thereof was contrary
20 to Section 86 of Presidential Decree No. 1445, otherwise known as the “Government
21 Auditing Code of the Philippines”, which required a certificate showing
22 appropriation to meet contract. Despite such requirement, appropriation for the
23 purchase of the sports facilities was actually “only made in the 2019 General
24 Appropriations Act which was signed on April 15, 2019”;⁴

25 WHEREAS, the COA also found that while the BCDA alleged the legality of the
26 modality by which the project was executed, it relied on Opinion No. 182 of the

¹ Commission on Audit. Annual Audit Report on the Bases Conversion and Development Authority for the Years Ended December 31, 2019 and 2018 - Part 2: Observations and Recommendations. Retrieved 17 October 2020, from: <https://www.coa.gov.ph/index.php/gov-t-owned-and-or-controlled-corp-goccs/2019/category/8434-bases-conversion-and-development-authority>

² Commission on Audit. Annual Audit Report on the Bases Conversion and Development Authority for the Years Ended December 31, 2019 and 2018 - Part 1: Notes to Financial Statements. Retrieved 17 October 2020, from: <https://www.coa.gov.ph/index.php/gov-t-owned-and-or-controlled-corp-goccs/2019/category/8434-bases-conversion-and-development-authority>

³ *Ibid.*

⁴ *Supra* Note 1.

1 OGCC. This legal opinion relied upon by the BCDA stated that the provisions of the
2 JVA and the legal framework of the project are compliant with existing laws, rules
3 and regulations. Such favorable legal opinion was, however, issued only on 02
4 October 2018 or eight (8) months after the JVA took effect;⁵

5 WHEREAS, the COA report revealed that BCDA and MTD Capital Berhad
6 initially only agreed on a project that comprised government buildings, commercial
7 centers and residential housing with a total cost of ₱4.185 billion. However, they
8 eventually agreed to incorporate in the project the sports facilities with the project
9 cost of ₱8.51 billion. This prompted COA to observe that, “there is no parallelism
10 between the two PPP frameworks, the differences between the two approaches make
11 them impossible to combine in a single project, such as NGAC”;⁶

12 WHEREAS, the COA also noted that the Sports Facilities portion of the
13 project planned/conceptualized by BCDA which was negotiated into an unsolicited
14 proposal rather than through competitive bidding, gave MTD Capital Berhad an
15 “undue advantage.” The COA postulated that since the project did not follow the
16 process applicable for solicited projects, it negatively affected the competitiveness of
17 the bidding;⁷

18 WHEREAS, the BCDA, in its response to COA, asserted that there was no
19 undue advantage because the proposal still underwent the required rigorous
20 negotiation process. The COA, in its rejoinder, disagreed because “[a]s early as 2015,
21 MTD already approached BCDA regarding the proposal, and on August 16, 2017, the
22 same day the Philippine Olympic Committee (POC) confirmed that the country will
23 be hosting the 2019 SEA Games, BCDA received from MTD Capital Berhad an
24 unsolicited proposal for the construction, operation and development of the NGAC in
25 the NCC”;⁸

26 WHEREAS, in maintaining that competitiveness was compromised, COA
27 cited that while the ₱8.51-billion project was subjected to a Swiss challenge – a
28 process where third parties are invited to submit better cost bids – MTD Capital
29 Berhad “had more time to study BCDA’s proposed project.” The Minutes of the Board
30 meetings show there have been discussions between BCDA and MTD about the

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Id.*

⁸ *Id.*

1 sports facilities even before September 6, 2017, or more than two months before the
2 issuance of the Certification of Successful Negotiation on November 10, 2017, while
3 prospective bidders were only given 30 days to study the specifics of the project. In
4 addition thereto, MTD Capital Berhad was also given the right to outbid the better
5 offer by submitting the offer at least five percent less than the offer of the private
6 sector participant, the COA divulged in the same report;⁹

7 WHEREAS, the COA uncovered that had the project, which was financed by
8 public funds, been subjected to the more stringent requirements of Republic Act
9 (R.A.) No. 6957, otherwise known as "An Act An Act Authorizing the Financing,
10 Construction, Operation and Maintenance of Infrastructure Projects by the Private
11 Sector, and for Other Purposes", and if only BCDA did not incorporate the
12 construction of its sports facilities with the NGAC JV project, "the government will
13 not entail additional expenses by paying interest or construction cost";¹⁰

14 WHEREAS, as the State Auditors rightfully observed, the terms of the project
15 fall under R.A. No. 6957, which deals with build-operate-transfer agreements.
16 BCDA's failure then to comply therewith when it pursued the JVA prejudiced
17 government interest. Had the BCDA pursued the project through R.A. No. 9184,
18 otherwise known as the "Government Procurement Reform Act", and was not
19 incorporated in a joint venture wherein BCDA secured unencumbered advances from
20 the Joint Venture, then "the whole amount of financing cost could have been
21 avoided";¹¹

22 WHEREAS, rejecting the reasons given by the BCDA, the COA explained that
23 the government could have actually gained more from the NGAC project if the sports
24 facilities were not included in the joint venture agreement since MTD Berhad
25 proposed a 100% premium on the value of the land used in the joint venture project
26 which could have doubled BCDA's ownership and share in gains. "However, this was
27 not adopted in the joint venture agreement as there was no premium given on the
28 value of the said property", the COA found;¹²

29 WHEREAS, contrary to the claim of BCDA that it was able to significantly
30 reduce the total project cost because of the JVA, the report would show that it is not

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

1 even proper to compare the two project costs “since they have different scopes of
2 work developments.” In fact, the sports facilities, the COA commented, “was totally
3 different from what was built under NGAC JV project which is world-class and with
4 international standards.”¹³ Facts would reveal that the unsolicited proposal had a
5 total project cost of ₱121.785 billion where BCDA would contribute land valued at a
6 100-percent premium. However, after negotiation, the proposal was changed and
7 was focused on the construction of the sports facilities to be used in the 2019 SEA
8 Games that cost ₱8.510 billion;¹⁴

9 WHEREAS, the parties also stipulated that the advances made shall be paid by
10 the BCDA in five (5) equal annual installments of ₱2.2 billion starting within the 45
11 days of the later of (i) Project Completion, or (ii) the Required Completion Date.
12 However, the COA report disclosed another irregularity: that “BCDA and the
13 National Government (NG) instead of paying the advances in five equal annual
14 installments decided to pay the full amount of ₱9.544 billion to PSP, as the
15 Department of Budget and Management (DBM) approved and appropriated the
16 amount in the 2019 GAA”;¹⁵

17 WHEREAS; the BCDA insisted that it only exercised prudent business
18 decision-making when it decided to pay for the Sports Facilities in just two (2)
19 installments, instead of availing of the installment scheme. It defended such decision
20 with the claim that it was able to secure savings amounting to ₱1.911 billion;¹⁶

21 WHEREAS, notwithstanding the defense of BCDA that the choice of modality
22 or legal framework of the project is part of its business prerogative in pursuance of its
23 statutory mandate to develop and accelerate the sound and balanced conversion of
24 Clark military reservations and its extensions,¹⁷ its creation and existence under
25 special law does not exempt it from laws governing public infrastructure projects and
26 expenditure of public funds;

¹³ *Id.*

¹⁴ Gonzales, Catherine. (16 October 2020). *CCOA: Contractor given 'undue advantage' by BCDA in SEA Games contract*. Retrieved 18 October 2020, from <https://newsinfo.inquirer.net/1348626/coa-contractor-given-undue-advantage-by-bcda-in-sea-games-contract>

¹⁵ *Supra* Note 1.

¹⁶ *Ibid.*

¹⁷ Aurelio, Julie and Corrales, Nestor. (17 October 2020). *COA flags BCDA's P8-B New Clark City project*. Retrieved 18 October 2020, from <https://newsinfo.inquirer.net/1349011/coa-flags-bcdas-p8-b-new-clark-city-project>

1 WHEREAS, there is a need to make a strong warning to the BCDA, along with
2 other government agencies and GOCCs, against combining incompatible projects
3 that are governed by different laws that result in the wastage of public funds;

4 WHEREAS, a thorough investigation on the reasons that led the BCDA to
5 execute the JVA months prior to the issuance by the OGCC of a favorable opinion
6 regarding the JVA's legality, and without prior appropriation of funds as mandated
7 by the Government Auditing Code of the Philippines, must be made in order to
8 determine the validity of such act;

9 WHEREAS, it is incumbent upon the BCDA to justify the choice of developing
10 the Sports Facilities under the Joint Venture which is contrary to Contract Review No.
11 068 issued by the OGCC on 30 January 2018 which said that, it is, as a rule, "subject
12 to public bidding."¹⁸, and which eventually proved to have resulted in government
13 paying an additional cost of money;

14 WHEREAS, in upholding the right of the people to information on matters of
15 public concern, the BCDA must now give a full accounting and explain why it made
16 the government disadvantageously spend ₱9.539¹⁹ billion instead of ₱8.51 billion
17 when it incorporated the construction of sports facilities and athlete's village in the
18 JVA covering the construction of the NGAC. As held by the Supreme Court in *Chavez*
19 *v. PEA and Amari*,²⁰ the right of the people to information contemplates the
20 inclusion of negotiations that led to the consummation of the transaction. The BCDA
21 is thus obliged to disclose the factors and circumstances that surrounded the
22 negotiations that preceded the execution of the JVA now under scrutiny;

23 WHEREAS, as public accountability demands, the BCDA must also justify
24 why they opted to pay the joint venture within calendar year 2019, considering that,
25 as the COA stressed, MTD Capital Berhad "could have shared in the losses that might
26 be incurred from the project inasmuch as there was no proof of viability for the
27 sports facilities";²¹

¹⁸ Buan, Lian. (22 November 2019). *OGCC flagged non-bidding of BCDA's New Clark sports facilities*. Retrieved 18 October 2020, from <https://www.rappler.com/newsbreak/in-depth/office-government-corporate-counsel-non-bidding-bcda-new-clark-sports-facilities>

¹⁹ Panti, Llanesca. (15 October 2020) *COA: SEA Games venue made BCDA deal 'disadvantageous' at P12B*. Retrieved 18 October 2020, from <https://www.gmanetwork.com/news/news/nation/760076/coa-sea-games-venue-made-bcda-deal-disadvantageous-at-p12b/story/>

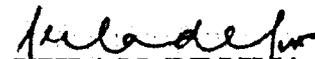
²⁰ G.R. No. 133250. (July 9, 2002)

²¹ *Supra* Note 1.

1 WHEREAS, a thorough probe is warranted in the billions-peso project in
2 order to understand the choices made by the BCDA that culminated in the deal which
3 not only failed to comply with laws, but likewise cost the government significant
4 public funds, considering that there are other arrangements that could promote
5 better transparency, competitiveness, equity, efficiency and economy for the
6 government infrastructure projects;

7 NOW, THEREFORE, BE IT RESOLVED BY THE SENATE, to direct the
8 appropriate Senate Committee to conduct an inquiry, in aid of legislation, on the
9 report made by the Commission on Audit (COA) on the irregularities that marred the
10 Joint Venture Agreement (JVA) entered into by the Bases Conversion and
11 Development Authority (BCDA) with MTD Capital Berhad for the construction of
12 ₱8.51-B Sports Facilities Project for the SEA Games, and which disadvantageously
13 entailed additional government spending.

Adopted,


HEILA M. DE LIMA