

# **POSITION PAPER ON HOUSE RESOLUTION NO. 654**

## **The Context of Privatization**

As far back as the administration of President Ferdinand E. Marcos, the need to divest government of properties which adversely affect their financial viability and liquidity was already acknowledged. On 04 February 1986, Presidential Decree No. 2030 was issued creating the Asset Disposition Trust, responsibility of which is "to administer the orderly disposition of assets transferred to and held by it pursuant to this Decree on terms and conditions deemed by it to be in the best interest of the National Government.

After the EDSA Revolution, on 08 December 1986, Proclamation No. 50 was issued as part of the structural reforms being instituted in the public sector to reduce the size of the corporate government sector by limiting government corporations to areas where private sector involvement is not feasible, or where intervention can favor disadvantaged sectors of society.

Under President Fidel V. Ramos' administration, Executive Order (EO) No. 37 series of 1992 was issued restating the privatization policy of the Government by encouraging government agencies and corporations to identify assets which may be disposed of to the private sector and activities which may be more efficiently, effectively and economically undertaken by the private sector, and that disposition of such assets/ activities may be undertaken through sale of physical assets, leasing of assets, management and maintenance contracts or build-operate-transfer (BOT) schemes.

President Joseph E. Estrada issued Executive Order No. 12 on 14 August 1998, and approved the Rules and Regulations implementing this EO on 13 January 1999, reaffirming the country's Privatization Program.

On 06 December 2000, prior to the expiration of COP and APT's term, President Estrada issued Executive Order No. 323, constituting an inter-agency Privatization Council (PC) and creating a Privatization and Management Office (PMO) under the Department of Finance for the continuing privatization of Government assets and corporations.

Under the administration of then President Gloria Macapagal Arroyo, privatization became a revenue-generation strategy.

The Aquino administration continued with the privatization program of previous administrations and established the Public Private Partnership (PPP) Center mandated to facilitate the privatization of state-owned assets.

In 2009, Republic Act No. 9593, otherwise known as the "Tourism Act of 2009", was passed. This law mandated the privatization of the properties of the Tourism Infrastructure and Enterprise Zone Authority (*formerly known as the Philippine Tourism Authority or PTA*) through sale or lease, the proceeds of which will be used to establish the Tourism Promotions Fund that will in turn finance the activities of the Tourism Promotions Board (TPB). This assets privatization is also in accordance with the national policy of revitalizing privatization in all government agencies.

The policy of privatization, therefore, is a national policy adopted by the Tourism Infrastructure Enterprise Zone Authority (TIEZA) to ensure that there are public funds available to support the much needed promotions and other priority projects of the Department of Tourism (DOT) and the Tourism Promotions Board.

## **Antecedent Facts**

Taking these into consideration, TIEZA embarked on the privatization of its assets by commissioning through public bidding the services of consultants to conduct the Highest and Best Use Study for the assets intended for privatization.

Based on the Highest and Best Use Study conducted over “Hilaga” or the property known before as “Paskuhan Village” in 2011 to 2012, it suggested that the highest and best use for the property is a mixed-use development consisting of a Business Process Outsourcing, a commercial center and a convention center that would necessitate an estimated investment cost of PhP. 6,738,000,000.00. Any major development similar to this would generate a multitude of jobs from the construction of structures to the actual operations. Without undermining the capacity of the Public Sector, it is reasonable to say that projects of this magnitude should be undertaken by the Private Sector that has the stability, expertise and resources to bring it to fruition.<sup>1</sup>

After the Best Use Study, TIEZA commissioned, through public bidding, consultancy services that will assist it in the formulation of procedures for privatization including tender documents, appraisal of assets for privatization by independent appraisers, marketing, and conduct of actual bidding. The winning bidder was the Consortium of Chadaro Holdings Corporation, Corporate Counsels Philippines Law Office, Jones Lang La Salle (Philippines), Inc., and San Diego Institute for Business Management and Economic Policies.

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<sup>1</sup>A copy of the Highest and Best Use Study of TIEZA assets is hereto attached as Annex “A” and made an integral part of this Position Paper

## **Issues**

On 28 February 2017, the Committee on Good Government and Public Accountability conducted a hearing on House Resolution No. 654, sponsored by Representative Aurelio “Dong” Gonzales, which is titled: *“Resolution to conduct an inquiry, in aid of legislation, into the circumstances surrounding the sale of Paskuhan Village in Pampanga by the Tourism Infrastructure and Enterprise Zone Authority (TIEZA) to SM Development Corporation (SMDC) reportedly under the former’s Asset Privatization Program, with the end in view of ascertaining the real ownership of the subject property amidst certain assertions to the contrary, as well as to determine whether correct procurement procedures were followed and whether the condition imposed by its former owner Jesus Lazatin has legal effect and to determine if the same was complied with or not”*.

There are two major issues raised in House Resolution No. 654, which concern the following:

1. circumstances that led to the ownership of Hilaga by then Philippine Tourism Authority, now Tourism Infrastructure and Enterprise Zone Authority; and
2. circumstances that led to the privatization through sale of Hilaga, including compliance with established procurement procedures.

## Factual and Legal Discussion

### 1. OWNERSHIP OF HILAGA AND NATURE OF THE PROPERTY: ACQUIRED THRU SALE, NOT DONATION

On 12 January 1989, pursuant to its mandate under Presidential Decree No. 564, Philippine Tourism Authority executed two separate Memoranda of Understanding with Jesus Lazatin for the purchase of parcels of land. For this purpose, PTA paid Jesus S. Lazatin the amount of One Hundred Thousand Pesos (PhP. 100,000.00) as earnest money.<sup>2</sup>

On 27 November 1989, two (2) Deeds of Absolute Sale were executed between the same parties over parcels of land containing an area of 50,000 square meters and 43,146 square meters for a consideration of Eighty Pesos (PhP.80.00) per square meter, the total amount of which was fully paid to Jesus Lazatin ("Vendor").<sup>3</sup>

On 30 April 30 1992, a Deed of Exchange was executed over Lot 3208-G-4 owned by PTA and Lot 3623-B owned by Jesus S. Lazatin. Subsequently, Transfer Certificates of Title Nos. 297231-R covering an area of 41,346 square meters and 3763223-R covering an area of 50,000 square meters were issued in favor of PTA on 30 March 1990 and 15 July 1994, respectively.<sup>4</sup>

**Hence, contrary to assertions in the aforementioned House Resolution, the subject parcels of land covering Paskuhan Village/Hilaga were acquired by PTA/TIEZA through Deeds of Absolute Sale for consideration and not through Donation by Jesus S. Lazatin.**

Moreover, there is no encumbrance, restriction, or lien annotated on the Transfer Certificates of Title issued in favor of PTA/TIEZA, which would preclude it from including the said property in its Asset Privatization Program.

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<sup>2</sup> Attached as Annex "B" is a copy of the Memorandum of Understanding

<sup>3</sup> Attached as Annex "C" and "C-1" are copies of the Deeds of Sale

<sup>4</sup> Attached as Annex "D" and "D-1" certified true copies of the Transfer of Titles

## **2. SALE OF HILAGA WITHIN THE MANDATE OF TIEZA**

The Philippine Tourism Authority is a government instrumentality that exercises both governmental and proprietary functions. In the case of **Association of Dedicated Employees of PTA (ADEPT) vs. Commission on Audit**<sup>5</sup>, the Supreme Court ruled that:

Government-owned and controlled corporations may perform governmental or proprietary functions or both, depending on the purpose for which they have been created. If the purpose is to obtain special corporate benefits or earn pecuniary profit, the function is proprietary. If it is in the interest of health, safety and for the advancement of public good and welfare, affecting the public in general, the function is governmental. Powers classified as proprietary are those intended for private advantage and benefit.

The PTA was established by Presidential Decree No. 189, as amended by Presidential Decree No. 564 (PD 564).

Its general purposes are:

1. to implement the policies and programs of the Department of Tourism (Department);
2. to develop tourist zones;
3. to assist private enterprises in undertaking tourism projects;
4. to operate and maintain tourist facilities;
5. to assure land availability for private investors in hotels and other tourist facilities;
6. to coordinate all tourism project plans and operations.

Its specific functions and powers are:

1. planning and development of tourism projects

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<sup>5</sup>G.R. No. 119597. September 11, 1998

- a. to assist the Department make a comprehensive survey of the physical and natural tourism resources of the Philippines; to establish the order of priority for development of said areas; to recommend to the President the proclamation of a tourist zone; and to define and fix the boundaries of the zone
  - b. to formulate a development plan for each zone
  - c. to submit to the President through the National Economic and Development Authority for review and approval all development plans before the same are enforced or implemented
  - d. to submit to the President an Annual Progress Report
  - e. to assist the Department to determine the additional capacity requirements for various tourist facilities and services; to prepare a ten-year Tourism Priorities Plan; to update annually the ten year Tourism Priorities Plan
  - f. to gather, collate and analyze statistical data and other pertinent information for the effective implementation of PD 564
2. Acquisition and disposition of lands and other assets for tourist zone purposes
- a. to acquire possession and ownership of all lands transferred to it from other government corporations and institutions and any land having tourism potential and earmarked in the Tourism Priorities Plans for intensive development into a tourist zone or as a part thereof, subject to the approval of the President
  - b. to acquire by purchase, by negotiation or by condemnation proceedings any private land within and without the tourist zones for any of the following reasons: (a) consolidation of lands for tourist zone development purposes, (b) prevention of

land speculation in areas declared as tourist zones, (c) acquisition of right of way to the zones, (d) protection of water shed areas and natural assets with tourism value, and (e) for any other purpose expressly authorized under PD 564

- c. for the purpose of providing land acquisition assistance to registered tourism enterprises, to sell, subdivide, resell, lease, sublease, rent out, or otherwise, to said registered tourism enterprises under sufficiently soft terms for use specifically in the development of hotels, recreational facilities, and other tourist services
- d. to develop and/or subdivide any land in its name or undertake condominium projects thereon, and sell subdivision lots or condominium units to private persons for investment purposes
- e. to take over or transfer to a registered tourism enterprise in accordance with law any lease on foreshore areas within a tourist zone or adjacent thereto, in cases said areas are not being utilized in accordance with the PTAs approved zone development plan and wherein the lessee concerned does not agree to conform accordingly
- f. to arrange for the reclamation of any land adjacent to or adjoining a tourist zone in coordination with appropriate government agencies

### 3. Infrastructure development for tourist zone purposes

- a. to contract, supervise and pay for infrastructure works and civil works within a tourist zone owned and operated by the PTA
- b. to coordinate with appropriate government agencies the development of infrastructure requirements supporting a tourist zone



- c. to take water from any public stream, river, creek, lake, spring, or waterfall and to alter, straighten, obstruct or increase the flow of water in streams

#### 4. Zone administration and control

- a. to formulate and implement zoning regulations
- b. to determine and regulate the enterprises to be established within a tourist zone
- c. to ensure, through the proper authorities concerned, the ecological preservation, maintenance and/or rehabilitation of the common and the public areas within a tourist zone and the environment thereof
- d. to identify and recommend to the President the preservation and/or restoration of national monuments or preserves; to arrange for the preservation and/or restoration of the same with appropriate government agencies or with the private sector or with the owners themselves of said tourist attractions; and to identify and recommend to the appropriate authorities concerned the declaration of tourist areas and attractions as national monuments and preserves

#### 5. Project and investment promotions

- a. to identify, develop, invest in, own, manage and operate such projects as it may deem to be vital for recreation and rest but not sufficiently attractive economically for private investment
- b. to construct hotel buildings and other tourist facilities within a tourist zone and in turn lease such facilities to registered tourism enterprises for operation, management and maintenance

- c. to organize, finance, invest in, manage and operate wholly-owned subsidiary corporations

6. Direct assistance to registered enterprises

- a. to administer the tax and other incentives granted to registered enterprises
- b. to evaluate, approve and register or reject any and all tourism projects or enterprises established within the tourist zones
- c. to grant medium and long-term loans and/or re-lend any funds borrowed for the purpose to duly qualified registered tourism enterprises
- d. to guarantee local and foreign borrowings of registered enterprises
- e. to provide equity investments in the form of cash and/or land
- f. to extend technical, management and financial assistance to tourism projects
- g. to identify, contact and assist in negotiations of suitable partners for both local and foreign investors interested in investment or participation in the tourism industry
- h. to assist registered enterprises and prospective investors to have their papers processed with dispatch by government offices

7. Other powers and functions

- a. to engage or retain the services of financial, management, legal, technical, and/or project consultants from the private or government sector
- b. to have the power to succeed by its corporate name
- c. to adopt, alter, and use a corporate seal
- d. to sue and be sued under its corporate name

- e. to enter into any contracts of any kind and description
- f. to own or possess personal and/or real property
- g. to make, adopt and enforce rules and regulations to execute its powers, duties and functions
- h. to purchase, hold, and alienate shares of stock or bonds of any corporation
- i. to collect fees or charges as may be imposed under PD 564
- j. to contract indebtedness and issue bonds
- k. to fix and collect rentals for the lease, use or occupancy of lands, buildings, or other property owned or administered by PTA
- l. to do any and all acts and things necessary to carry out the purposes for which the PTA is created

Categorized in light of the foregoing provisions of law in point, PTA's governmental functions include the first, third, fourth, and sixth of the aforesaid general purposes. The second and fifth general purposes fall under its proprietary functions.

With respect to PTAs specific functions and powers, the first and fourth are governmental in nature while the fifth specific functions and powers are proprietary in character. The second, third, sixth, and seventh specific functions and powers can be considered partly-governmental and partly-proprietary, considering that 2(a), 2(b), 2(c), 2(d), 2(e), 3(a), 6(c), 6(d), 6(e), 7(h), 7(j), and 7(k) are proprietary functions while 2(f), 3(b), 3(c), 6(a), 6(b), 6(f), 6(g), 6(h), 7(a), 7(b), 7(c), 7(d), 7(f), 7(g), and 7(l) are governmental functions. The specific functions and powers treated in 7(e) and 7(i) may be classified *either* as proprietary or governmental, depending on the circumstances under which they are exercised or performed.

The aforesaid powers and functions of PTA are predominantly governmental, principally geared towards the development and promotion of tourism in the scenic

Philippine archipelago. But it is irrefutable that PTA also performs proprietary functions, as envisaged by its charter.

Consistent with this, the Philippine Tourism Authority has consistently embarked on the privatization of its assets to spur tourism development, whether through sale, joint venture, lease or management contract. In order to facilitate this, a Special Bids and Awards Committee (SBAC) for Privatization was convened as early as the 1990s.<sup>6</sup>

With the enactment of Republic Act No. 9593 or “The Tourism Act of 2009”, the Philippine Tourism Authority was reorganized into the Tourism Infrastructure and Enterprise Zone Authority. TIEZA remained the infrastructure arm of the Department of Tourism and was given additional mandate of designating areas as Tourism Enterprise Zones and administering fiscal and non-fiscal incentives. Section 64 of said law also authorized and mandated TIEZA to continue to exercise functions previously exercised by the PTA under Presidential Decree No. 564.

Apart from the express provisions in PD 564<sup>7</sup> allowing PTA to privatize its assets, Section 54 of the Tourism Act of 2009 also provides for the **privatization of TIEZA assets, either through sale or lease**, the proceeds of which will be used for the establishment of the Tourism Promotions Trust.

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<sup>6</sup> Attached as Annex “E” is a copy of a PTA Board Resolution mandating privatization of PTA assets and Annex “E-1” a copy of the Office Order creating a Special Bids and Awards Committee

<sup>7</sup> Section 5 (G.) [6.], Presidential Decree no. 564 which reads as follows:

6. Ownership or Possession of Personal and/or Real Property. To acquire, lease, own or possess such personal and/or real property as it deems necessary or convenient in the transaction of its business and/or in relation with the carrying out of its purposes, functions and objectives under this Decree; and to lease, mortgage, sell, alienate, or otherwise encumber or dispose of any such personal and real property held by it.

Section 54 provides, as follows:

“Tourism Promotions Trust. - Within one hundred and twenty (120) days from the effectivity of this Act, an audit shall be conducted by the Commission on Audit to determine the true value of the assets and liabilities of the PTA. After such audit, the TIEZA and the Department, in coordination with the Privatization Council, shall determine which assets shall be put up for sale or lease: Provided, That concerned LGUs interested to manage and operate said assets shall have the right of first refusal. The TIEZA and the Department shall take into consideration the importance of maintaining and preserving the PTA assets which may already be considered cultural treasures and heritage sites, such as the Banaue Hotel and similar assets, which shall not be sold or in any way disposed of and shall be placed under the ownership of the TIEZA for their continued maintenance.

The Tourism Promotions Trust shall hereby be established from the proceeds of the sale or lease of the assets of the PTA. The trust shall be managed by a government-owned bank or financial institution selected by the Tourism Board. Said bank or institution shall report the status and profitability of the trust on a quarterly basis to the Tourism Board, the Secretary, and the Joint Congressional Tourism Oversight Committee created under this Act.”

It should be noted that Section 54 of Republic Act 9593 is not part of the chapter on Tourism Enterprise Zones or TIEZA, but is subsumed under Chapter III, Tourism Promotions, more specifically in Subchapter III, Tourism Promotions Funding.

The second paragraph of Section 54 and the entire Section 55 indicate that the proceeds from the sale or lease of PTA assets shall be the source for the Tourism Promotions Trust, investment earnings of which shall help finance the activities of the Tourism Promotions Board.

In effect, the authors of RA 9593 identified the privatization of TIEZA Assets as a **strategy** to fund tourism promotion activities.

The investment earnings from the Tourism Promotions Trust is one of the sources of the Tourism Promotions Fund to be managed, not by TIEZA, but by the TPB. The unallocated portion of the Fund shall also support the development of Tourism Enterprise Zones, DOT programs and for other purposes that would contribute to the development of the tourism industry.

### **Coordination with the Commission on Audit**

The decline of Hilaga's operational viability was once the subject of a COA Observation on 17 April 2012. Then COA Regional Director for Region 3, Winnie Rose H. Encallado, wrote TIEZA through Hilaga's Officer-in-charge to transmit the audit results for Calendar Year 2011. Among the detailed observations and recommendations of COA for Hilaga is the doubtful viability of the TIEZA-Hilaga, stating, *"The continued operation of TIEZA-HILAGA may no longer be advantageous to the government as the entity has been continuously incurring losses on its operation amounting to P52.2 million for the past five years."* Based on COA's review, *TIEZA-HILAGA has neither generated enough revenue to sustain its operations, nor contribute in the fulfillment of its one of its thrusts of 'generating revenues to fund both national and corporate developmental needs and/or undertakings.'*<sup>8</sup>

In the same Audit Observation Memorandum, the COA had in fact recommended as well the privatization of the asset.

Under Section 54 of RA 9593, the Commission on Audit is given 120 days from the effectivity of RA 9593 on August 2009 to determine the true value of the assets and liabilities of TIEZA. Sometime in 2010, COA, through its former TIEZA Resident Auditor Gloria Cruz, requested TIEZA to submit a list of all its assets which may be included in the privatization program. This request of COA was duly complied with.

It is worthy to note that in an Audit Report dated April 2012, COA identified the value of the **total assets of Hilaga at PhP. 60.95 Million after a decrease of P3.7 Million** from the previous year's level mainly

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<sup>8</sup> Attached as Annex "F" is a copy of the Audit Observation of the Commission on Audit

due to the disposition of properties damaged by typhoon “Quiel” during the year under audit.

### **Coordination with the Privatization Council**

Since the 1990s, TIEZA has been coordinating with the Privatization Management Office (PMO) and Privatization Council on the privatization of its assets.

For the privatization efforts of TIEZA under RA 9593, coordination with the Privatization Council was likewise conducted. In 2012, the TIEZA personnel involved in the efforts for privatization met with Undersecretary John Sevilla of the Privatization Council to seek guidance on privatization. In the said meeting, TIEZA was informed that under RA 9593 and PD 564 (PTA Charter), TIEZA is authorized to conduct the privatization of its assets. As to the proper appraisal of the assets, TIEZA was informed that government corporations avail of the services of the Development Bank of the Philippines, a government financial institution, to do the appraisal.<sup>9</sup>

Thereafter, TIEZA, through public bidding, commissioned the services of consultants to conduct the Highest and Best Use Study for the assets intended for privatization; requested DBP to conduct appraisal of the assets; and commissioned another consultant to assist TIEZA in the formulation of procedure for privatization including the tender documents and conduct of actual bidding.

It must also be noted further that with the adoption of the Governance Law for GOCCs in 2010, the powers and functions of the Privatization Council were already absorbed by the Governance Commission for GOCCs:

SEC. 31. *Transitory Provision.*—The Privatization Council and Privatization and Management Office created under Executive Order No. 323, Series of 2000, shall continue to implement and finish the privatization of GOCCs that have been identified by the said Privatization Council and approved for privatization by the President prior to the effectivity of this Act: *Provided, however,* That the privatization of said GOCCs hat remain unfinished at the end of every two

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<sup>9</sup> Attached as Annex “G” is a copy of the report rendered by TIEZA personnel

(2) years after the effectivity of this Act shall be automatically transferred to the GCG which shall continue the privatization of the GOCCs.

The Asset Privatization Program of TIEZA is also a commitment made with the clear consent and mandate of the Governance Commission for GOCCs. This is reflected in the signed Performance Negotiation Agreement (PNA) executed by both GCG and TIEZA in 2014 and properly reported as well to the regulatory body in 2015.<sup>10</sup>

### ***Hilaga not declared as a cultural treasure and heritage site***

Section 54 of RA 9593 provides, “The TIEZA and the Department shall take into consideration the importance of maintaining and preserving the PTA assets which may already be considered cultural treasures and heritage sites, such as the Banaue Hotel and similar assets, which shall not be sold or in any way disposed of and shall be placed under the ownership of the TIEZA for their continued maintenance.”

On the other hand, Republic Act No. 10066, “An Act Providing for the Protection and Conservation of the National Cultural Heritage, Strengthening the National Commission for culture and the Arts (NCCA) and its Affiliated Cultural Agencies, and for Other Purposes,” defines Important Cultural Property as a “cultural property having exceptional, cultural, artistic and historical significance to the Philippines, **as shall be determined by the National Museum and/ or National Historical Institute.**”

At the onset, TIEZA concedes that it has no expertise in assessing which areas are cultural treasures or heritage sites, and has decided to refer to proper government institutions for proper guidance and determination.

Hilaga was never declared an Important Cultural Property by government agencies mandated to make such determination.

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<sup>10</sup> See attached Annex “H” and “HH”



Although Hilaga was the venue for significant events such as the Florikultura and the Lantern Festival or was once used to showcase products from the northern Philippines, what were significant here are the events that were held, and not exactly the venue.

Since 2001, the property was never used as the venue for the traditional Christmas Lantern Festival of the province of Pampanga. For instance, even at the time when Paskuhan Village was still operational, the conduct of the Lantern Festival was already transferred to different venues, particularly in SM and Robinsons malls located in San Fernando, where more people came to witness the event. The said transfer of venue of the Lantern Festival from Paskuhan Village to the malls did not diminish the significance of the event which showcased Kapampangan ingenuity and craftsmanship.

It may also be mentioned that there were no objections from the people of Pampanga when PTA decided to adopt a different concept for the place as an exhibition space for products of northern provinces, and changed the name of the property from Paskuhan Village to "Hilaga. "

In a published media report in 2011<sup>11</sup>, the dire condition of the property was reported as well:

Viray, 50, marketing officer of the park, was there when Ms. Aquino opened the park to the public on Dec. 11, 1990.

The concept was simple, Viray said. The park was to showcase small and giant lanterns and other Christmas items in support of local craftsmen and entrepreneurs.

It could have made Paskuhan a unique tourist destination in Asia. Sadly, it isn't to be sustained.

Floods, Mt. Pinatubo's 1991 eruptions, changes in administration and the rise of shopping malls had sounded the death knell for the park, Viray said.

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<sup>11</sup> Source: Please refer to <http://newsinfo.inquirer.net/112501/paskuhan-village-a-park-bereft-of-joy>

Former First Lady Amelita Ramos recreated Paskuhan, using the “Gardens of the World” theme or “Florikultura” in 1998. A year after, however, the tropical plants, flowers and foliage wilted.

Its current theme as “North Philippines” or “Hilaga” is gone. The Days Hotel at the park’s northern side is non-operational.

### **No income**

Only one of 32 stalls is leased. The five exhibit halls are empty. Tenants from Central Luzon, the Ilocos, Cagayan Valley and the Cordillera had closed shop after months of suffering losses since their most active supporter, then Tourism Secretary Richard Gordon, won a seat in the Senate in 2004.

Al-fresco bars are closed and the nightly concerts of local bands have stopped. Last year’s rides and games on the parking ground will not return this month.

What keeps Paskuhan alive could be the 24 workers that keep the park going and clean despite a lean budget of PhP. 800,000.00 a month. They work on job order status, meaning they are not entitled to benefits.

Income from rental and gate receipts (P10 per person) have not reversed Paskuhan’s net losses, said a Department of Tourism source who did not want to be named for lack of authority to speak.

**The “intangible heritage” of the Christmas tradition in the Province of Pampanga has not been diminished by the sale of the park.** In a report dated 24 December 2016 of the Philippine Daily Inquirer, it was established that “San Fernando remains to be the country’s Christmas capital”. The report noted that:

CITY OF SAN FERNANDO— “Christmas Capital of the Philippines” and “Home of the Giant Lanterns” are titles claimed by this Pampanga capital since the 1990s, and the city has stuck to that stature with community pride.

But in losing the Paskuhan Village, which was sold in December 2014 by the Tourism Infrastructure and Enterprise Zone Authority (Tieza), could San Fernando still make that same boast?

Vice Mayor Jaime Lazatin, city tourism officer Ching Pangilinan and several craftsmen still believe the titles are untarnished and unrivaled—even without the Paskuhan. The strongest proof was that the “Ligligan Parul” (Giant Lantern Festival), which was first started 108 years ago, proceeded on Dec. 17. (Only martial law interrupted the festival from 1972 to 1975.)

“San Fernando is the only place in the country that makes such big lanterns. We also have a homegrown industry [for household lanterns] and our lantern makers who live and do business in various parts of the country have influenced the design and makeup of these Christmas ornaments,” Lazatin said.

His father, Jesus, originally owned the 9.3-hectare land where Paskuhan Village was built. Opened by then President Corazon Aquino on Dec. 11, 1990, it became the venue of the Ligligan Parul.

By 2001, the venue shifted to SM City Pampanga and in the last 12 years to Robinsons Starmills.

Before the 2014 sale, the Department of Tourism failed to put new life into the Paskuhan even after it was repackaged as a flower park, a showcase of culture in central and northern Luzon, a venue for musical concerts or a conference destination.

Pangilinan defended the title, saying, "The moniker Christmas Capital of the Philippines is rooted in our intangible heritage, manifested by the Giant Lantern Festival, even before Paskuhan was established and became part of our built heritage."<sup>12</sup>

### **3. RIGHT OF FIRST REFUSAL**

Section 54 of RA 9593 provides that, "concerned LGUs interested to manage and operate said assets shall have the right of first refusal".

Based on the provision of the law, TIEZA and DOT were given the authority to choose the mode of privatization on whether sale or lease.

For Hilaga, the mode of privatization chosen was through sale. This mode was not a result of whim or caprice on the part of TIEZA and DOT but a result of several deliberations with private consultants who were commissioned for the purpose of assisting and advising them on the proper mode and procedure of privatization. The consultants recommended sale as the mode of privatization for the following reasons:

1. *"The said mode only requires internal approval (i.e. Board approval), therefore, the implementation of Tranche 1 can be fast tracked as directed by the Board of Directors;*
2. *The sale mode eliminates the added risks to TIEZA inherent in operate and manage proposals (e.g. financial risks, operational risks, etc.)*
3. *The ownership documents of the properties themselves are free of any legal issues;*
4. *In terms of benefits, the sale mode provides TIEZA with immediate cash flow and optimum value as the winning*

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<sup>12</sup> Source: <http://newsinfo.inquirer.net/856313/san-fernando-still-ph-christmas-capital>

*bidders will be required to pay the purchase price in full upon signing of the sale documents;*

- 5. The sale mode eliminates the subsidies and capital expenditures required by said properties from TIEZA;*
- 6. The proceeds from the sale plus the savings generated from elimination of subsidies and capital expenditures can be used for other projects; and*
- 7. In our pre-marketing activities, the potential investors/developers with whom we had discussions with are interested only in the sale/purchase mode of privatization of the properties included in Tranche 1."*

**a. The LGU's Right of First Refusal is limited only to operation and management.**

Given that the mode chosen was sale, the right of first refusal of the concerned LGU to operate and manage the assets will not apply. There is a difference between "manage and operate" and "sale". If the framers of the law intended the right of first refusal to apply in case of sale, they would have stated it. As it is, the right of first refusal is limited only to manage and operate mode of privatization.

**Granting without conceding that the right of first refusal may also apply in case of sale, the same may not be exercised arbitrarily but must be done considering applicable laws, rules, and jurisprudence on the matter.**

**b. The Right of First Refusal may not be invoked indefinitely and must be seasonably exercised.**

**Despite publication of the notice of the public bidding** of Hilaga, the Province of Pampanga did not participate in said bidding. Instead, it sent a letter addressed to then President Benigno Simeon Aquino, which was received in Malacanang Palace on 29 December 2014, offering to purchase Hilaga at book value or turn-over of the administration and operation to the provincial government. This letter

was forwarded by the Office of the President to TIEZA last 08 January 2015, which was already after the conduct of bidding.

In the case of **Republic of the Philippines vs. Sandiganbayan**<sup>13</sup>, the Supreme Court, in deciding that the Presidential Commission on Good Government (PCGG) had actually been informed of the actual sale, explained the notice requirement for the exercise of the right of first refusal as follows:

Where it is shown that a stockholder had actual knowledge of the intended sale within the period prescribed to exercise the right, the notice requirement had been sufficiently met. In the case at bar, PCGG had actual knowledge of UNIMOLCO's offer to sell its shares of stock. In fact, it issued Resolution No. 96-142 enjoining the sale of the said shares of stock to Smart. Petitioner, thus, cannot feign lack of notice.

**Therefore, we sustain the Sandiganbayan's ruling that petitioner's right of first refusal was not seasonably exercised.** (Emphasis provided.)

Analogous to an option contract without a specified period for the exercise of the option, **Villamor vs. Court of Appeals**<sup>14</sup> states that "it **cannot be presumed that the exercise thereof can be made definitely, and even render uncertain the status of the subject matter.**"

The Invitation to Bid/ Request for Expressions of Interest published and posted with respect to the property in question has specified the following dates relevant to the Public Bidding:

<b>Activity</b>	<b>Date</b>
Acceptance of Required Documents (as enumerated in the Invitation to Bid / Request for Expressions of Interest)	10AM of November 4, 2014 to 12 NN of December 17, 2014

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<sup>13</sup> G.R. No. 128606 December 4, 2000

<sup>14</sup> 202 SCRA 607 1991

Pre-bidding Conference	2 PM of November 20, 2014
Deadline for submission of Bids	December 17, 2014

The Province of Pampanga was given reasonable opportunity to express its interest directly to TIEZA. Neither law nor jurisprudence requires a specific form of notice to those who have the right of first refusal. The Supreme Court had the occasion to rule in the case of **Adriano Manalang vs. Intermediate Appellate Court**<sup>15</sup> on constructive notice to the whole world. Thus:

The Municipality of Bugallon, acting thru its duly-constituted municipal council is clothed with authority to pass, as it did the two resolutions dealing with its municipal waters, and it cannot be said that petitioners were deprived of their right to due process as **mere publication of the notice of the public bidding suffices as a constructive notice to the whole world.**

Apart from the publication of the notice of the bidding in newspapers of general circulation, there have been postings in pertinent bulletin boards, and postings at the TIEZA website and Philgeps, which by law are effective notices to the whole world that a bidding will take place and may be considered as an offer to purchase to the LGU and the public. On 09 June 2014, the Consultants for privatization of TIEZA reached out and had a meeting with Municipal Assessor Jose de Leon and the Sangguniang Panglungsod of San Fernando.

**The LGU of San Fernando and the Province of Pampanga, therefore, had actual knowledge of the direction of TIEZA to privatize its assets, including Hilaga.**

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<sup>15</sup> G.R. No. L-66575. September 30, 1986.

**c. The Right of First Refusal must be harmonized with laws, rules, and other issuances requiring public bidding in the disposition of government assets.**

In ensuring that the government obtains the most advantageous terms in both privatization and procurement, the law demands that a public bidding shall be conducted. In the case of **Power Sector Assets and Liabilities Management Corporation (PSALM) vs. Pozzolanic Philippines Incorporated**<sup>16</sup>, the Court invalidated the right of first refusal granted through a contract to Pozzolanic Philippines Incorporated for being contrary to public policy:

*“By its very nature, public bidding aims to protect public interest by giving the public the best possible advantages through open competition. Thus, competition must be legitimate, fair and honest. In the field of government contract law, competition requires not only bidding upon a common standard, a common basis, upon the same thing, the same subject matter, and the same undertaking, but also that it be legitimate, fair and honest and not designed to injure or defraud the government. **An essential element of a publicly bidded contract is that “all bidders must be on equal footing, not simply in terms of application of the procedural rules and regulations imposed by the relevant government agency, but more importantly, on the contract bidded upon. Each bidder must be able to bid on the same thing.”*** (Emphasis supplied.)

While the right of first refusal of the concerned LGU is provided by law, the exercise of such right should not be arbitrary and must be in accordance with the privatization procedure adopted by the owner of the asset subject of disposition which is sale through public bidding. The concerned LGU of Pampanga should have signified its intention to join the bidding within the period provided in the notice to the public. At the very least, the LGU should have seasonably informed TIEZA of its intent to exercise its right of first refusal.

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<sup>16</sup> G.R. No. 183789 citing Agan Jr. vs. Philippine International Air Terminals Co. Inc.



The decision of TIEZA to conduct public bidding in its privatization efforts is not only supported by law but was the subject of a request for opinion by TIEZA to the Office of the Government Corporate Counsel (OGCC) as early as year 2009.

On 12 August 2009, the **OGCC rendered Opinion No.175**<sup>17</sup> as its reply to PTA's request for an opinion on the proposed transfer of ownership, management and operations of the Paskuhan Village (Hilaga) from PTA to Pampanga Mayors' League Inc.:

*“In sum, the PTA possesses the corporate power to dispose of its properties, including the Paskuhan Village. In the exercise of such power, however, the PTA must comply with the applicable laws. First, the PTA's Board of Directors (BOD) must first authorize the disposition of such property. Second, the PTA must also conduct a public bidding for the said purpose. Finally, as an entity desirous of acquiring the Paskuhan Village, the PMLI should comply with the PTA's bidding procedures for the disposition of the said property.”*

Based on the OGCC opinion, there was no option left for TIEZA except to conduct public bidding in the disposition of its assets.

**d. The right of first refusal must be exercised considering the identity of terms and conditions to be offered to all other prospective buyers.**

It is within the powers of TIEZA to set the terms and conditions of the public bidding, including the minimum bid price. It was not only the result of the due diligence conducted over several months, but of all the efforts exerted prior to the public bidding, including the Highest and Best Use Study conducted in 2011, to assure that the best interest of the government is protected.

In the presentation made by American lawyers Edward B. Poitevent II and Christopher L. Hewitt to the American Association of Petroleum Landmen in June 2000 titled, “Preferential Rights, Rights of First Refusal and Options: The Whys and Wherefores”, citing the Anderson case

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<sup>17</sup> See attached copy of OGCC Opinion, marked as Annex “I”

[473 P.2d 84 (Kan. 1970)], it is stated that , “**A key feature of a preferential right, moreover, is that the terms under which the right may be exercised lie within the exclusive control of the owner of the property subject to the right.**”

The Province of Pampanga offered to purchase Hilaga at book value which on March 2014 is reflected in TIEZA's books as follows:

Land	PhP. 7,432,080.00
Land Improvements	PhP. 11,490,919.24
Book Value	<b>PhP. 18,922,999.24</b>

Through a public bidding, Premiere Central Incorporated submitted a bid for Hilaga in the amount of **PhP. 939,656,848.00**, which is more than the minimum amount set for the property.

As previously stated, the highest and best use for Hilaga is a mixed-use development consisting of a Business Process Outsourcing, a commercial center and a convention center that would necessitate an investment of PhP. 6,738,000,000.00. Any major development similar to this would generate a multitude of jobs from the construction of structures to the actual operations. Without undermining the capacity of the Public Sector, it is reasonable to say that projects of this magnitude should be undertaken by the Private Sector which has the stability, expertise and resources to bring it to fruition.

TIEZA has methodologically and diligently evaluated the properties prior to the bidding to enable it to come up with a set of standards upon which the assets identified shall be disposed.

The results of a public bidding conducted within the parameters set by law and by TIEZA should be respected, as it is considered a public policy. **[Asia’s Emerging Dragon Corporation vs. The Department of Transportation and Communication (G.R. No. 169914) and Republic of the Philippines vs. The Honorable Court of Appeals and Salacnib Baterina, (G.R. No. 174166)]**

Even granting that the Province of Pampanga has timely informed TIEZA of its interest, its offer to purchase the land at Book Value may be considered a counter-offer which is lower than the Minimum Bid Price required by TIEZA based on appraisals conducted. In the case

of **Logan vs. Philippine Acetylene Co.**<sup>18</sup>, the Supreme Court held that, **“A counter-offer is always considered in law as a rejection of the original offer.”**

Moreover, the acceptance by TIEZA of an offer which is lower than the minimum amount determined in the appraisals and set in the Terms of Reference will result in the determination of liability of the persons involved by the Commission on Audit. Such act will be treated as an act prejudicial to the best interest of government and the public.

#### **4. PROCUREMENT LAW ADOPTED AND FOLLOWED, DESPITE INAPPLICABILITY**

##### **a. Disposal of government property and other assets is not a procurement activity.**<sup>19</sup>

With the enactment of Republic Act No. 9593 calling for the privatization of TIEZA assets, the TIEZA Board approved the reconvening of the Special Bids and Awards Committee (SBAC) which has been in existence since the 1990s.

After the approval by the TIEZA Board of Directors of the Study for the Highest and Best Use and the Master Planning of thirteen identified properties last 27 June 2013; TIEZA procured, through another public bidding, the consulting services of Chadaro Consortium (“Consortium”) in 2014.

As provided in the Services Contract, within 2 years, the Consortium shall provide the conceptualization and groundwork for privatization of assets; provide expert advice in determining the best option on how to successfully privatize the identified assets. Equally important, the Consortium shall also assist TIEZA throughout the process of implementing the concept based on the due diligence they have conducted, and in the actual privatization of the assets. At least four of these assets shall be privatized through sale, joint venture, lease, management contract or through other modalities allowed by law.

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<sup>18</sup> 33 Phil. 173

<sup>19</sup> Section 4.4 (f), Revised IRR of RA 9184

Due diligence was undertaken by the Consultants for the next eight months, enabling them to deliver the following:

1. identification of the proposed work program, approach and methodology (Inception Report);
2. determination of the market value of the properties (Appraisal Reports);
3. identification of the optimum method of privatizing the properties (Report on Privatization Options);
4. provision of a guide for potential bidders on how to participate in the bidding (Terms of Reference for the first tranche of properties identified for privatization);
5. provision of a guide to potential bidders on how their respective proposals will be evaluated (Evaluation Methodology); and
6. provision of Marketing Briefs and Presentation to potential bidders.

The people in the community where the properties are located are part of the major stakeholders in any development that may happen. Considering this, ocular inspections of the properties and the nearby relevant areas were conducted, and meetings were held with officers from local government units to apprise them of the TIEZA asset privatization program and to get information as to the direction, policies and programs of the LGUs concerned.

A summary of the meetings held is as follows:

<b>Properties</b>	<b>Resource persons in the LGU/Offices Coordinated with</b>
<b>OPERATING PROPERTIES</b>	
1. Banaue Hotel and Youth Hostel	Mayor Jerry Dalipog Municipal Assessor's Office Municipal Planning Office Municipal Tourism Office Governor Denis Habawel
2. Hilaga (Paskuhan Village)	Municipal Assessor Jose de Leon Sangguniang Panglungsod ng San Fernando
3. Club Intramuros	Registry of Deeds in Manila
4. Balicasag Island Dive Resort	Mayor Leonila Montero Municipal Assessor's Office Municipal Planning Office Municipal Tourism Office

	Sangguniang Pambayan ng Panglao
5. Moalboal Lots in Cebu	Mayor's Office Municipal Planning Office
6. Dalaguete Beach Park	Mayor Ronald Allan Cesante Municipal Assessor's Office Municipal Planning Office Municipal Tourism Office
7. Gardens of Malasag Eco-tourism Village	Mayor Oscar Moreno Municipal Assessor's Office
8. Zamboanga Golf Course and Beach Park	Mayor Maria Isabelle Climaco-Salazar Municipal Assessor's Office Municipal Planning Office Municipal Tourism Office Registry of Deeds
<b>NON-OPERATING PROPERTIES</b>	
9. Agoo Playa Hotel	Mayor Sandra Eriguel Congressman Eufanio Eriguel Municipal Assessor's Office Municipal Planning Office Municipal Tourism Office
10. Matabungkay Lots in Batangas	Municipal Administrator of Lian Municipal Planning Office Municipal Tourism Office
11. Talisay Lots in Batangas	Municipal Assessor's Office
12. Kang-irag Golf Course	City Assessor's Office City Planning Office City Tourism Office Registry of Deeds
13. Argao Beach Club and Airstrip	Mayor Edsel Galeos Municipal Administrator Municipal Assessor's Office Municipal Planning Office Municipal Tourism Office Sangguniang Bayan ng Argao

Exploratory discussions and market sounding activities with prospective investors were held, initiating interests in the properties and presenting TIEZA and the Consortium information and insights that can be translated into reasonable Terms of Reference.

A summary of the presentations held is as follows:

<b>DATE</b>	<b>COMPANY</b>	<b>REPRESENTATIVES</b>	<b>PROPERTIES of INTEREST</b>
1. July 23, 2014	Alveo Land Corporation	Glo P. de Castro Apple B. Posadas	Kang-irag Matabungkay Talisay ZGCBP Balicasag (refer to Resorts Group)
2. July 30, 2014	Discovery World Corporation	Ana May B. Nieva R. Sykat	Balicasag Moalboal Argao BHYH
3. July 30, 2014	International School for Sustainable Tourism  Glacex	Mina Gabor  Greg Duffell	
4. August 1, 2014	Zoomanity Group Yupangco Holdings	Robert Yupangco Delia C. De Jesus Ma. Fe Garchitorena JB L. Badon	Club Intramuros
5. August 1, 2014	Fersal Hotel Group	Atty. Jesus S. Fernando Jr.	
6. August 1, 2014	Widus Hotel	Alfred Reyes	Balicasag Argao GMETV Hilaga
7. August 5, 2014	Filinvest Land Inc.	Joseph Yap Andrew "Bibot" Gotianun	Balicasag Hilaga
8. August 6, 2014	Century Properties Group Incorporated	Tim Hallett Resty Engel	
9. August 6,	Tune Hotels	Benjie Martinez	

2014			
10. August 8, 2014	ELRO Corporation  Fuego Hotels	Javier F. de Castro Carlos Elizalde  Ricard Nolla Alfredo Roca	Club Intramuros
11. August 19, 2014	The Bayleaf Intramuros Lyceum of the Philippines	Atty. Bobby Laurel Ed Vitug Beth Dar	Club Intramuros
12. August 20, 2014	Manny O Group	Prisco Pona RJQ Sepullede	Argao Dalaguete Kang-irag Balicasag
13. August 22, 2014	Microtel	Mary Grace Magnaye	<i>For Microtel &amp; Phinma:</i> Matabungkay Talisay Moalboal Hilaga Zamboanga Club Intramuros  <i>For Microtel and Paramount:</i> GMETV  <i>For Paramount:</i> BHYH
14. August 29, 2014	Vista Land Starmalls	Cynthia S. Delfin Atty. Cristy B. Dizon-Victorio	Moalboal Talisay Dalaguete Agoo Playa Hotel Club Intramuros BHYH
15. September 3, 2014	International Enterprise Singapore	Rose Anne Pamittan	BHYH Hilaga Club Intramuros Cebu Propertie
16. September 3, 2014	KC		Club Intramuros

17. September 17, 2014	Club Med	Karen Anne Lai Qui Liang	
18. September 24, 2014	DMCI	Rey C. Salazar Gerardo Martin J. Ramos	
19. October 2014	Finasia Group	AJ Pangilinan	Club Intramuros Balicasag
20. December 9, 2014	Filipino First	Dennis Nakpil	

After TIEZA provided the documents and other information required, a thorough research was conducted by the Consultants to come up with the legal basis for the mode of privatization appropriate for each property. This became part of the submitted reports by the Consultants.

For the First Tranche of assets, which are the Agoo Playa Hotel in La Union, Hilaga in Pampanga, properties in Matabungkay and Talisay, Batangas, the fast-tracking of these assets, the mode of privatization and the appraisal of the value for each asset was approved by the Board of Directors last 27 October 2014. The mode of privatization chosen was an outright sale on an “as is, where is” basis.

Based on the Appraisal Reports submitted by independent private appraisers, Royal Asia Appraisal Company and Asian Appraisal Company, the Board of Directors approved the use of the median approach in computing for the following minimum bid prices:

<b>Property</b>	<b>Asian Appraisal</b>	<b>Royal Asia Appraisal/ CCGA</b>	<b>Average Appraisal Value/ Minimum Bid Price</b>
Hilaga	797,395,000	834,019,000	<b>815,707,000</b>



Prior to this, an appraisal was also conducted by the Development Bank of the Philippines (DBP) for Hilaga. As of 19 May 2014, the value of Hilaga according to the DBP is PhP. 782,354,000.00. This was not included in the computation of the Minimum Bid Price but was considered a possible floor price in case of a negotiated bid since the value was from a government financial institution.

**b. The Public Bidding Process was properly applied.**

The public bidding for the privatization through sale of Hilaga is not considered procurement and, therefore, does not fall under Republic Act No. 9184.<sup>20</sup> Although this is the case, the provisions of RA 9184 on procedures for public bidding were applied and followed.

The sale of Hilaga is a divestment of assets which falls under Commission on Audit Circular No. 89-296 or the Audit Guidelines on the divestment or disposal of properties and other assets of national government agencies and instrumentalities, local government units and government-owned or controlled corporations and their subsidiaries, and COA Circular No. 86-264. In conformity with the existing state policy, the divestment or disposal of government property shall be undertaken primarily thru **public auction**. Such mode of divestment or disposal shall observe and adhere to established mechanics and procedures in **public bidding**, namely:

- a. adequate publicity and notification so as to attract the greatest number of interested parties;
- b. sufficient time frame between publication and date of auction;
- c. opportunity afforded to interested parties to inspect the property or assets to be disposed of;
- d. confidentiality of sealed proposals;
- e. bond and other prequalification requirements to guarantee performance; and
- f. fair evaluation of tenders and proper notification of award."

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<sup>20</sup> Section 4.5 (e), IRR of RA 9184

TIEZA has complied with all the requirements of both COA Circulars. In fact, a representative of the Commission was invited and was present during the meetings and activities on privatization.

After the approval of the Terms of Reference, the SBAC conducted a public bidding on 17 December 2014 for the first tranche of properties. The following schedule was implemented:

<b>ACTIVITIES</b>	<b>TIMETABLE</b>
Publication of the Invitation to Bid	October 31, November 3 and November 10
Availability of the Terms of Reference	November 4, 2014
Pre-bid Conference	November 20, 2014 2:00 p.m.
Deadline for Submission of Request for Clarifications	December 5, 2014 2:00 p.m.
Issuance of Bid Bulletin	December 12, 2014
Deadline for Submission of Required Documents	December 17, 2014 12:00 noon
Start of Acceptance of Bids	December 17, 2014 10:00 a.m.
Deadline for Submission of Bids	December 17, 2014 2:00 p.m.
Opening of Bids	December 17, 2014 2:15 p.m.
Submission by SBAC of Recommendation of Award to Winning Bidder to TIEZA Board	January 2015

### ***Bidding Process for Tranche I - HILAGA***

**Publication/Issuance of ITB.** The ITB was first published in the **Business World and the Philippine Daily Inquirer** last 31 October 2014. The ITB was likewise posted continuously for a period of seven (7) calendar days, starting on the date of the advertisement at the following: (1) TIEZA website; (2) PhilGeps, and (3) in conspicuous place within the premises of TIEZA. <sup>21</sup>

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<sup>21</sup> See attached Annex "J"

In response to the said advertisement, four (4) companies purchased the Bid Documents: *SM Development Corporation, Premier Central Incorporated, SM Prime Holdings Corporation and SEJ North Premier Holding Corporation*. At this point, TIEZA has no idea yet which asset out of the four (4) in Tranche 1 the bidders will bid for. Purchase of one set of bid documents allow the Interested Bidder to consider bidding on any of the assets in Tranche 1.

Among the four Interested Bidders, only **Premier Central Incorporated** submitted a bid for Hilaga for a total amount of **Nine Hundred Thirty-Nine Million Six Hundred Fifty-Six Thousand Eight Hundred Forty-Eight Pesos (PhP.939,656,848.00)**, which is more than the minimum bid of PhP.815,707,000.00.

As to the issue on whether the bid of a single bidder should be considered, Section 36 of RA 9184 is instructive:

*Section 36. Single Calculated/Rated and Responsive Bid Submission. – A single calculated/rated and responsive bid shall be considered for award if it falls under any of the following circumstances:*

- (a) If after advertisement, only one prospective bidder submits a Letter of Intent and/or applies for eligibility check, and meets the eligibility requirements or criteria, after which it submits a bid, which is found to be responsive to the bidding requirements;*
- (b) If after the advertisement, more than one prospective bidder applies for eligibility check, but only one bidder meets the eligibility requirements or criteria, after which it submits a bid which is found to be responsive to the bidding requirements; or*
- (c) If after the eligibility check, more than one bidder meets the eligibility requirements, but only one bidder submits a bid, and its bid is found to be responsive to the bidding requirements.*

*In all instances, the Procuring Entity shall ensure that the ABC reflects the most advantageous prevailing price for the Government.*

Moreover, on 12 December 2014, Bid Bulletin No. 2014-158 was issued to clarify that the bidding will proceed even if there is only one (1) compliant bid submitted by an Interested Bidder which meets the minimum requirement of the TOR and whose bid is found to be responsive to the bidding requirements.<sup>22</sup>

Based on the foregoing, even if there was only one bidder who submitted a bid, the same may be considered for award considering that the bid amount was more than the minimum bid required by TIEZA, based on two independent appraisals and also that of another government financial institution.

### **Developments Post-Sale**

On 07 January 2015, TIEZA received a letter from the Office of the President, referring the letter of the Provincial Government of Pampanga dated 04 December 2014, for comment and recommendation with regard to the Provincial Government's offer to purchase Hilaga at book value, or if not feasible, to turn-over its administration and operation.

In reply, TIEZA sent a letter dated 19 January 2015 addressed to then Deputy Executive Secretary Teofilo S. Pilando<sup>23</sup>, Office of the President, which states:

*“We would like to inform your Office that the TIEZA Board of Directors approved the privatization of thirteen (13) assets including Hilaga. Public Bidding for the First Tranche of Properties identified for privatization, namely, Agoo Playa Hotel in La Union, Hilaga in Pampanga, and Lots in Matabungkay and Talisay in Batangas, commenced last October 31, 2014 through a series of publication and posting of the Invitation to Bid in different platforms. Bids were opened on December 17, 2015. The responsive bid was Nine Hundred Thirty Nine Million Six Hundred Fifty-six*

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<sup>22</sup> See attached “Annex K”

<sup>23</sup> See attached “Annex L”

*Thousand Eight Hundred Forty-eight Pesos (PhP. 939,656,848.00) for Hilaga. This bid amount is more than the minimum bid of Eight hundred Fifteen Million Seven Hundred Seven Thousand (PhP. 815,707,000.00), which was based on the average appraisal value of two independent companies.*

*We are now awaiting the approval of the Board of Directors. TIEZA will then proceed with the remaining activities to successfully conclude the sale.*

*This program is consistent with the policy of the government encouraging privatization of assets and undertakings that would allow the different government agencies to transfer the risks and responsibilities that only the private sector can carry, and focus on creating the environment conducive for economic growth."*

This act of the Province in writing the Office of the President, instead of TIEZA directly, is proof of its actual knowledge on the privatization. After writing the Office of the President, there was no further formal or informal communication from the Province or the City of San Fernando on their further intentions.

## **5. TAXES PAID**

In the Terms of Reference, Capital Gains Tax is the responsibility of TIEZA, but a pending issue exists at the time of sale as to whether or not TIEZA is liable for capital gains tax or VAT, depending if the assets would be considered a capital asset or an ordinary asset.

By April 2015, the accounts of Hilaga, as a subsidiary entity of TIEZA, were incorporated in the books of the TIEZA Main Office. Subsequently, Fixed Assets were recognized as Non-current Assets Held for Sale in conformity with Philippine Financial Reporting Standard (PFRS) No. 5 paragraph 7, which provides that an item of property plant and equipment is classified as "held of sale" if the assets is available for immediate sale in the present condition within one year from the date of classification as held for sale. On-Current Assets Held for Sale is classified as Current Asset in the Financial Statement, thus, it is not subject to depreciation as per PFRS 5, paragraph 25.

Since the Hilaga property was previously used in trade/ business and was included in the privatization plan approved by the TIEZA Board, the sale was subjected to Value Added Tax (VAT) in accordance with Section 14 of Revenue Regulation No. 4-2007 dated February 7, 2007, which provides that:

“However, even if the real property is not primarily held for sale to customers or held for lease in the ordinary course of trade or business by the same is used in the trade or business of the seller, the sale thereof shall be subject to VAT being a transaction incidental to the taxpayer's main business.”

Although there is an issue on whether or not capital gains are due, the value added tax for the sale of the said property was properly paid already by TIEZA in the amount of One Hundred Twelve Million Pesos (PhP. 112,000,000.00) with the Bureau of Internal Revenue.<sup>24</sup> It is noteworthy that if TIEZA was to pay the capital gains, it would have to pay only the amount of Fifty-Six Million Pesos (PhP. 56,000,000.00).

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<sup>24</sup> See attached Official Filing Report of TIEZA marked as “Annex M”

## **CONCLUSION**

The sale or disposition of the asset known as “Hilaga” is a proper exercise by TIEZA of the mandate provided by law and is above board based on existing law/rules and regulations. The proceeds from the disposition shall be used to support the meager budget of the Department of Tourism and the Tourism Promotions Board to further improve the country’s tourism competitiveness.

The development of the former asset to a mixed use destination by the buyer of the property will further enhance the tourism value, contribute to the local economy and create more job opportunities for the Province.

For the Honorable Committee's Guidance.