

## SPECIAL THIRD DIVISION

**[ G.R. No. 212686, October 05, 2016 ]**

**SERGIO R. OSMEÑA III, PETITIONER, VS. POWER SECTOR  
ASSETS AND LIABILITIES MANAGEMENT CORPORATION,  
EMMANUEL R. LEDESMA, JR., SPC POWER CORPORATION, AND  
THERMA POWER VISAYAS, INC., RESPONDENTS.**

### RESOLUTION

**VELASCO JR., J.:**

For resolution of the Court is the Manifestation/Motion dated March 16, 2016 of private respondent Therma Power Visayas, Inc. (TPVI). As TPVI expounded,<sup>[1]</sup> a Notice of Award dated April 30, 2014 was issued in its favor for the purchase of the Naga Power Plant Complex (NPPC). The award, however, was cancelled because of the exercise by SPC Power Corporation (SPC) of its Right to Top. TPVI then implores the Court to clarify the effect on the Notice of Award of the subsequent annulment of the said Right to Top in our September 28, 2015 Decision, and prays for the reinstatement thereof.

### The Facts

On December 27, 2013, the Board of Directors of the Power Sector Assets and Liabilities Management Corporation (PSALM) approved the commencement of the 3<sup>rd</sup> round of bidding for the sale of the 153.1MW NPPC. Respondents SPC Power Corporation (SPC) and TPVI submitted their respective bids for the project.<sup>[2]</sup> The results of the bidding are as follows:<sup>[3]</sup>

	<b>TPVI</b>	<b>SPC</b>
a. Purchase Price	441,191,500.00	211,391,388.88
b. Rentals	588,735,000.00	588,735,000.00
c. Option Price	58,873,500.00	58,873,500.00
<b>Financial Bid, PhP</b>	<b>1,088,800,000.00</b>	<b>858,999,888.88</b>

In due course, PSALM issued a Notice of Award dated April 30, 2014 in favor of TPVI, declaring the latter as the Winning Bidder. The execution of a Land Lease Agreement (LLA) and Assets Purchase Agreement (APA) in favor of TPVI, however, was subject to SPC's non-exercise of its Right to Top. The pertinent portion of the Notice of Award provides:<sup>[4]</sup>

In accordance with the bidding procedures for the sale of the 153.1MW Naga Power Plant dated 6 February 2014, the Power Sector Assets and Liabilities Management Corporation (PSALM) Privatization Bids and Awards Committee (PBAC) hereby issues this Notice of Award which declares that TPVI is the Winning Bidder for the Sale of NPP.

PSALM's execution of the APA, however, shall be subject to the second paragraph of Section IB-20 (Award to the Winning Bidder) of the Bidding Procedures, which provides that: *"PSALM's entering into the Asset Purchase Agreement with the Winning Bidder shall be subject to SPC's rights under Section 3.02 of the LLA. Hence, if the exercise of the rights of SPC under Section 3.02 of the LLA is legally and validly consummated, PSALM shall not enter into the Asset Purchase Agreement with the Winning Bidder. Should SPC not exercise its rights under Section 3.02 of the LLA or if the exercise of the rights of SPC under Section 3.02 of the LLA is not legally and validly consummated, upon notice by PSALM, the Winning Bidder must enter into and fully and faithfully comply with the Asset Purchase Agreement."*

On the assumption that SPC validly exercised its Right to Top, PSALM executed the NPPC-APA and NPPC-LLA in SPC's favor, cancelling TPVI's Notice of Award in the process. The Right to Top and the resultant agreements from its exercise, however, were subsequently nullified by the Court through its September 28, 2015 Decision, the dispositive portion of which reads:

**WHEREFORE**, the petition is hereby **GIVEN DUE COURSE** and the writ prayed for accordingly **GRANTED**. The right of first refusal (right to top) granted to Saicon Power Corporation under the 2009 Naga LBGT-LLA is hereby declared **NULL and VOID**. Consequently, the Asset Purchase Agreement (NPPC-APA) and Land Lease Agreement (NPPC-LLA) executed by the Power Sector Assets and Liabilities Management Corporation and SPC are **ANNULLED** and **SET ASIDE**.

No costs.

#### **SO ORDERED.**

Petitioner Sergio R. Osmeña III (Osmeña) and respondents PSALM and SPC filed their respective motions for reconsideration. Meanwhile, respondent TPVI filed the instant Manifestation/Motion wherein it maintained that the nullification of SPC's Right to Top calls for the reinstatement of the cancelled April 30, 2014 Notice of Award in its favor.

The Court resolved to deny with finality SPC's motion on December 9, 2015,<sup>[5]</sup> and those of Osmeña and PSALM on April 6, 2016. Notwithstanding the denial with finality of their respective motions, they were nevertheless required to comment on TPVI's Manifestation/Motion that remained unresolved.<sup>[6]</sup> For their part, respondents SPC and PSALM contend that the Decision resulted in the material alteration of the terms of the public bidding and called for the conduct of another in its stead.

#### **Our Ruling**

TPVI's motion is impressed with merit.

**The Bidding Procedures contain a severability clause that allows the award in favor of TPVI to survive**

Section IB-20 of the PSALM Bidding Procedures pertinently provides:<sup>[7]</sup>

Anything in these bidding procedures notwithstanding, PSALM's entering into the Asset Purchase Agreement with the Winning Bidder shall be subject to SPC's rights under Section 3.02 of the LLA. Hence, if the exercise of the rights of SPC under Section 3.02 of the LLA **is legally and validly consummated**, PSALM shall not enter into the Asset Purchase Agreement with the Winning Bidder. **Should SPC not exercise its rights under Section 3.02 of the LLA or if the exercise of the rights of SPC under Section 3.02 of the LLA is not legally or validly consummated**, upon Notice by PSALM, the Winning Bidder must enter into and fully and faithfully comply with the Asset Purchase Agreement. (emphasis added)

Tucked at the end of the guidelines, however, is a **severability clause** that reads:  
[8]

## **IB-28 General Conditions**

x x x x

**26. If any one or more of the provisions of the Bidding Procedures or any part of the bidding package is held to be invalid, illegal or unenforceable, the validity, legality, or enforceability of the remaining provisions will not be affected thereby and shall remain in full force and effect.** (emphasis added)

Contrary to the postulations of respondents PSALM and SPC, the nullification of the Right to Top did not change the complexion of the bidding. By no means should this be considered an alteration of the terms of the public bidding, let alone a material one, for it was clearly a contingency expressly covered by the provisions of the Bidding Procedure as evidenced by the severability clause.

The afore-quoted severability clause conveys the clear intention to isolate and detach any invalid provision from the rest so that the latter may continue to be in force and effect. It operates to salvage the surviving provisions of the Bidding Procedures as valid, legal, and enforceable, despite the nullity of a component part.

Our Decision nullifying SPC's Right to Top ought not then be construed as the nullification of the entire third round of the public bidding. It merely called for the application of the severability clause to prevent PSALM, as much as possible, from having to repeat the process for the fourth time. Consistently, the Court never expressly declared the third round of bidding as invalid. Clear from the language of the dispositive portion of the Court's Decision is that the nullification was limited only to SPC's Right to Top and the NPPC-LLA and NPPC-APA in its favor, nothing more. The results of the prior conducted bidding process should then be upheld, and the Notice of Award dated April 30, 2014, reinstated.

The Notice of Award dated April 30, 2014 is a perfected contract between PSALM and TPVI.<sup>[9]</sup> As can be recalled, it states that the obligation of PSALM to execute the NPPC-APA and NPPC-LLA in favor of TPVI is conditioned on SPC's non-exercise or failure to legally and validly exercise its Right to Top. This agreement is the law between the contracting parties with which they are required to comply in good faith.<sup>[10]</sup>

In view of the Court's Decision, however, the condition in the Notice of Award should be deemed as not written, and the obligation to award the NPPC-LLA and NPPC-APA to TPVI, due and demandable. Furthermore, the mutual obligation of the parties to abide by their covenant in good faith remains, entitling TPVI to demand compliance from PSALM, including the award of the purchase contracts in its favor. This is but the proper application of the severability clause.

### **Articles 1181 and 1185 of the Civil Code find application in this case**

The award of the NPPC-LLA and NPPC-LLA to TPVI further finds justification under Arts. 1181 and 1185 of the Civil Code, viz:

**Article 1181.** In conditional obligations, the acquisition of rights, as well as the extinguishment or loss of those already acquired, shall depend upon the happening of the event which constitutes the condition.

x x x x

**Article 1185. The condition that some event will not happen at a determinate time shall render the obligation effective** from the moment the time indicated has elapsed, or **if it has become evident that the event cannot occur.** x x x (emphasis added)

The Court explained in *The Wellex Group, Inc. v. U-Land Airlines, Co., Ltd.*<sup>[11]</sup> that, under Art. 1185, if an obligation is conditioned on the non-occurrence of a particular event at a determinate time, that obligation arises (a) at the lapse of the indicated time, or (b) if it has become evident that the event cannot occur. To illustrate:<sup>[12]</sup>

Petitioner Wellex and respondent U-Land bound themselves to negotiate with each other within a 40-day period to enter into a share purchase agreement. If no share purchase agreement was entered into, both parties would be freed from their respective undertakings.

It is the non-occurrence or non-execution of the share purchase agreement that would give rise to the obligation to both parties to free each other from their respective undertakings. This includes returning to each other all that they received in pursuit of entering into the share purchase agreement.

At the lapse of the 40-day period, the parties failed to enter into a share purchase agreement. This lapse is the first circumstance provided for in Article 118.5 that gives rise to the obligation. Applying Article 1185, the parties were then obligated to return to each other all that they had received in order to be freed from their respective undertakings.

However, the parties continued their negotiations after the lapse of the 40-day period. They made subsequent transactions with the intention to enter into the share purchase agreement. Despite that, they still failed to enter into a share purchase agreement. Communication between the parties ceased, and no further transactions took place.

It became evident that, once again, the parties would not enter into the share purchase agreement. This is the second circumstance provided for in Article 1185. Thus, the obligation to free each other from their respective undertakings remained.

In the case at bar, PSALM's obligation to award the contract in TPVI's favor was dependent on the non-occurrence of an event: SPC's legal and valid exercise of its Right to Top. As phrased by PSALM: "*the approval of the sale to TPVI was a conditional one, the consummation of which is dependent on the non-exercise by SPC of its right to top.*"<sup>[13]</sup> It has become apparent, however, that such event will never occur. SPC can never legally and validly invoke its Right to Top in view of its nullity. The condition, therefore, is deemed complied with by operation of law, and the obligation to execute the purchase contracts in favor of TPVI, due and demandable.

### **There was genuine competition when the public bidding was conducted**

In *JG Summit Holdings, Inc. v. Court of Appeals*,<sup>[14]</sup> the Court enumerated the three principles of public bidding, thusly: (1) the offer to the public; (2) an opportunity for competition; and (3) a basis for comparison of bids. As long as these three principles are complied with, the public bidding can be considered valid and legal.

In the case at bar, respondents PSALM and SPC challenge the conduct of the bidding process for allegedly violating the second principle. They posit that SPC's Right to Top prevented genuine competition by discouraging other corporations from submitting their respective bids.

PSALM and SPC's contentions are untenable.

It bears stressing on the outset that the severability clause under IB-28, paragraph 26 was known to the bidders, as it was embodied in the Bidding Procedures itself. Thus, any interested party had prior knowledge of the possibility of the eventual nullification of SPC's Right to Top and of its repercussions.

That aside, the allegation that the Right to Top discouraged parties from participating in the bidding process is speculative. There is no guarantee that conducting another round of bidding will increase the number of bidders.

To put the situation into perspective, it is well to recall that SPC's right to top can be found in IB-20 of the Bidding Procedure. Thus, parties interested in buying the NPPC would only know of SPC's Right to Top if they availed of the bid documents. There is no showing, however, that there is a disparity between the number of parties who purchased the bid documents, on the one hand, and the number of parties who actually submitted their respective bids, on the other. Only then could PSALM and SPC have possibly, but not even conclusively, established that the Right to Top dissuaded other parties from submitting their bids.

It is likewise worthy to note that this is already the third round of bidding for the purchase of NPPC and in this round, only two companies participated: respondents SPC and TPVI. It may then be that the properties subjected to bidding are just really not attractive assets to begin with so as to appeal to the public.