

SPECIAL THIRD DIVISION

[G.R. No. 203655, March 18, 2015]

SM LAND, INC., PETITIONER, VS. BASES CONVERSION AND DEVELOPMENT AUTHORITY AND ARNEL PACIANO D. CASANOVA, ESQ., IN HIS OFFICIAL CAPACITY AS PRESIDENT AND CEO OF BCDA, RESPONDENTS.

R E S O L U T I O N

VELASCO JR., J.:

For reconsideration is the Decision of this Court dated August 13, 2014, which granted the petition for certiorari filed by SM Land, Inc. (SMLI) and directed respondent Bases Conversion Development Authority (BCDA) and its president to, among other things, subject SMLI's duly accepted unsolicited proposal for the development of the Bonifacio South Property to a competitive challenge.

The gravamen of respondents' motion is that BCDA and SMLI do not have a contract that would bestow upon the latter the right to demand that its unsolicited proposal be subjected to a competitive challenge. Assuming *arguendo* the existence of such an agreement between the parties, respondents contend that the same may be terminated by reasons of public interest.

We are not convinced.

There exists a valid agreement between SMLI and BCDA

Article 1305 of the New Civil Code defines a contract as "a meeting of minds between two persons whereby one binds himself, with respect to the other, to give something or to render some service." It is a "juridical convention manifested in legal form, by virtue of which one or more persons bind themselves in favor of another or others, or reciprocally, to the fulfilment of a prestation to give, to do, or not to do."^[1] The succeeding Article 1318 of the Code lays down the essential requisites of a valid contract, to wit:

- (1) Consent of the contracting parties;
- (2) Object certain which is the subject matter of the contract; and
- (3) Cause of the obligation which is established.

In the case at bar, there is, between BCDA and SMLI, a perfected contract--a source of rights and reciprocal obligations on the part of both parties. Consequently, a breach thereof may give rise to a cause of action against the erring party.

The first requisite, *consent*, is manifested by the meeting of the offer and the acceptance upon the thing and the cause which are to constitute the contract.^[2] In

the case at bar, when SMLI submitted the first Unsolicited Proposal to BCDA on December 14, 2009, the submission constituted an **offer** to undertake the development of the subject property. BCDA then entered into **negotiations** with SMLI until the BCDA finally **accepted** the terms of the final unsolicited proposal.^[3] Their agreement was thereafter reduced into writing through the issuance of the Certification of Successful Negotiations where the meeting of the parties' minds was reflected in this wise:

NOW, THEREFORE, for and in consideration of the foregoing, **BCDA and SMLI have, after successful negotiations** pursuant to Stage II of Annex C xxx, **reached an agreement** on the purpose, terms and conditions on the JV development of the subject property, which shall become the terms for the Competitive Challenge pursuant to Annex C of the JV Guidelines xxx.^[4] (emphasis ours)

Then, **to manifest their assent** to the terms thereof and their respective obligations, both parties--BCDA and SMLI, represented by Gen. Narciso L. Abaya and Ms. Ana Bess Pingol, respectively--**affixed their signatures** on the Certification of Successful Negotiations and had it **notarized** on August 6, 2010.

Cause, on the other hand, is the essential reason which moves the parties to enter into the contract. It is the immediate, direct and proximate reason which justifies the creation of an obligation through the will of the contracting parties.^[5] Complementing this is Article 1350 of the New Civil Code which provides that "[i]n onerous contracts the cause is understood to be, for each contracting party, the prestation or promise of a thing or service by the other." As such, the cause of the agreement in the case at hand is their interest in the sale or acquisition and development of the property and their undertaking to perform their respective obligations, among others, as reflected in the Certificate of Successful Negotiations and in the Terms of Reference (TOR) issued by BCDA.

Lastly, *object certain* refers to the subject matter of the contract. It is the thing to be delivered or the service to be performed.^[6] Here, when the BCDA Board issued, on August 6, 2010, the Certification of Successful Negotiations,^[7] it not only accepted SMLI's Unsolicited Proposal and declared SMLI eligible to enter into the proposed JV activity. It also **"agreed to subject [SMLI]'s Original Proposal to Competitive Challenge** pursuant to Annex C [of the NEDA JV Guidelines], which competitive challenge process shall be immediately implemented following the [TOR] Volumes 1 and 2."^[8] Moreover, said Certification provides that **"the BCDA shall, thus, commence the activities for the solicitation for comparative proposals** xxx starting on August 10, 2010, on which date [SMLI] shall post the required Proposal Security xxx."^[9]

The elements of a valid contract being present, **there thus exists between SMLI and BCDA a perfected contract, embodied in the Certification of Successful Negotiations, upon which certain rights and obligations spring forth**, including the **commencement of activities for the solicitation for comparative proposals**. Thus, as evinced in the Certification of Successful Negotiation:

BCDA and SMLI have agreed to subject SMLI's Original Proposal to Competitive Challenge pursuant to Annex C – Detailed Guidelines for Competitive Challenge Procedure for Public-Private Joint Ventures of the NEDA JV guidelines, which competitive challenge process shall be immediately implemented following the Terms of Reference (TOR) Volumes 1 and 2.^[10] x x x

This agreement is the law between the contracting parties with which they are required to comply in good faith.^[11] Verily, it is BCDA's subsequent unilateral cancellation of this perfected contract which this Court deemed to have been tainted with grave abuse of discretion. BCDA could not validly renege on its obligation to subject the unsolicited proposal to a competitive challenge in view of this perfected contract, and especially so after BCDA gave its assurance that it would respect the rights that accrued in SMLI's favor arising from the same.^[12]

The NEDA JV Guidelines has the force and effect of law

Aside from the agreement between the parties, the ruling in favor of SMLI is likewise based on the NEDA JV Guidelines. As mandated by the rules, the Joint Venture activity, upon the successful completion of the detailed negotiation phase, shall be subjected to a competitive challenge.^[13] While it is not disputed that respondents failed to comply with the pertinent provisions of the NEDA JV Guidelines, the dissent postulates that it is justifiable since it is a mere guideline and not law.^[14]

We regretfully disagree.

Under the Administrative Code of 1987,^[15] acts of the President providing for rules of a general or permanent character in implementation or execution of constitutional or statutory powers shall be promulgated in Executive Orders (EOs).^[16] In other words, it is through these orders that the President ensures that laws are faithfully executed, by handing out instructions to subordinate executive officials and the public, in the form of implementing rules and regulations, on how the law should be executed by subordinate officials and complied with by the public.^[17]

For government contracts and procurement in the Philippines, then President Gloria Macapagal-Arroyo, adopting the recommendation of the NEDA, issued EO 109^[18] on May 27, 2002. As its title indicates, EO 109 streamlined the rules and procedures on the review and approval of all contracts of departments, bureaus, offices and agencies of the government, including government-owned and controlled corporations and their subsidiaries. This executive issuance was, however, later amended by EO 109-A,^[19] to conform to RA 9184 which was enacted barely two months after the issuance of EO 109.^[20] Two years later, or on April 30, 2005, EO 423^[21] was issued, repealing EO 109-A and simplifying the procurement process. Section 4 of EO 423 was later amended by EO 645.^[22]

Amidst the changes effected on procurement rules, the NEDA's duty to issue a JV

Guidelines under the said executive orders remained unaffected.^[23] Through Section 5 of EO 109, Section 8 of EO 109-A and now Section 8 of EO 423, the President effectively delegated her inherent executive power to issue rules and regulations on procurement to her subordinate executive officials,^[24] her *alter egos*, the most recent of which reads in this wise:

Section 8. Joint Venture Agreements. The NEDA, in consultation with the GPPB, **shall issue guidelines regarding joint venture agreements** with private entities with the objective of promoting transparency, competitiveness, and accountability in government transactions, and, where applicable, complying with the requirements of an open and competitive public bidding.

Pursuant to said repeated directives from no less than the Chief Executive, the NEDA issued the JV Guidelines providing the procedures for the coagulation of joint ventures between the government and a private entity. In this regard, attention must be drawn to the well-established rule that **administrative issuances, such as the NEDA JV Guidelines, duly promulgated pursuant to the rule-making power granted by statute, have the force and effect of law.**^[25] As elucidated in the August 13, 2014 Decision:

x x x **Being an issuance in compliance with an executive edict, the NEDA JV Guidelines, therefore, has the same binding effect as if it were issued by the President himself**, who parenthetically is a member of NEDA. As such, no agency or instrumentality covered by the JV Guidelines can validly deviate from the mandatory procedures set forth therein, even if the other party acquiesced therewith or not.^[26]

Articles III (4) and VIII (3) only refer to Private Sector Entities (PSEs), effectively excluding the Original Proponent

The dissent would next draw our attention to Article III (on General Information) and VIII (on Qualifications and Waivers) of the TOR Volume 1, which read:

III. GENERAL INFORMATION

x x x x

4. Amendment of these TOR. The information and/or procedures contained in these TOR may be amended or replaced at any time, at the discretion of the BCDA Board, without giving prior notice or providing for any reason. Should any of the information and/or procedures contained in these TOR be amended or replaced, the JV-SC shall inform and send Supplemental Notices to all **PSEs** xxx.^[27]

x x x x

VIII. QUALIFICATIONS AND WAIVERS

3. BCDA further reserves the right to call off this disposition prior to acceptance of the proposal(s) and call for a new disposition process under amended rules, and without any liability whatsoever to any or all of the **PSEs**, except the obligation to return the Proposal Security.^[28] (emphasis added)

On this point, it is well to emphasize that **the TOR containing the said provisions details the requirements for eligibility to qualify as a PSE that may submit its technical and financial proposals for the JV, and does not encompass the entire Swiss Challenge procedure.** This is bolstered by the provisions' perfect consonance with the procedure for Stage Three per Annex C of the Guidelines, thus:

3. The Private Sector Entity shall post the proposal security at the date of the first day of the publication of the invitation for comparative proposals in the amount and form stated in the tender documents.

4. The procedure for the determination of eligibility of comparative proponents/private sector participants, issuance of supplemental competitive selection bulletins and pre-selection conferences, submission and receipt of proposals, opening and evaluation of proposals shall follow the procedure stipulated under Annex A hereof. In the evaluation of proposals, the best offer shall be determined to include the original proposal of the Private Sector Entity. If the Government Entity determines that an offer made by a comparative private sector participant other than the Original Proponent is superior or more advantageous to the government than the original proposal, the Private Sector Entity who submitted the original proposal shall be given the right to match such superior or more advantageous offer within thirty (30) calendar days from receipt of notification from the Government Entity of the results of the competitive selection. Should no matching offer be received within the stated period, the JV activity shall be awarded to the comparative private sector participant submitting the most advantageous proposal. If a matching offer is received within the prescribed period, the JV activity shall be awarded to the Original Proponent. If no comparative proposal is received by the Government Entity, the JV activity shall be immediately awarded to the original private sector proponent.

Pursuant to the above-quoted provisions from the NEDA JV Guidelines, the interested PSEs, in order to be able to participate in the competitive challenge, must first post their respective proposal securities before submitting their comparative proposals for evaluation and consideration. Consequently, per the reservation clause, should the government entity (GE) decide to make material changes in the TORs issued, it must do so before it accepts the comparative proposals from the interested PSEs. This deadline is intended to protect the participating PSEs from alterations in the benchmarks set forth in the TOR after their proposals have already been seen and reviewed by the GE. Furthermore, should modifications be validly