

## THIRD DIVISION

**[ G.R. No. 212686, September 28, 2015 ]**

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

### D E C I S I O N

**VILLARAMA, JR., J.:**

In a direct recourse to this Court, Senator Sergio R. Osmeña III (petitioner) seeks to enjoin the sale of the Naga Power Plant Complex (NPPC) to respondent SPC Power Corporation (SPC) resulting from the latter's exercise of the *right to top* the winning bid of respondent Therma Power Visayas, Inc. (TPVI), and to declare such stipulation in the Lease Agreement as void for being contrary to public policy.

#### Antecedents

Respondent Power Sector Assets and Liabilities Management Corporation (PSALM) is a government-owned and controlled corporation created by virtue of Republic Act (R.A.) No. 9136, otherwise known as the Electric Power Industry Reform Act (EPIRA) of 2001. Its principal purpose is to manage the orderly sale, disposition, and privatization of the National Power Corporation's (NPC's) generation assets, real estate and other disposable assets, and Independent Power Producer (IPP) contracts, with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner.<sup>[1]</sup> Respondent Emmanuel R. Ledesma, Jr. (Ledesma) is the incumbent President and Chief Executive Officer of PSALM.

SPC is a joint venture corporation between Salcon Power Corporation and Korea Power Corporation (Kepco).<sup>[2]</sup> TPVI is a subsidiary of AboitizPower, the power generation company of the Aboitiz Group.

PSALM provided the following brief description of the two (2) facilities subject of the present controversy:

Facility Name	Naga Power Plant Complex (NPPCx)	Land-Based Gas Turbine (LBGT)
Location	Brgy. Colon, Naga, Cebu	Brgy. Colon, Naga, Cebu
Power Plants Installed	a. 52.5 MW Cebu 1 coal-fired thermal power plant; b. 56.8 MW Cebu 2 coal-fired thermal power plants; and	55-MW Naga LBGT Power Plant

	c. 43.8 MW Cebu Diesel Power Plant 1 composed of six (6)7.3 MW bunker-C fed power units	
Total Rated Capacity	153.10 MW	55.00 MW
Land Area	209,000.00 [sq. m.]	5,504.02 [sq. m.] [3]

The Naga Land-Based Gas Turbine (LBGT) is located inside the same compound as the NPPC.[4]

On October 16, 2009, PSALM privatized the 55-MW Naga Power Plant (LBGT) by way of negotiated sale after a failed bidding in accordance with the LBGT Bidding Procedures.[5] The land underlying the LBGT was also leased out for a period of 10 years. This bidding resulted in SPC's acquisition of the LBGT through an Asset Purchase Agreement (LBGT-APA) and lease of the land under a Land Lease Agreement (LBGT-LLA). The LBGT-LLA would expire on January 29, 2020. The LBGT-LLA contained a provision for SPC's right to top in the event of lease or sale of property which is not part of the leased premises.

On December 27, 2013, the Board of Directors of PSALM approved the commencement of the 3<sup>rd</sup> Round of Bidding for the sale of the 153.1-MW NPPC. Only SPC and TPVI submitted bids. On March 31, 2014, TPVI was declared as the highest bidder. Consequently, a Notice of Award[6] was issued to TPVI on April 30, 2014, subject to SPC's right under Section 3.02 of the LBGT-LLA, as previously stated in Section 1B-20 of the Bidding Procedures.

The results of the NPPC bidding are as follows:

	<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> [7]

In a letter dated April 29, 2014, PSALM notified SPC of TPVI's winning bid which covers the purchase of the NPPC and lease of the land. It also advised SPC that under the terms of LBGT-LLA (Sections 2.01 and 3.02), the lease of the land (as governed by the LBGT-LLA) will likewise expire on January 29, 2020.[8] In a letter-reply dated May 7, 2014, SPC confirmed that it is exercising the right to top the winning bid of TPVI and will pay the amount of Php1,143,240,000.00 on the understanding that the term of the lease is 25 years from Closing Date. SPC argued that -

As SPC also participated in the bidding, the bid for the lease component clearly computed on the basis of, and was for **twenty-five (25) years**. However, by now stating in your letter that the "*lease has a Term often (10) years and will expire on 29 January 2020,*" SPC would effectively have less than six (6) years from today to use the property, which is extremely short for the lease component computed and based on the twenty-five (25) year term that was offered during the bidding. While we are aware that the second paragraph of Section 3.02 of the LLA-LBGT provides that the property covered by the right to top will be "governed" by the LLA-LBGT, we are of the reasonable belief that this does not include "Term" under Section 2.01 thereof considering that the "Draft Land Lease Agreement for the 153.1-MW Naga Power Plant," which formed part of the bid documents, **specifically provided for a "Term" of twenty-five (25) years**.<sup>[9]</sup>

PSALM then wrote the Office of the Government Corporate Counsel (OGCC) requesting for legal opinion or confirmation of its position that the term of the lease of the NPPC upon SPC's exercise of its right to top would be for the remaining period of the lease of the land of the Naga LBGT Power Plant, which will expire in 2020.<sup>[10]</sup>

On May 21, 2014, the OGCC rendered Opinion No. 098, Series of 2014 which upheld PSALM's position that SPC may exercise the right to top under the LBGT-LLA provisions, the source of such right. It explained that the NPPC-LLA is a separate and distinct transaction which is inapplicable with respect to SPC's right to top.<sup>[11]</sup>

However, upon re-evaluation of the arguments in the position papers submitted by SPC and PSALM, the OGCC submitted its study and recommendation to Secretary of Justice Leila M. De Lima. The study concluded that the right to top exercised by SPC in the NPPC bidding is a right to top on a sale, which must then be separately governed by the NPPC-APA, and implemented in accordance with the NPPC-APA and LLA provisions.<sup>[12]</sup>

On June 16, 2014, the present petition was filed in this Court praying that (1) a temporary restraining order (TRO) be issued *ex parte*, and after hearing the parties, a writ of preliminary injunction be issued enjoining PSALM from implementing SPC's exercise of its right to top in connection with the NPPC bidding; (2) SPC's right to top as provided in Section 3.02 of the LBGT-LLA be declared void; and (3) a permanent injunction be issued enjoining respondents Ledesma and PSALM from committing any act in furtherance of SPC's exercise of the right to top.<sup>[13]</sup>

SPC, TPVI and PSALM filed their respective Comments on the petition, while SPC filed a Reply to TPVI's Comment and petitioner his Reply to PSALM's Comment.

On August 7, 2014, SPC filed a Manifestation with Motion informing this Court that on July 28, 2014, PSALM advised that PSALM's Board of Directors has already declared SPC as the winning bidder for the privatization of NPPC. It thus contended that with this development, the present petition had become moot.<sup>[14]</sup>

On August 11, 2014, petitioner filed a Supplemental Petition with Motion for Early Resolution of the Application for Temporary Restraining Order and/or Writ of

Preliminary Injunction.<sup>[15]</sup> According to petitioner, the transfer and possession to SPC of the NPPC and of the land on which it is built should be deferred until after this Court has ruled on his petition due to the following reasons: (1) there seems to be no urgency for PSALM to rush the award of the NPPC; (2) by the execution of the subject NPPC-APA and LLA in favor of SPC, PSALM has invalidly awarded a government property without the requisite public bidding; and (3) there are practical difficulties and expense that will be incurred in order to reverse acts that are committed before any provisional or preventive relief is issued, such as transfer of ownership and/or possession of the properties in SPC's name or to third parties, and potential liability of the Government under suit for damages to be filed by any interested party.

On November 11, 2014, PSALM filed a Manifestation in Lieu of Comment to the Supplemental Petition,<sup>[16]</sup> stating that: (1) PSALM's Board of Directors, in a meeting held on July 25, 2014, taking into consideration the OGCC's letter dated June 13, 2014 and the DOJ's opinion-letter dated June 23, 2014, declared SPC as the winning bidder for the sale of 153.1-MW NPPC; (2) PSALM issued on July 28, 2014 the Notice of Award and Certificate of Effectivity in favor of SPC; (3) the NPPC-APA and LLA were already signed and delivered to SPC; and (4) PSALM turned over the properties to SPC last September 25, 2014.

### **Petitioner's Arguments**

Petitioner asserts that the right to top provision in the LBG-LLA is an option contract which must be supported by a consideration separate from the lease contract and may be withdrawn at any time by PSALM in the absence of such consideration. He submits that SPC's preferential right to buy or lease "any property in the vicinity of the Leased Premises which is not part of the Leased Premises" was a gratuitous concession to SPC, and most likely was part of a scheme to bar any competition to SPC and to restrict the production of energy. Citing *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated*,<sup>[17]</sup> petitioner argues that the right of first refusal is upheld only in cases where the holder of such right holds an existing, or at least, a vested interest in the object for which the right is to be exercised. Thus, even if SPC has a legal interest in the vicinity lots, its right to top can no longer be exercised because it is not operating the Naga LBG itself.

Another legal ground for the nullity of the option raised by petitioner pertains to the policy requiring competitive public bidding in all government contracts. Petitioner contends that by granting SPC the right to top, PSALM violated the express provisions of R.A. No. 9136 (EPIRA Law) and R.A. No. 9184 (Procurement Law) on public bidding by failing to maintain bidders on equal footing in order to give the government the best possible and available offer for public assets being sold or leased. He posits that SPC's exercise of its right to top is disadvantageous to the Government and that the provision enables SPC to skirt around eligibility requirements for a qualified bidder.

Alleging an anomalous track record for SPC since 1994 when as then Salcon Power Corporation it entered into a 15-year contract to "Rehabilitate, Operate, Maintain and Manage" a coal plant, petitioner argues that the 2009 Naga LBG contract should have been terminated for SPC's failure to comply with its obligations. Under

the 2009 Naga LBGT, not only does SPC enjoy an invalid option or preferential right unsupported by any consideration, such right to top is also without a determinate object and founded on illegal cause considering that it was merely intended to maintain SPC's dominance and to assist SPC in restricting competition.

### **Respondents' Arguments**

At the outset, SPC questions petitioner's legal standing to file the present petition, having failed to establish any personal benefit in the event relief is granted, and there being no expenditure of public funds involved that would impress upon the petition the character of a taxpayer's suit. Neither could petitioner invoke his office as a Senator because legislators may only be accorded standing to sue if there is a claim that official action complained of infringes upon their prerogative as legislators. Petitioner could also not have anchored his standing upon his status as a citizen as he failed to demonstrate how he would suffer personal injury as a result of respondents' acts and erroneously invoked this Court's jurisdiction to rule on a policy issue relating to the manner PSALM carries out its mandate, even as he failed to cite specific provision in the law and in EPIRA which was supposedly violated by the petitioner.

On procedural grounds, SPC seeks the dismissal of the petition as there is no basis for annulling PSALM's acts by way of a petition for certiorari or prohibition, and said petition was not filed within the 60-day reglementary period from the time the Naga LBGT contract incorporating the right to top was awarded to SPC in 2009 and the issuance of DOJ opinion dated January 9, 2013 wherein SPC's right to top was held to be valid and not disallowed by law.

SPC asserts that even on substantive grounds, the petition should still be dismissed as the right to top is clearly not an option contract and the Naga LBGT was validly awarded to SPC through a public bidding. Citing *JG Summit Holdings, Inc. v. Court of Appeals*,<sup>[18]</sup> SPC maintains that the right to top granted under the LBGT-LLA and exercised by it did not violate the rules of competitive bidding. The implementation of such right to top, moreover, does not place the Government in a disadvantaged position but rather assures the Government of an additional 5% of the highest reasonable bid. SPC thus argues that the right to top provision in the LBGT-LLA is consistent with public policy and there is no law that invalidates such provision, such that SPC's vested right should not be disregarded.

On its part, PSALM notes that similar right to top provisions are found in several other land lease agreements in its privatization undertakings. In the 2013 Bidding Procedures for the 3rd Round of Bidding for the NPPC, PSALM duly disclosed to the potential bidders the right to top provision under the LBGT-LLA (Sections 1B-05 and 1B-20 and Form of Certificate Closing for Seller). PSALM avers that it simply complied with the opinions rendered by the DOJ and the second opinion of the OGCC, which have been held persuasive and hence it acted in good faith in subsequently allowing SPC to exercise its right to top the winning bid for the purchase of NPPC and lease of the land.

TPVI concurs with the allegations in the petition which it said are sufficient to vest standing upon petitioner as citizen, taxpayer, Senator and Chairman of the Joint Congressional Power Committee (Committee). It likewise finds the petition for certiorari as the proper remedy in view of the grave abuse of discretion committed